WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OF INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: Office of Tax Appeals TITLE NUMBER: 121

CITE AUTHORITY W. Va. Code § 11-10A-20

RULE TYPE: PROCEDURAL X INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE (s) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

_____

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

_____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 1

TITLE OF RULE BEING ADOPTED: Rules of Practice and Procedure Before the West Virginia Office of Tax Appeals

_____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE EFFECTIVE DATE OF THIS RULE IS April 20, 2003

Brian M. Kastick, Secretary of Tax And Revenue

422.50

TITLE 121
PROCEDURAL RULE
WEST VIRGINIA OFFICE OF TAX APPEALS

SERIES 1
RULES OF PRACTICE AND PROCEDURE BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

§ 121-1-1. General.

1.1. *Scope.* -- These procedural rules govern the practice and procedure in all cases and proceedings before the West Virginia office of tax appeals. These rules shall be known and may be referred to as the "office of tax appeals rules" and may be cited as "OTA".

1.2. *Authority.* -- These procedural rules are issued under the authority of W. Va. Code § 11-10A-20.

1.3. *Intent.* -- The intent of these procedural regulations is to provide the public with a clear, uniform, prompt, efficient, inexpensive, and just system of resolving controversies with the West Virginia state tax department that are within the jurisdiction of the West Virginia office of tax appeals under the provisions of article 10A of chapter 11 of the W. Va. Code.

1.4. *Construction.* -- These procedural rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every controversy and shall not be construed to limit or repeal rights afforded or requirements imposed by statute or otherwise.

1.6. *Filing Date.* -- March 21, 2003.

1.7. *Effective Date.* -- April 20, 2003.

§ 121-1-2. Definitions.

As used in this rule, and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular or in the plural.

2.1. "Administrative law judge" means any individual designated and empowered by the chief administrative law judge to conduct any hearing to be held by the office of tax appeals, including any status conference, pre-hearing conference, oral argument, hearing, or similar proceeding before the office.

2.2. "Appellant" unless otherwise noted, means a petitioner or the representative of a petitioner, or other person directly interested who is legally entitled to initiate proceedings before the office of tax appeals.

2.3. "Business day" means any calendar day of the week other than a Saturday, Sunday or a legal holiday in the state of West Virginia. If the last day for filing a document under the provisions of this rule falls on a Saturday, Sunday or legal holiday in this state, the document is considered timely if filed on the following business day.

2.4. "Chief administrative law judge" means the individual appointed by the governor, as provided in W. Va. Code § 11-10A-6, to be the chief executive officer of the office of tax appeals, until the individual resigns or is removed from office.

2.5. "Clerk" means the executive director of the office of tax appeals.

2.6. "Code" or "this code" means the code of West Virginia of 1931, as amended, as in effect for the relevant period or relevant time.

2.7. "De novo" means the office of tax appeals will decide questions of fact and of law based on the evidence and legal arguments presented in the proceedings before the office. Parties will need to be prepared to present exhibits, testimony and argument to the administrative law judge to which the proceeding is assigned.

2.8. "Division" or "tax division" means the tax division of the West Virginia department of tax and revenue provided for in W. Va. Code § 11-1-1.

2.9. "Executive director" means the individual employed by the chief administrative law judge to provide management and administration necessary to run the office of tax appeals.

2.10. "Findings of fact and conclusions of law" means concise statements of the determinations made as to the contested issues of fact, and statements of the applicable law, as determined by the office of tax appeals, which are applicable to the findings of fact.

2.11. "Includes" and "including" when used in a definition contained in this rule shall not be deemed to exclude other things otherwise within the meaning of the term being defined.

2.12. "Intervenor" means any person who meets the qualifications and requirements for intervention under section 96 of this rule and who, upon filing a motion to intervene, is permitted by the office of tax appeals to intervene as a party in the proceeding.

2.13. "Office of tax appeals," "OTA," or "office" means the West Virginia office of tax appeals created by W. Va. Code § 11-10A-3, except when the context in which the term "office" is used clearly indicates that a different meaning is intended.

2.14. "Party" means any of the following:

2.14.1. A petitioner or any other person who files a petition or other document seeking to invoke the jurisdiction of the office of tax appeals, the state tax department or other respondent, or both the petitioner and the respondent.

2.14.2. Any intervenor permitted to intervene by the office of tax appeals under section 97 of this rule; and

2.14.3. Any person joined as a contingently necessary party under section 42 of this rule.

2.15. "Person" includes (1) individuals, (2) associations, corporations, estates, limited liability companies, partnerships, trusts, any other group or combination acting as a unit treated as a taxpayer under the laws of this state, (3) any individual or entity acting in a fiduciary or representative capacity for any of the preceding individuals or entities, and (4) any combination of any of the preceding.

2.16. "Petition" includes an application, petition, demand for hearing, or variation of these terms as used in the applicable sections of laws administered by the tax commissioner and for which the office of tax appeals has jurisdiction under W. Va. Code § 11-10A-8.

2.17. "Petitioner," unless otherwise noted, means a taxpayer or a representative of a taxpayer, or other person or entity directly interested who is legally entitled to initiate proceedings before the office of tax appeals.

2.18. "Pleading" includes any of the following:

2.18.1. petition for appeal;

2.18.2. application for appeal;

2.18.3. motion;

2.18.4. brief;

2.18.5. proposed findings of fact and conclusions of law; and

2.18.6. any other similar document formally filed with the office of tax appeals.

2.19. "Presiding administrative law judge" means the administrative law judge assigned to conduct the status conference, pre-hearing conference, oral arguments, hearing, or similar proceedings before the office of tax appeals.

2.20. "Respondent" means any party or person otherwise responding to a petition or other document originating a proceeding before the office of tax appeals.

2.21. "State tax department" means the tax division of the West Virginia department of tax and revenue, *see* W. Va. Code § 11-1-1, and includes the state tax commissioner or his or her authorized designee.

2.22. "Substantive issue" means an issue where a substantive right, interest or privilege of any party is involved that may be prejudiced as opposed to a minor or mere procedural matters dealt with by the office of tax appeals.

2.23. "Supporting authorities" means cases and authorities cited and relied upon by a party.

2.24. "Tax commissioner" or "commissioner" means the tax commissioner of the state of West Virginia, or his or her authorized designee.

2.25. "This rule" means all of series 1, title 121 of the state code of rules.

2.26. "This state" means the state of West Virginia.

§ 121-1-3. Name of office, location and business hours.

3.1. **Name**. The name of the office is the West Virginia office of tax appeals.

3.2. **Office location**. The principal office of the office of tax appeals shall be in Charleston, West Virginia. However, the office of tax appeals may hold hearings at any place within the state of West Virginia.

3.3. **Business Hours**. The office of tax appeals shall be open during business hours on all days, except Saturdays, Sundays, and legal holidays in the state of West Virginia, for the purpose of receiving petitions, pleadings, motions, and other papers. Business hours are from 8:30 a.m. to 5:00 p.m. For legal holidays, see section 7 of this rule.

3.4. **Mailing Address**.

3.4.1. Mail sent to the office of tax appeals by United States mail should be addressed to:

West Virginia Office of Tax Appeals
815 Quarrier Street, Suite # 200
Charleston, WV 25301

3.4.2. Mail sent to the office of tax appeals by a delivery service other than the United States Postal Service shall be addressed and delivered to:

West Virginia Office of Tax Appeals
Morrison Building, Suite 200
815 Quarrier Street
Charleston, WV 25301

§ 121-1-4. Jurisdiction of office of tax appeals.

4.1. The office of tax appeals has exclusive and original jurisdiction to hear and determine all of the following:

4.1.1. Appeals from any assessment of tax (including additions to tax, penalties, interest or other amounts) issued by the state tax department pursuant to the West Virginia tax procedure and administration act, W. Va. Code § 11-10-1 *et seq.*

4.1.2. Appeals from decisions or orders of the state tax department denying, in whole or in part, any refund or credit of any tax (including additions to tax, penalties, interest or other amounts) administered under provisions of the West Virginia tax procedure and administration act, W. Va. Code § 11-10-1 *et seq.*

4.1.3. Requests to review orders of the state tax department denying, suspending, revoking, or refusing to renew any license or business registration certificate, or imposing any civil money penalty for violating the provisions of any licensing or registration law administered by the tax commissioner, W. Va. Code § 11-10-1 *et seq.*

4.1.4. Questions presented when a hearing is requested pursuant to any provision of any article of chapter 11 of the West Virginia Code that is administered by the provisions of the West Virginia tax procedure and administration act.

4.1.5. Requests to reconsider fines levied by the state tax department under provisions of the charitable bingo or raffle laws of this state.

4.1.6. Matters which the tax commissioner is required by statute or legislatively approved rules to hear, except employee grievances filed pursuant to the grievance procedure for state employees set forth in W. Va. Code § 29-6A-1 *et seq.*

4.1.7. Other matters that may be conferred on the office of tax appeals by statute or legislatively approved rules.

4.2. *Timely petition required.* – In all cases, the jurisdiction of the office of tax appeals depends on the timely filing of a petition. *See, e.g.*, W. Va. Code §§ 11-10-8 and 11-10-14.

4.3. *Bankruptcy.* – With respect to the filing of a petition, or the continuation of proceedings, in the office of tax appeals after the filing of a bankruptcy petition, *see* Title 11 U.S.C. § 362(a).

§ 121-1-5. Timely filing.

5.1. *General.* – Any petition, statement or other document required to be filed within a prescribed period, or on or before a prescribed date, is timely filed if it is delivered in person on or before the due date to the office of tax appeals at its office during normal business hours.

5.2. *Timely deposited in U.S. mail.* – Any petition, statement or other document required to be filed within a prescribed period, or on or before a prescribed date, that is delivered by the United States mail to the office of tax appeals is timely filed if the date of the United States postmark stamped on the envelope is within the prescribed period or on or before the prescribed date for filing, and the envelope was deposited in the United States mail, postage prepaid, and properly addressed to the office of tax appeals.

5.2.1. *Deposited in U.S. mail defined.* – For purposes of this subsection 5.2, a document or payment is deposited in the mail in the United States when it is deposited with the domestic mail service of the U.S. Postal Service. The domestic mail service of the U.S. Postal Service, as defined by the Domestic Mail Manual, as incorporated by reference in the postal regulations, includes mail transmitted within, among, and between the United States of America, its territories and possessions, and Army post offices (APO), fleet post offices (FPO), and the United Nations, NY. (See Domestic Mail Manual, section G011.2.1, as incorporated by reference in 39 CFR 111.1.) Subsection 5.2 does not apply to any document that is deposited with the mail service of any other country.

5.2.2. *U.S. Postal Service postmark.* – If the postmark on the envelope is made by the U.S. Postal Service, the postmark must bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment. If the postmark does not bear a date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment, the document or payment is considered not to be timely filed or paid, regardless of when the document or payment is deposited in the mail. Accordingly, the sender who relies upon the applicability of W. Va. Code § 11-10A-21 and this section 121-1-5 assumes the risk that the postmark will bear a date on or before the last date, or the last day of the period, prescribed for filing the document. See, however, subdivision 5.2.6 of this section with respect to the use of registered mail or certified mail to avoid this risk.

a. If the postmark on the envelope is made by the U.S. Postal Service but is not legible, the person who is required to file the document or make the payment has the burden of proving the date that the postmark was made.

b. If the envelope that contains the document has a timely postmark made by the U.S. Postal Service, but it is received after the time when a document or payment postmarked and mailed at that time would ordinarily be received, the sender may be required to prove that it was timely mailed.

5.2.3. *Postmark made by other than U.S. Postal Service* -- If the postmark on the envelope is made other than by the U.S. Postal Service: (1) the postmark so made must bear a

legible date on or before the last date, or the last day of the period, prescribed for filing the document or making the payment; and (2) the document must be received by the office of tax appeals not later than the time when a document contained in an envelope that is properly addressed, mailed, and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the U.S. Postal Service on the last date, or the last day of the period, prescribed for filing the document.

5.2.4. *Document received late.* – If a document described in subparagraph 5.2.2.b of this section is received after the time when a document so mailed and so postmarked by the U.S. Postal Service would ordinarily have been received by the office of tax appeals, the document shall be treated as having been received at the time when a document so mailed and so postmarked would ordinarily be received if the person who is required to file the document establishes:

a. That it was actually deposited in the U.S. mail before the last collection of mail from the place of deposit that was postmarked (except for the metered mail) by the U.S. Postal Service on or before the last date, or the last day of the period, prescribed for filing the document or making the payment;

b. That the delay in receiving the document was due to a delay in the transmission of the U.S. mail; and

c. The cause of the delay.

5.2.5. *U.S. and non-U.S. postmarks.* – If the envelope has a postmark made by the U.S. Postal Service in addition to a postmark not so made, the postmark that was not made by the U.S. Postal Service is disregarded, and whether the envelope was timely mailed will be determined solely by the postmark made by the U.S. Postal Service.

5.2.6. *Registered or certified mail.* – If the document is sent by U.S. registered mail, the date of registration of the document shall be treated as the postmark date. If the document or payment is sent by U.S. certified mail, and the sender's receipt is postmarked by the postal employee to whom the document or payment is presented, the date of the U.S. postmark on the receipt shall be treated as the postmark date of the document. Accordingly, the risk that the document will not be postmarked on the day that it is deposited in the mail may be eliminated by the use of registered or certified mail.

§ 121-1-6. Computation of time.

6.1. *General.* – In computing any period of time prescribed or allowed by these rules or by direction of the office of tax appeals or by any applicable statute that does not provide otherwise, the day of the act, event, or default from which a designated period of time begins to run shall not be included, and (except as provided in subsection 6.2.) the last day of the period so computed shall be included. If service is made by regular mail, then a period of time computed with respect to the service shall begin on the day after the date of mailing.

6.2. *Saturdays, Sundays, and holidays.* – Saturdays, Sundays, and all legal holidays in the State of West Virginia shall be counted, except that:

6.2.1. If the period prescribed or allowed is less than seven (7) days, then intermediate Saturdays, Sundays, and legal holidays in the state of West Virginia shall be excluded in the computation;

6.2.2. If the last day of the period so computed is a Saturday, Sunday, or a legal holiday in the state of West Virginia, then that day shall not be included and the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday in this state; and

6.2.3. If any act is required to be taken or completed no later than (or at least) a specified number of days before a date certain, then the earliest day of the period so specified shall not be included if it is a Saturday, Sunday, or a legal holiday in the state of West Virginia, and the earliest such day shall be the next preceding day which is not a Saturday, Sunday, or a legal holiday in this state. When a legal holiday falls on a Sunday, the next day shall be considered a holiday; and, when a legal holiday falls on a Saturday, the preceding day shall be considered a holiday.

6.3. *Cross-references.* For computation of the period within which to file a petition with the office of tax appeals, see W. Va. Code § 11-10A-9(b).

§ 121-1-7. West Virginia legal holidays.

7.1. *General.* – Legal holidays within the State of West Virginia, in addition to any other day appointed as a holiday by the President of the United States or the governor of this state, are as follows:

New Year's Day – January 1
Birthday of Martin Luther King, Jr. – Third Monday in January
Lincoln's Birthday – February 12
Washington's Birthday – Third Monday in February
Memorial Day – Last Monday in May
West Virginia Day – June 20
Independence Day – July 4
Labor Day – First Monday in September
Columbus Day – Second Monday in October
State General election day – First Tuesday in November (even number years)
Veterans Day – November 11
Thanksgiving Day – Fourth Thursday in November
Christmas Day – December 25

7.2 *Special rule.* – When a holiday described in this subsection 7.1 falls on a Sunday, then the following Monday is the legal holiday. When the holiday falls on a Saturday, then the preceding Friday is the legal holiday. This subsection 7.2 does not apply to primary, general or special election days in this state.

7.3. *Election days.* – State primary, general and special election days are also legal holidays in West Virginia.

General election day – The Tuesday after the first Monday in November of each even year.
Primary election day – The second Tuesday in May of each even year.

§ 121-1-8. Enlargement or reduction of time.

8.1. *General.* – Unless precluded by statute, the administrative law judge, in his or her discretion, may make longer or shorter any period provided by these rules. The period fixed by statute, within which to file a petition invoking the jurisdiction of the office of tax appeals, may not be extended by an administrative law judge.

8.2. *Continuances.* – As to continuances, see section 57 of this rule.

8.3. *Certain motions.* – Where a motion is made concerning jurisdiction or the sufficiency of a pleading, the time for filing any response to that pleading shall begin to run from the date of service of the order denying the motion, unless the administrative law judge shall direct otherwise.

8.4. *Briefs.* – Where the dates for filing briefs are fixed, an extension of time for filing a brief or the granting of leave to file a brief after the due date shall correspondingly extend the time for filing any other brief due at the same time and for filing succeeding briefs, unless the administrative law judge shall order otherwise.

§ 121-1-9. Office records.

9.1. *Removal of records.* – No original record, paper, document, or exhibit filed with the office of tax appeals shall be taken from the hearing room or from the offices of the office of tax appeals or from the custody of an administrative law judge or employee of the office, except as authorized by an administrative law judge or except as may be necessary for the executive director to furnish copies or to transmit the same for appeal or other official purposes. With respect to return of exhibits after a decision of the office becomes final, see subdivision 64.4.2 of this rule.

9.2. *Copies of Records.*

9.2.1. *Administrative decisions.*

9.2.1.a. Administrative decisions issued by the office of tax appeals subsequent to hearing shall be redacted to preserve confidentiality and, after they become final, shall be filed in the State Register maintained and published by the West Virginia secretary of state. A copy shall also be posted on the website maintained for the office of tax appeals.

9.2.1.b. A plain or certified copy of the redacted decision may be obtained by any person not a party to the proceeding upon application to the executive director of the office

of tax appeals and payment of the required postage. In the event the decision is appealed to a court in this state, a plain or certified copy of the decision, as issued and without redaction, may be obtained by any person not a party to the proceeding upon application to the executive director of the office of tax appeals and payment of the required fee and postage, if the copies are to be mailed to the applicant.

9.2.1.c. A plain or certified copy of a decision may be obtained by any person who is a party to the proceeding upon application to the executive director of the office of tax appeals and payment of the required fee and postage, if the copies are to be mailed to the applicant.

9.2.2. *Transcripts and other records pertaining to a proceeding.* – A plain or certified copy of the transcript and other records pertaining to a proceeding may be obtained by any person who is a party to the proceeding upon application to the executive director of the office of tax appeals and payment of the required fee and postage, if the copies are to be mailed to the applicant.

9. 3. *Fees.*

9.3.1. The fees to be charged and collected for any copies shall be twenty-five cents per page.

9.3.2. *Transcripts.* The executive director shall maintain a record indicating the current cost of obtaining a copy of a transcript of any proceeding.

9.4. *Destruction of records.*

9.4.1. If an administrative decision is not appealed timely to a circuit court of this state, the record of the proceeding and any other documents and papers pertaining to the proceeding may be destroyed three years after the day the administrative decision was issued by the office of tax appeals.

9.4.2. If an administrative decision is appealed timely to a circuit court of this state, the record of the proceeding and any other documents and papers pertaining to the proceeding may be destroyed six years after the day the administrative decision was issued by the office unless a party to the proceeding notifies the office in writing that the administrative decision has not become final and that the decision is still subject to revision by a court. The records may then be destroyed six months after the administrative decision is no longer subject to judicial review.

§ 121-1-10. Confidentiality of records and information.

10.1. *General.* – Pleadings, motions, briefs, proposed findings of fact and conclusions of law and other documents filed in or pertaining to a tax or program administered under the West Virginia tax procedure and administration act, W. Va. Code § 11-10-1 *et seq.*, that are in the custody of the office of tax appeals may not be disclosed to the public and are exempt from

disclosure under the West Virginia freedom of information act, W. Va. Code § 29B-1-1 *et seq.*, except as otherwise provided in this rule.

10.2. The confidentiality rules set forth in W. Va. Code § 11-10-5d, to the extent not inconsistent with the provisions of article 10A, chapter 11 of the Code, are applicable to all records and to all employees of the office of tax appeals, as provided in W. Va. Code § 11-10A-23.

§ 121-1-11. Proceedings not open to public.

Unless otherwise provided by statute, proceedings before the office of tax appeals are not open to the public. Unless prior permission is granted by the office of tax appeals, no person shall be permitted to make photographs, video recordings, sound recordings, or any other form of recording of proceedings, or any sound, video, or other form of transmission or broadcast of proceedings. Unless prior permission is granted by the office of tax appeals, these activities are not permitted in areas immediately adjacent to the hearing room. With prior approval of the office of tax appeals, photographs, video recordings, sound recordings, other forms of recordings, and sound, video, or other forms of transmissions or broadcasts may be made of ceremonial proceedings in the hearing room.

§ 121-1-12. Seal; authenticating records; judicial notice.

12.1. The office of tax appeals shall have a seal. The seal shall have the following words engraved thereon: "West Virginia Office of Tax Appeals." The office of tax appeals shall authenticate all of its orders, records and proceedings with the seal.

12.2. The courts of this state take judicial notice of the seal as provided in W. Va. Code § 11-10A-5.

§ 121-1-13. Payment of fees or charges.

13.1. Payments to the office of tax appeals for fees or other charges shall be made in United States currency, or by check, money order or other draft payable in United States currency that is made payable to the order of the "State of West Virginia". Payments shall be mailed or delivered to the executive director of the office of tax appeals in Charleston, West Virginia.

13.2. The executive director shall keep proper records of all payments and shall issue a written receipt to the payor when the payment is made in cash.

§ 121-1-14. Disability of administrative law judge.

In the event of the death, sickness, or disability of an administrative law judge after he or she has heard any part of the case, his or her successor or alternate may continue the proceeding and decide the matter, if, in the discretion of the chief administrative law judge, continuing the proceeding will not injure a party to the proceeding or otherwise result in injustice, or the chief administrative law judge may, in his or her discretion, order the matter reheard.

§ 121-1-15. Form and style of papers.

15.1. *Caption, date, and signature required.* – All papers filed with the office of tax appeals shall have a caption, shall be dated, and shall be signed as follows:

15.1.1. *Caption.* – A proper caption shall be placed on all papers filed with the office of tax appeals, and the requirements provided in section 29 of this rule shall be satisfied with respect to all such papers. All prefixes and titles, such as "Mr.", "Ms.", or "Dr.", shall be omitted from the caption. The full name and surname of each individual petitioner shall be set forth in the caption. The name of an estate or trust or other person for whom a fiduciary act shall precede the fiduciary's name and title, as for example "Estate of Mary Doe, deceased, Richard Roe, Executor".

15.1.2. *Date.* – The date of signature shall be placed on all papers filed with the office of tax appeals.

15.1.3. *Signature.* – The original signature, either of the party or the party's representative, shall be subscribed in writing to the original of every paper filed by or for that party with the office of tax appeals, except as otherwise provided by these rules.

15.1.3.a. An individual rather than a firm name shall be used, except that the signature of a petitioner corporation, partnership, limited liability company, other legal entity, or unincorporated association shall be in the name of the corporation, partnership, limited liability company, other legal entity, or association by one of its active and authorized officers, partners or members, as for example "ABC Company, Inc., by Richard Roe, President".

15.1.3.b. The name, mailing address, and telephone number of the party or the party's representative, as well as the representative's state court bar number, if any, shall be typed or printed immediately beneath the written signature.

15.1.3.c. The mailing address of a signatory shall include a firm name if it is an essential part of the accurate mailing address.

15.2. *Number Filed.* – For each paper filed with the office of tax appeals, there shall be filed one conformed copy together with the signed original thereof, except as otherwise provided in these rules.

15.2.1. When the filing is in more than one proceeding or contested case (as a motion to consolidate, or in cases already consolidated), the number filed shall include one additional copy for each docket number in excess of one.

15.2.2. If service of a paper is to be made by the executive director, copies of any attachments to the original of such paper shall be attached to each copy to be served by the executive director. As to stipulations for evidentiary hearing, see subsection 47.2 of this rule.

15.3. *Legible papers required.* – Papers filed with the office of tax appeals may be prepared by any process, but may be filed only if all papers, including copies, filed with the office are clear and legible.

15.4. *Size and style.*

15.4.1. Typewritten, computer generated or printed papers should be typed or printed only on one side, on opaque, unglazed paper, 8 1/2 inches wide by 11 inches long.

15.4.2. All the papers should have margins on both sides of each page that are no less than 1 inch wide, and margins on the top and bottom of each page that are no less than 3/4 inch wide.

15.4.3. Text and footnotes should appear in consistent typeface no smaller than 12 characters per inch produced by a typewriting element or 12-point type produced by a nonproportional print font (e. g., Courier), with double spacing between each line of text and single spacing between each line of indented quotations and footnotes.

15.4.4. Quotations in excess of five lines should be set off from the surrounding text and indented.

15.4.5. Double-spaced lines shall be no more than three lines to the vertical inch, and single-spaced lines shall be no more than six lines to the vertical inch.

15.5. *Binding and covers.* – All papers should be bound together on the upper left-hand side only and shall have no backs or covers.

15.6. *Citations.* – All citations of case names should be underscored when typewritten or handwritten, and should be in italics when computer generated or printed.

15.7. *Return of papers for failure to conform to this section.* – The office of tax appeals may return without filing any paper that does not conform sufficiently overall to the requirements of this section.

§ 121-1-16. Docketing of cases.

16.1. Upon the filing of the petition, the executive director shall do all of the following:

16.1.1. Time-stamp all pleadings.

16.1.2. Assign an individual docket number to the proceeding.

16.1.3. Secure all original pleadings for safekeeping.

16.1.4. Establish a separate docket record for each case on a form approved by the chief administrative law judge.

16.2. The docket number assigned to each case shall be the permanent number of the proceeding and shall be affixed by the parties to all future filings in the case. The separate docket record established for each case shall contain entries of all pertinent filings and proceedings in the case and, together with the file containing all original pleadings, constitute the original record of the case to be preserved by the office of tax appeals as prescribed by law.

§ 121-1-17. Appearances and representation of parties.

17.1. *In general.* – A petitioner may appear before the office of tax appeals in his or her own behalf, or by a representative when a power of attorney is filed with the office of tax appeals. See form WV-2848 for an example of a power of attorney. A petitioner may be represented, for example, by a lawyer qualified to practice law in this state (or by co-counsel of record so qualified); or by a certified public accountant; or by a registered public accountant; or by a person who is an enrolled agent for Internal Revenue Service purposes; or by virtually any other adult person.

17.2. *Pro se appearance.* – Where a party attempts to represent himself or herself and, in the opinion of the office of tax appeals there is a serious question as to such party's competence to do so, the office of tax appeals, if it deems justice so requires, may continue the case until appropriate steps have been taken to obtain an adjudication of the question by a court having jurisdiction so to do, or may take such other action as it deems proper.

17.3. *Representative not to engage in unauthorized practice of law.*

17.3.1. While a person who is not authorized to practice law in this state may generally represent a petitioner before the office of tax appeals, that person may not engage in the unauthorized practice of law. Therefore, he or she may not: interrogate his or her own witness, that is, conduct a direct examination, at a hearing before the office of tax appeals; may not cross-examine witnesses; may not argue that a statute, regulation, tax policy, or the like is unconstitutional (on its face or as applied to a particular situation); and may not argue that an ambiguous statute, regulation, tax policy, or the like should be interpreted (construed) in a particular manner.

17.3.2 *Practice of law defined.* – The West Virginia supreme court of appeals defines the practice of law as follows:

> "In general, one is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge and skill.
>
> "More specifically but without purporting to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without

compensation and whether or not in connection with another activity, to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures. Nothing in this paragraph shall be deemed to prohibit a lay person from appearing as an agent before a justice of the peace or to prohibit a bona fide full-time lay employee from performing legal services for his regular employer (other than in connection with representation of his employer before any judicial, executive or administrative tribunal, agency or officer) in matters relating solely to the internal affairs of such employer, as distinguished from such services rendered to or for others."

17.4. *In-house counsel.* – A lawyer, including in-house counsel, or the like, for any corporation or other entity, who is not authorized to practice law in this state, must engage, as co-counsel of record, a lawyer who is authorized to practice law in this state, and such co-counsel must be a signatory (including noting his or her West Virginia state bar membership number) in all papers and must appear as the "responsible local attorney" at all proceedings before the office of tax appeals.

17.5. *Visiting attorney.*

17.5.1. Any person who has not been admitted to practice before the supreme court of appeals of West Virginia, but who is a member in good standing of the bar of the supreme court of the United States, the bar of the highest court of any other state in the United States, or the bar of the District of Columbia (which bar shall extend like privileges to members of the West Virginia state bar), shall be permitted to appear *pro hac vice* as a visiting attorney in a particular case, in association with a person admitted to practice before the West Virginia supreme court of appeals, and in good standing as a member of its bar, in accordance with rule 8.0 of the West Virginia rules for admission to the practice of law, which rule reads:

"(a) *General rule.* Whenever it shall appear that a person, who has not been lawfully licensed and admitted to the practice of the law in the State of West Virginia, has been duly licensed to be admitted to practice before a court of record of general jurisdiction in any other state or country or in the District of Columbia, and is in good standing as a member of the bar of such jurisdiction, he or she may appear in a particular action, suit, proceeding or other matter in any court of this State or before any judge, tribunal or body of this State upon full compliance with the requirements of this rule, if like courtesy or privilege is extended to members of the West Virginia State Bar in such other jurisdiction. Except in conformity with this rule, members of the Bar of any jurisdiction other than the State of West Virginia may not in this State do any act, or hold themselves out as entitled to do any act, within the

definition of the practice of law, as prescribed by the Supreme Court of Appeals of West Virginia.

"(b) *Admission process*. Before such privilege of appearance is granted, the applicant shall provide to the judge, tribunal or other body before which the applicant desires to appear, as well as to the West Virginia State Bar, a verified statement of application for pro hac vice admission listing (1) the action, suit, proceeding or other matter which is the subject of the application; (2) the name, address and telephone number of the registration or disciplinary agency of all state courts, the District of Columbia or of the country in which such person is admitted; (3) the name and address of the member of the West Virginia State Bar who will be a responsible local attorney in the matter; (4) all matters before West Virginia tribunals or bodies in which such person is or has been involved in the preceding 24 months; (5) all matters before West Virginia tribunals or bodies in which any member of petitioner's firm, partnership, corporation or other operating entity is or has been involved in the preceding 24 months; (6) a representation by the applicant for each State, the District of Columbia or any other country where said applicant has been admitted to practice, stating whether the applicant is in good standing with the bar of every such jurisdiction and that he or she has not been disciplined in any such jurisdiction within the preceding 24 months; (7) an agreement to comply with all laws, rules and regulations of West Virginia state and local governments, where applicable, including taxing authorities and any standards for pro bono civil and criminal indigent defense legal services. A fee of one-hundred fifty dollars ($150) shall be paid to the West Virginia State Bar for each individual applicant in each individual *pro hac vice* admission. The fee shall accompany the verified statement of application for *pro hac vice* admission which is sent to the West Virginia State Bar.

"(c) *Responsible local attorney*. The applicant shall be associated with an active member in good standing of the state bar, having an office for the transaction of business within the State of West Virginia, who shall be a responsible local attorney in the action, suit, proceeding or other matter which is the subject of the application, and service of notices and other papers upon such responsible local attorney shall be binding upon the client and upon such person. The local attorney shall be required to sign all pleadings and affix the attorney's West Virginia State Bar ID number thereto, and to attend all hearings, trials or proceedings actually conducted before the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission pro hac vice. The local attorney shall further attend the taking of depositions and other actions that occur in the proceedings which are not actually conducted before the judge, tribunal or other body of the State of West Virginia for which the applicant has sought admission pro hac vice, and shall be a responsible attorney in the matter in all other respects. In order to be a "responsible local attorney" the local attorney must maintain an actual physical office equipped to conduct the practice of law in the State of West Virginia, which office is the primary location from which the "responsible local attorney" practices law on a daily basis. The responsible local attorney's agreement to participate in the matter shall be evidenced by the local attorney's endorsement upon the verified statement of application, or by written statement of the local attorney attached to the application.

"It shall be the duty of every circuit clerk to reject any pleading or other document tendered for filing in the office of said clerk which is not signed or otherwise executed as required by this rule. Any document filed in violation of this rule may be expunged as a fugitive document; Provided, However, that any party shall have a period of thirty days after notice to comply with this rule by filing a certification with the circuit clerk signed by the responsible local attorney and identifying the pleadings and documents thereby affected.

"(d) *Grounds for denial.* If a complete and truthful statement of application be not filed, or if inquiry by the court concerning the applicant's admission and ethics in another jurisdiction indicates, or if the applicant's appearances within the State of West Virginia within the past 24 months are numerous or frequent or involve improper conduct, the court or tribunal shall deny such person the continuing privilege of appearance.

"(e) *Effect of denial.* Any pleading filed by a visiting attorney without complying with this section may, after 14 days' written notice mailed to him or her at the address then known to the clerk of the circuit court or other tribunal or body, be stricken from the record."

17.5.2. Before appearing before the office of tax appeals, the visiting attorney shall file with the chief administrative law judge a true copy of the verified statement filed with the West Virginia state bar in conformity with the requirements of rule 8 of the West Virginia rules for admission to practice law. If the chief administrative law judge is satisfied that the visiting attorney meets all of the qualifications for admission *pro hac vice* the chief administrative law judge shall enter an order to that effect and send a copy to the West Virginia state bar.

17.5.3. Alternatively, the visiting attorney may apply for *pro hac vice* admission to the judge of any circuit court of this state in which a petition for appeal of an adverse administrative decision of the office of tax appeals may be filed, and then tender a copy of the order of the circuit court judge granting the *pro hac vice* admission.

17.5.4. *Duty of local attorney.* – The local attorney shall attend the taking of depositions and other actions that occur in the proceedings which are not actually conducted before the office of tax appeals, as well as those conducted by the office of tax appeals, as required by rule 8 of the West Virginia rules for admission to practice law.

17.5.5. *Failure to comply.* – Any pleading, motion, or other paper filed by a visiting attorney not in compliance with this section may be stricken from the record after fifteen (15) days written notice mailed to the visiting attorney at his or her address as known to the chief administrative law judge.

17.6. *Representation of tax commissioner.* – Unless the tax commissioner represents himself or herself in person, the tax commissioner shall be represented in all cases, except small claim cases to which the provisions of section 270 of this rule apply, by a person who is authorized to practice law in this state.

§ 121-1-18. Encouraged resolution of controversies by the parties.

The availability and pendency of proceedings before the office of tax appeals may not be viewed as precluding the parties from attempting to resolve the matters in controversy prior to the hearing, thereby avoiding the need for a hearing, or after the hearing is held but before the administrative decision is issued.

§ 121-1-19. Counsel conference.

19.1. In all proceedings, except small claims proceedings under section 270 of this rule, the petitioner or the petitioner's representative shall arrange for a conference with all other parties or representatives for the following purposes:

19.1.1. To discuss the possibility of settlement;

19.1.2. To stipulate to the admissibility of evidence to the fullest extent to which complete or qualified agreement can be reached, including all material facts that are not, or fairly should not be, in dispute;

19.1.3. To identify, for purposes of discovery, all discoverable evidence or documents known to be in the possession or control of the other party, which shall be specifically listed in the summary required by this rule; or

19.1.4. To consider all other matters that may aid in the disposition of the proceeding;

19.2. The conference shall be held within sixty (60) days after the filing of the initial petition requiring service upon the respondent, at a time and place mutually agreed to or, if an agreement cannot be reached, fixed by order of the office of tax appeals.

§ 121-1-20. Ex parte communications.

20.1. All parties and their representatives shall have access to administrative law judges on an equal basis.

20.2. No party, either directly or through a representative, may communicate in writing with an administrative law judge about any aspect of the merits of the case unless a copy of the written communication is promptly delivered to the opposing representative or, if there is none, to the opposing party.

20.3. Similarly, no party may, either directly or through a representative, communicate orally with an administrative law judge about any aspect of the merits of the case without providing prior notice to the opposing representative or, if there is none, to the opposing party.

20.4. On the other hand, any party may, unilaterally, seek clarification of purely procedural matters, either orally or in writing, by directing questions about the same to the executive director of the office of tax appeals.

§ 121-1-21. Commencement of proceedings.

21.1. *Petition required.* - All proceedings before the office of tax appeals shall be commenced by timely filing with the executive director as a written petition that meets the requirements of this section. An ordinary letter or a substitute form is not sufficient, unless it contains all of the required information, including required attachments.

21.2. *Petition must be filed timely.* - Under West Virginia law, the period of time within which a person may file a petition with the office of tax appeals is jurisdictional, not merely directory. The office of tax appeals does not have authority to suspend or extend, for any reason at all, that limitation period.

21.2.1. The office of tax appeals will not hold a hearing on the issue of why, factually, a complete and proper petition was not filed within the time period prescribed by the applicable statute and why, as a matter of "equity" or the like, the untimeliness should be "excused." The office of tax appeals will hold a hearing to determine if a petitioner has in fact timely filed in accordance with section 5 of this rule.

21.2.2. If a petition is received in the office of tax appeals that is not timely filed, the chief administrative law judge shall enter an order refusing to docket the petition because the office of tax appeals has no jurisdiction to hear a petition that is not filed timely. The chief administrative law judge shall send a copy of the order to the petitioner, or to the petitioner's representative, if any, identified in the petition, by certified mail, and to the tax commissioner's legal representative. The order shall further advise the petitioner that the determination of the state tax department that the petitioner sought to appeal is now final and is not subject to administrative or judicial review. This administrative order is not subject to any further review by the office of tax appeals.

21.3. *Form of petition.*

21.3.1. A form for a petition is available from the office of tax appeals, upon request. The form is also available on the internet at http://www.state.wv.us/ota. *See also*, Form 2 in Appendix I of this rule.

21.3.2. A petition shall be prepared on letter-size paper (8 ½" x 11") by computer or typewriter, if possible. If a computer or typewriter is not available, the petition may be completed by handwriting that is legible (printing is preferred over cursive).

21.3.3. A petition shall include the following information:

a. The petitioner's name, including any "doing business as" name;

b. The petitioner's mailing address (street address and any post office box or drawer), e-mail address (if any), telephone number(s), and fax number (if any);

c. The petitioner's social security number, federal employer identification number, or any other identifying number assigned to the petitioner by the West Virginia state tax department or by the Internal Revenue Service (the office of tax appeals will use any of these numbers only for purposes of performing its functions as required by law);

d. The type(s) of tax(es) involved or the specific nature of the non-tax matter involved (such as a charitable bingo license revocation);

e. The division, section, unit, or other organizational part of the state tax department that issued the notice of assessment, denied the claim for refund or credit, suspended or refused to issue the license or business registration certificate, or took any other action prompting the filing of the petition;

f. The date on which the petitioner received the written notice that prompted the filing of the petition;

g. If applicable, the taxable period(s) or year(s) involved and the amount of tax, additions, penalty, interest or other amount in controversy;

h. Separately numbered paragraphs stating, in clear, concise, and, as much as possible, specific terms, each and every material error, factual or legal, that the petitioner alleges has been made by the state tax department;

i. The specific relief sought by the petitioner;

j. If desired by the petitioner, a request that the matter, if eligible and approved by the office of tax appeals, be processed as a small claim case under section 110 of this rule;

k. If desired by the petitioner, a waiver of the right to be heard in person and, instead, submission of the matter by the petitioner on the petition and any notarized affidavits or other relevant and self-explanatory documents submitted with the petition;

l. The name, mailing address, e-mail address (if any), telephone number(s), fax number (if any), and occupation (such as lawyer or certified public accountant) of the petitioner's representative, if any;

m. A legible copy of the power of attorney that is necessary for any representative (see Form WV-2848, available from the state tax department or from the internet at http://www.state.wv.us/taxrev/uploads.wv2848.pdf);

n. The signature of the petitioner, or of the petitioner's representative, and the date signed, beneath a statement that the petition is made with the knowledge that a willfully false representation set forth in the petition is a misdemeanor punishable according to law; and

o. It is not necessary that the petition be notarized.

21.4. *Required attachment.*

21.4.1. *In general.* – A legible and complete copy of the determination of the state tax department (e.g., notice of assessment, denial of claim for refund or credit, refusal to issue license, order suspending a license, etc.) prompting the filing of the petition shall be attached to the petition. A petition is not complete and is deficient without this attachment.

21.4.2. *Exception.* – The only exception to subdivisions 21.3.1 is a petition for refund or credit that is filed because the state tax department failed to act on a claim for refund or credit. In this latter instance, a true copy of the claim for refund or credit shall be attached, along with evidence of the date the claim was filed with the state tax department, such as a certified mail return receipt card signed by an employee or agent of the state tax department.

21.5. *Number of copies to be filed.* – An original of the petition and one exact copy of the same shall be filed simultaneously. A petition is not complete and is deficient without inclusion of the copy, except as otherwise provided in this rule.

§ 121-1-22. Filing of petition.

22.1. *Hand delivery.* – The petition, including the required copy and attachments, may be hand delivered to the office of tax appeals, in Charleston, West Virginia, during normal business hours, which are 8:30 a.m. to 5:00 p.m., Monday through Friday, except legal holidays in this state.

W. Va. Office of Tax Appeals
Morrison Building, Suite # 200
815 Quarrier Street
Charleston, WV 25301

22.2. *U. S. mail delivery.* The petition, including the required copy and attachments, may be mailed, postage prepaid, to the office of tax appeals. Timely mailing is timely filing. The earliest U. S. postmark date shown on the envelope or other wrapper is the date of filing. If the U. S. postmark date is illegible or missing, the date of physical receipt of the petition in the office of tax appeals is the date of filing. The mailing address for the office of tax appeals is:

W. Va. Office of Tax Appeals
815 Quarrier Street, Suite # 200
Charleston, WV 25301

22.3. *Private delivery service.* – The petition, including the required copy and attachments, may be delivered, charges prepaid, to the office of tax appeals by any delivery service approved by the Internal Revenue that a taxpayer may use to deliver tax returns or other documents to the Internal Revenue Service. Delivery to the delivery service on the last day for filing the petition is timely filing, only if the taxpayer requires that delivery be made to the office of tax appeals, during normal business hours, on the office of tax appeal's next business day. If the delivery service is not one approved by the Internal Revenue Service, the petition is not filed until it is physically received in the office of tax appeals. The address of the office of tax appeals is:

W. Va. Office of Tax Appeals
Morrison Building, Suite 200
815 Quarrier Street
Charleston, WV 25301

22.4. *Facsimile transmission.* – The petition may be filed by facsimile transmission to the office of tax appeals at (304) 558-1670. With the exception that there are no filing fees, the facsimile transaction shall be subject to and conform to the West Virginia supreme court of appeals' rules for filing and service of pleadings and other documents by facsimile transmission, codified as W. Va. trial court rule 12, see Appendix II of this rule. In this instance, only one original of the petition and attachments must be transmitted. A conforming fax transaction received during normal business hours of the office of tax appeals, as shown on the transmittal sheet accompanying the fax, shall be treated as filed on that business day. A conforming facsimile transaction that is received after 5:00 p.m. (in Charleston, WV) on one business day of OTA will be treated as filed on the next business day of the office of tax appeals.

22.5. *E-mail delivery.* – Sending petitions by unsecure e-mail is discouraged because the petitioner's confidentiality may be breached. The petition may be sent by e-mail to the executive director of the office of tax appeals at the following e-mail address: execdir@ota.state.wv.us. In this instance, only one copy of the petition and attachments must be e-mailed. A petition that is not signed and does not include copies of required attachments is a deficient petition. The e-mail attachments shall be a Microsoft Word file or an Acrobat PDF file. The required attachment to the petition must be an Acrobat PDF document produced by scanning the notice of assessment, or denial of the claim for refund or credit or other document precipitating the filing of the petition. An e-mail attachment that cannot be opened by the office of tax appeals shall be treated as if it were never received by the office of tax appeals. An e-mail attachment that is a corrupt file or infected file shall be treated as if it were never received by the office of tax appeals.

22.6. *Web-based filing.* – [RESERVED]

22.7. *Wrong address.* – If instead of mailing or otherwise delivering the petition to the office of tax appeals, the petitioner, or the petitioner's representative, causes the petition to be delivered to a place other than the office of tax appeals, such as, for example, the office of secretary of tax and revenue, the office of state tax commissioner or another office in the state tax department, receipt by that office is not receipt by the office of tax appeals unless the other office

forwards the petition to the office of tax appeals within the original statutory period for filing the petition.

§ 121-1-23. Special rule for appeal of jeopardy assessment.

23.1. *Time for filing petition.* – Except as provided in subdivision 23.2 of this section, a jeopardy assessment issued under W. Va. Code § 11-10-8(b) is appealed by filing with the office of tax appeals a petition for reassessment within twenty (20) days after the person is served with notice of the jeopardy assessment. The petition shall be accompanied by remittance of the amount assessed, or such security as the tax commissioner deems necessary to ensure compliance with applicable provisions of chapter 11 of the West Virginia Code.

23.2. *Extension of time.* – If a motion requesting an extension of time is filed with the office of tax appeals within twenty (20) days after the person is served with notice of the jeopardy assessment and the motion is accompanied by remittance of the amount assessed, or such security as the tax commissioner deems necessary to ensure compliance with applicable provisions of chapter 11 of the West Virginia Code, the person may have an additional thirty (30) days in which to file the petition for reassessment. If an extension of time is granted, the petition for reassessment must be filed within fifty (50) days after the notice of jeopardy assessment is served on the taxpayer. The office of tax appeals has no authority to extend this fifty-day period.

23.3. *Security.* – Security posted with the petition for reassessment of a jeopardy assessment, or with the motion to extend the time for filing a petition for reassessment of a jeopardy assessment, shall be in United States currency or in the form of:

23.3.1. A certified check for the amount of the jeopardy assessment drawn on a state or national bank located in this state or on a national bank located in another state made payable to the State of West Virginia;

23.3.2. An irrevocable letter of credit for an amount not less than the amount of the jeopardy assessment issued by a state or national bank located in this state or a national bank located in another state that may be drawn on by the tax commissioner without the consent of any other person;

23.3.3. A corporate surety bond issued by a surety company authorized to engage in surety business in this state and conditioned upon taxpayer's payment of the amount assessed, or the amount for which the taxpayer is found to owe the state of West Virginia in an administrative decision of the office of tax appeals that becomes final or, if the decision is appealed, the amount for which the taxpayer is found liable in a final decision of a court of competent jurisdiction, including the amount of statutory interest that continues to accrue after the jeopardy assessment is issued until the amount due is paid; or

23.3.4. Other security acceptable to the tax commissioner.

23.4. For purposes of subsection 23.3 of this section, the amount of the jeopardy assessment includes the amount of tax, additions to tax, penalties, and other amounts assessed plus accrued statutory interest calculated under W. Va. Code § 11-10-17.

23.5. *Other security.* – When the amount of security acceptable to the tax commissioner is less than the amount assessed, or the security acceptable to the tax commissioner is in a form other than set forth in subsection 46.3 of this section, exclusive of subdivision 46.3.4, there shall be attached to the motion for extension of time, or the petition for reassessment, whichever is first filed with the office of tax appeals, the certificate of the tax commissioner, or a joint motion signed by the taxpayer (or taxpayer's authorized representative) and legal counsel for the tax commissioner, stating the amount of the security and the form of the security that is acceptable to the tax commissioner.

§121-1-24. Service of papers.

24.1. *When required.* – Except as otherwise required by this rule or directed by the office of tax appeals, all pleadings, motions, orders, decisions, notices, demands, briefs, appearances, or other similar documents or papers relating to a case or other proceeding before the office of tax appeals, also referred to as the papers in a case, shall be served on each of the parties or other persons involved in the matter to which the paper relates other than the party who filed the paper.

24.2. *Manner of Service.*

24.2.1. *General.*

a. *Petitions.* – All petitions invoking the jurisdiction of the office of tax appeals and commencing the case or proceeding shall be served by the executive director of the office of tax appeals.

b. *Other documents.* – All other papers required to be served on a party shall be served by the party who filed the paper unless otherwise provided in this rule or directed by the office of tax appeals.

c. *Certificate of service.* – Except for petitions invoking the jurisdiction of the office of tax appeals, the original paper filed with the executive director shall include a certificate by a party or a party's representative of record that service of that paper has been made on the party to be served or the party's representative of record. For the form of such certificate of service, see Form 1, Appendix I.

d. *Method of service.*

(1) *By mail.* – Service of a document may be made by mail directed to the party, or the party's representative of record, at the person's last known address. Service by mail is complete upon mailing, and the date of such mailing shall be the date of such service.

(2) *Alternative delivery.* - As an alternative to service by mail, service may be made by delivery to a party, or a party's representative of record.

e. *Service on tax commissioner.* - Service shall be made on the tax commissioner by service on, or directed to, the commissioner's counsel at the office address shown in the commissioner's answer filed in the case or, if no answer has been filed, on the director of the legal division of the state tax department at Charleston, West Virginia 25305.

f. *Service on nonparties.* - Service on a person other than a party shall be made in the same manner as service on a party, except as otherwise provided in this rule or directed by the office of tax appeals. In cases consolidated pursuant to section 148 of this rule, a party making direct service of a paper shall serve each of the other parties or representative of record for each of the other parties, and the original and copy thereof required to be filed with the office of tax appeals shall each have a certificate of service attached.

24.3. *Representative of record.* - Whenever under this rule service is required or permitted to be made upon a party represented by a person who has entered an appearance, service shall be made upon the representative unless service upon the party is directed by the office of tax appeals. Where more than one representative appears for a party, service will be made only on that representative whose appearance was first entered of record, unless that representative notifies the office of tax appeals, by a designation of representative to receive service filed with the office of tax appeals, that the other representative of record is to receive service, in which event service will be made only on the person so designated.

24.4. *Service of subpoenas.* - For service of a subpoena or subpoena duces tecum, see section 68 of this rule.

24.5. *Change of address.* - The office of tax appeals shall be promptly notified, by a notice of change of address filed with the executive director of the office, of the change of mailing address of any party, any party's counsel, or any party's duly authorized representative. A separate notice of change of address shall be filed for each docket number.

§ 121-1-25. Proper parties; capacity.

25.1. *Petitioner.*

25.1.1. *Reassessment.* - A petition for reassessment shall be filed in the name of the person or persons against whom the notice of assessment was issued, or by and with the full descriptive name of the fiduciary entitled to file the petition on behalf of such person.

25.1.2. A petition timely filed shall not be dismissed on the ground that it is not properly brought on behalf of a party until a reasonable time has been allowed after objection for ratification by such party of the filing of the petition; and such ratification shall have the same effect as if the petition had been properly brought by such party. Where the notice of assessment was

issued against more than one person, as stated in the tax commissioner's notice of assessment, only those persons who timely acted to file a petition for reassessment shall be deemed a party or parties.

25.2. *Respondent.*– The tax commissioner shall be named the respondent.

25.3. *Capacity.* – The capacity of an individual, other than one acting in a fiduciary capacity, to file a petition in the office of tax appeals, shall be determined by the law of the individual's domicile. The capacity of a corporation to file a petition shall be determined by the law under which it was organized. The capacity of a fiduciary to file a petition shall be determined in accordance with the law of the jurisdiction from which such person's authority is derived and in accordance with any applicable West Virginia law. In case of any conflict, West Virginia law shall control. The authority or a person to represent a petitioner before the office of tax appeals shall be determined under rules of the West Virginia supreme court of appeals.

25.4. *Infants or incompetent persons.* – Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may file a petition or defend in the office on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may act by a next friend or by a guardian ad litem.

§ 121-1-26. Processing of filed petition.

26.1. *Assignment of docket number.* – Upon receipt of a timely filed petition, the office of tax appeals shall assign it a docket number and notify the parties in writing of that number and the date, time and place of the administrative hearing on the petition. The parties shall refer to that docket number in all subsequently filed documents or communications with the office of tax appeals concerning that matter.

26.2. *Service on tax commissioner.* – Within five (5) days after receiving a petition, the office of tax appeals shall forward a copy of the petition, including any attachments, to the state tax commissioner.

§ 121-1-27. Scheduling of hearing.

In every matter, without waiting for an answer to the petition or a reply to the answer to be served and filed, the office of tax appeals shall schedule a date and time for a hearing that shall be held within ninety (90) days after the petition was filed, unless the hearing is continued (postponed) for cause by the office of tax appeals.

§ 121-1-28. General rules of pleading.

28.1. *Purpose.* – The purpose of the pleadings is to give the parties and the office of tax appeals fair notice of the matters in controversy and the basis for their respective positions.

28.2. *Pleading to be concise and direct.* -- Each statement of fact in a pleading shall be simple, concise, and direct. No technical forms of pleading are required.

28.3. *Consistency.* – A party may set forth two or more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them would be sufficient if made independently, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may state as many separate claims or defenses as the party has regardless of consistency or the grounds on which based. All statements shall be made subject to the signature requirements of sections 28 and 64 of this rule.

28.4. *Construction of pleadings.* – All pleadings shall be so construed as to do substantial justice.

§ 121-1-29. Form of pleading.

29.1. *General.* – All documents filed with the office of tax appeals shall contain all of the following information:

29.1.1. The caption "West Virginia Office of Tax Appeals";

29.1.2. The title of the case;

29.1.3. The docket number of the case after it is assigned by the office; and

29.1.4. A designation showing the nature of the document.

29.2. *Names of parties.* -- The title of the case shall include the names of all parties, but shall not include as a party-petitioner the name of any person other than the person or persons by or on whose behalf the petition is filed. In other pleadings, it is sufficient to state the name of the first party with an appropriate indication of other parties.

29.3. *Separate statement.* -- All statements of claim or defense, and all statements in support thereof, shall be made in separately designated paragraphs, the contents of each of which shall be limited, as far as practicable, to a statement of a single item or a single set of circumstances. Such paragraph may be referred to by that designation in all succeeding pleadings. Each claim and defense shall be stated separately whenever a separation facilitates the clear presentation of the matters set forth.

29.4. *Adoption by reference; exhibits.* – Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

29.5. *Other provisions.* – With respect to other provisions relating to the form and style of papers filed with the office of tax appeals, see section 15 of this rule.

29.6. The original of all pleadings, motions, and briefs shall be filed with the executive director of the office of tax appeals.

§ 121-1-30. Signing of pleadings.

30.1. *Signature.* – Each pleading shall be signed in the manner provided in section 15 of this rule. Where there is more than one attorney or other representative of record, the signature of only one is required. Except when otherwise required by statute or specifically directed by the office of tax appeals, pleadings need not be verified or accompanied by affidavit.

30.2. *Effect of signature.*

30.2.1. The signature of the attorney or other representative of a party constitutes a certificate by the signer that the signer has read the pleading, that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

30.2.2. The signature of the attorney or other representative or the party also constitutes a representation by the person that he or she is authorized to represent the party or parties on whose behalf the pleading is filed.

30.3. If a pleading is not signed, it shall be stricken, unless it is signed promptly after the omission is called to the attention of the pleader.

§ 121-1-31. Answer.

31.1. *Time for filing answer.* – Within forty (40) days after receiving a copy of the petition from the office of tax appeals, the tax commissioner shall file with the executive director of the office of tax appeals an original and one conforming copy of his or her written answer to the petition accompanied by proof of service of a copy of the answer on the petitioner or the petitioner's representative of record, if any.

31.2. *Content of answer.* – The answer shall be drawn so that it will advise the petitioner and the office of tax appeals fully of the nature of the defense.

31.2.1. It shall contain a specific admission or denial of each material allegation in the petition; however, if the tax commissioner is without knowledge or information sufficient to form a belief as to the truth of an allegation, then the commissioner shall so state, and such statement shall have the effect of a denial.

31.2.2. If the tax commissioner intends to qualify or to deny only a part of an allegation, then the commissioner shall specify so much of it as is true and shall qualify or deny only the remainder. In addition, the answer shall contain a clear and concise statement of every

ground, together with the facts in support thereof on which the commissioner relies and has the burden of proof.

31.2.3. It shall fully advise the petitioner of any affirmative relief sought for the first time by the tax commissioner in his or her answer.

31.2.4. Paragraphs of the answer shall be designated to correspond to those of the petition to which they relate and the answer shall clearly and concisely state:

a. The nature of the case;

b. The facts relied upon by the tax commissioner;

c. A specific admission or denial of each statement of alleged material fact contained in the petition; however, if the tax commissioner is without knowledge or information sufficient to form a belief as to the truth of a statement, then the answer shall so state, and such statements shall have the effect of a denial; otherwise, any material allegations of fact contained in the petition that are not specifically admitted or denied in the answer shall be deemed to be admitted.;

d. A specific answer to each question, whether of law, accounting, or otherwise, raised in the petition;

e. A statement of any additional material facts concerning (1) any specific affirmative relief not previously requested by the tax commissioner or (2) any issue for which the tax commissioner has the burden of proof under law; and

f. The specific relief that the tax commissioner now seeks, including any specific affirmative relief sought for the first time in the answer.

31.2.5. It is not necessary for the answer to be notarized.

31.3. *No extension of time to file.* – The forty (40)-day period of time for filing an answer is statutory and the office of tax appeals does not have the authority to suspend or extend this period for any reason.

31.4. *Effect of answer.* – Every material allegation set out in the petition and not expressly admitted or denied in the answer shall be deemed to be admitted.

§ 121-1-32. Reply.

32.1. *When required.* – If the tax commissioner in his or her answer seeks affirmative relief not previously requested, the petitioner shall serve a reply on the tax commissioner's legal representative within ten (10) days after service of the answer. Within that same ten (10)-day period, the petitioner shall file with the executive director of the office of tax appeals a copy of the reply with proof of the required service on the tax commissioner's legal representative.

32.2. *When optional.* – In any other matter, the petitioner may choose to serve on legal counsel for the tax commissioner and file with the office of tax appeals a reply within the ten (10)-day time period and in the manner stated in subsection 32.3 of this section.

32.3. *Form and content of reply.*

32.3.1. In response to each material allegation in the answer and the facts in support thereof on which the tax commissioner has the burden of proof, the reply shall contain a specific admission or denial; however, if the petitioner is without knowledge or information sufficient to form a belief as to the truth of an allegation, then the petitioner shall so state, and such statement shall have the effect of a denial.

32.3.2. In addition, the reply shall contain a clear and concise statement of every ground, together with the facts in support thereof, on which the petitioner relies affirmatively or in avoidance of any matter in the answer on which the tax commissioner has the burden of proof.

32.3.3. In other respects, the requirements of pleading applicable to the answer provided in subsection 31.2 of this rule shall apply to the reply.

32.3.4. The paragraphs of the reply shall be designated to correspond to those of the answer to which they relate.

32.4. *Effect of reply or failure to reply.*

32.4.1. When a required or optional reply is filed, every affirmative allegation set out in the answer and not expressly admitted or denied in the reply shall be deemed to be admitted.

32.4.2. When a reply is not required to be filed, and an optional reply is not filed, the affirmative allegations in the answer will be deemed denied.

32.5. *New material.* – Any new material contained in the reply shall be deemed to be denied.

§ 121-1-33. Pleading special matters.

33.1. A party shall set forth in the party's pleading any matter constituting an avoidance or affirmative defense, including res judicata, collateral estoppel, estoppel, waiver, duress, fraud, and the statute of limitations.

33.2. A mere denial in a responsive pleading will not be sufficient to raise an avoidance or affirmative defense.

§ 121-1-34. Defenses and objections made by pleading or motion.

34.1. Every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion:

34.1.1. Lack of jurisdiction, and

34.1.2. Failure to state a claim upon which relief can be granted.

34.2. If a pleading sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, then such party may assert at the hearing any defense in law or fact to that claim for relief.

34.3. If, on a motion asserting failure to state a claim on which relief can be granted, matters outside the pleading are to be presented, then the motion shall be treated as one for summary determination and disposed of as provided in section 124 of this rule, and the parties shall be given an opportunity to present all material made pertinent to a motion under section 124 of this rule.

§ 121-1-35. Amended and supplemental pleadings.

35.1. *Amendments.*

35.1.1. A party may amend a pleading once, as a matter of course, at any time before a responsive pleading is served.

35.1.2. If the pleading is one to which no responsive pleading is permitted, a party may so amend it at any time within 30 days after it is served.

35.1.3. Otherwise, a party may amend a pleading only by leave of the presiding administrative law judge or by written consent of the adverse party, and leave shall be given freely when justice so requires. No amendment shall be allowed after expiration of the time for filing the petition, however, which would involve conferring jurisdiction on the office over a matter which otherwise would not come within its jurisdiction under the petition as then on file. A motion for leave to amend a pleading shall state the reasons for the amendment and shall be accompanied by the proposed amendment. The amendment to the pleading shall not be incorporated into the motion,

but rather shall be separately set forth and consistent with the requirements of section 15 of this rule regarding form and style of papers filed with the office. *See* sections 31 and 32 of this rule for time for responding to amended pleadings.

35.2. *Amendments to conform to the evidence.*

35.2.1. *Issues tried by consent.* – When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. The presiding administrative law judge, upon motion of any party at any time, may allow such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues, but failure to amend does not affect the result of the evidentiary hearing of these issues.

35.2.2. *Other evidence.* – If evidence is objected to at the evidentiary hearing on the ground that it is not within the issues raised by pleadings, then the presiding administrative law judge may receive the evidence and at any time allow the pleadings to be amended to conform to the proof, and shall do so freely when justice so requires and the objecting party fails to satisfy the administrative law judge that the admission of the evidence would prejudice the party in maintaining the party's position on the merits.

35.3. *Filing.* – The amendment or amended pleadings permitted under subsection 35.2 of this section shall be filed with the office of tax appeals at the evidentiary hearing or shall be filed with the executive director at Charleston, West Virginia, within such time as the administrative law judge may fix.

35.4. *Supplemental pleadings.* – Upon motion of a party, the presiding administrative law judge may, upon such terms as are just, permit a party to file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If the presiding administrative law judge deems it advisable that the adverse party plead to the supplemental pleading, then it shall so direct, specifying the time within which the supplemental pleading shall be file.

35.5. *Relation back of amendments.* – When an amendment of a pleading is permitted, it shall relate back to the time of filing of that pleading, unless the presiding administrative law judge shall order otherwise either on motion of a party or on its own initiative.

§ 121-1-36. Motions.

36.1. *General.* – All requests to the office of tax appeals shall be made by written motion filed with the executive director and accompanied by the appropriate fee, if any. Motions shall be served concurrently by the moving party on all other parties of record and proof of service shall be filed with the executive director. Written opposition, if any, to motions shall be filed within seven (7) days after service. For purposes of this section 36, a stipulation requiring action by the office of tax appeals is treated as a motion.

36.2. *Pleadings on motions.* – Pleading on motions shall be limited to the motion and a brief in support of the motion and a single response to the motion and a supporting brief.

36.3. *Oral argument.* – Oral argument is not allowed on motions, except by order of the presiding administrative law judge.

§ 121-1-37. Motion for more definite statement.

37.1. *General.* – If a pleading to which a responsive pleading is permitted or required is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, then the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. See sections 50 and 67 of this rule for procedures available to narrow the issues or to elicit further information as to the facts involved or the positions of the parties.

37.2. *Penalty for failure of response.* – The presiding administrative law judge may strike the pleading to which the motion is directed or may make such other order as he or she deems just, if the required response is not made within such time period as the administrative law judge may direct.

§ 121-1-38. Motion to strike.

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within ten (10) days after the service of the pleading, or upon the presiding administrative law judge's own initiative at any time, the presiding administrative law judge may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, frivolous, or scandalous matter. In like manner and procedure, the presiding administrative law judge may order stricken any such objectionable matter from briefs, documents, or any other papers or responses filed with the office of tax appeals.

§ 121-1-39. Motion to dismiss.

A petition or proceeding may be dismissed for cause upon motion of a party or upon the presiding administrative law judge's initiative.

§ 121-1-40. Motions – timely filing and joinder of motions.

40.1. Motions must be made timely, unless the office of tax appeals shall permit otherwise.

40.2. Motions shall be separately stated and not joined together, except that a motion for a more definite statement (section 37) and a motion to strike (section 38) may be joined.

§ 121-1-41. Parties.

41.1. *General.* – The party who commences a proceeding shall be designated as petitioner and the adverse party as the respondent.

41.2. *Change or transfer of interest.* – Upon a change or transfer of interest, the proceeding may be continued by or against the original party in its original capacity, unless the presiding administrative law judge directs the person to whom the interest is transferred to be substituted in the proceeding for the original party, joined with the original party, or made a party in another capacity.

41.3. *Joinder or consolidation.* – If proceedings involving a substantial and controlling common question of law or fact are pending before the office of tax appeals, then the presiding administrative law judge may, with the consent of the petitioners, do any or all of the following:

41.3.1. Order a joint hearing on any or all matters in issue;

41.3.2. Order a joinder of all parties in accordance with their interests;

41.3.3. Order the proceedings consolidated; or

41.3.4. Make other orders concerning the proceedings as may tend to avoid unnecessary costs or delay.

41.4. Parties may be added or dropped by order of the presiding administrative law judge on the motion of any interested person at any stage of the proceedings and according to terms that are just.

§ 121-1-42. Permissive joinder of parties.

42.1. *Permissive joinder.* – No person to whom a notice of assessment has been issued may join with any other person against whom a notice of assessment has been issued in filing a petition in the office of tax appeals, except as may be permitted by subdivision 96.2.1 of this rule.

42.2. *Severance or other orders.* – The office of tax appeals may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party, or may order separate evidentiary hearings or make other orders to prevent delay or prejudice; or may limit the evidentiary hearing to the claims of one or more parties, either dropping other parties from the proceeding on such terms as are just or holding in abeyance the proceedings with respect to them. Any claim by or against a party may be severed and proceeded with separately. (See also subdivision 60.1.1 of this rule regarding consolidation.)

§ 121-1-43. Misjoinder of parties.

Misjoinder of parties is not grounds for dismissal of a case. The office of tax appeals may order a severance on such terms as are just. *See* subsection 42.2 of this rule.

§ 121-1-44. Intervention.

44.1. *No intervention of right.* – Because of the confidentiality rules in W. Va. Code §11-10-5d and W. Va. Code §11-10A-10(g), no person has a right to intervene in a proceeding before the office of tax appeals.

44.2. *Permissive intervention.* – Upon timely application, anyone may be permitted to intervene in a proceeding before the office of tax appeals: (1) when a statute of this state confers a right to intervene, or (2) when the applicant's claim or defense and the main proceeding have a question of law or fact in common. In exercising its discretion, the office of tax appeals shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties and the petitioner's statutory right to confidentiality.

44.3. *Procedure.* – A person desiring to intervene shall serve a motion to intervene upon the parties as provided in section 24 of this rule. The motion shall state the grounds for the motion and be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

§ 121-1-45. Substitution of parties; change or correction in name.

45.1. *Death.* – If a petitioner dies, the presiding administrative law judge, on motion of a party or the decedent's successor or representative or on its own initiative, may order substitution of the proper parties.

45.2. *Incompetency.* – If a party becomes incompetent, the presiding administrative law judge on motion of a party or the incompetent's representative or on its own initiative, may order the representative to proceed with the case.

45.3. *Successor fiduciaries or representatives.* – On motion made where a fiduciary or representative is changed, the presiding administrative law judge may order substitution of the proper successors.

45.4. *Other cause.* – The presiding administrative law judge, on motion of a party or on its own initiative, may order the substitution of proper parties for other cause.

45.5. *Change or correction in name.* – On motion of a party or on its own initiative, the presiding administrative law judge may order a change of or correction in the name or title of a party.

§ 121-1-46. Depositions and discovery.

A party may obtain depositions and discovery for purposes of evidentiary hearings before the office of tax appeals by following the rules of civil procedure for those purposes adopted by the West Virginia supreme court of appeals, W.Va.R.C.P. rules 26 through 37, except rule 35, which are reproduced in Appendix III to this rule. For these purposes, whenever the words "trial" or "court" are used in rules 26 through 34 and rules 36 and 37, they shall, for purposes of section 121-1-100, mean, respectively "evidentiary hearing" and "office of tax appeals."

§ 121-1-47. Stipulations for evidentiary hearing.

47.1. **Stipulations Required.**

47.1.1. *General.* --The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute. Where the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this section without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

47.1.2. *Stipulations to be comprehensive.* – The fact that any matter may have been obtained through discovery or requests for admission or through any other authorized procedure is not grounds for omitting such matter from the stipulation. Such other procedures should be regarded as aids to stipulation, and matter obtained through them, which is within the scope of subdivision 114.1.1, must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation.

47.2. *Form.* – Stipulations required under this section shall be in writing, signed by the parties thereto or by their counsel, and shall observe the requirements of section 15 of this rule as to form and style of papers, except that the stipulation shall be filed with the office of tax appeals in duplicate and only one set of exhibits shall be required. Documents or other papers, which are the subject of stipulation in any respect and which the parties intend to place before the office of tax appeals, shall be annexed to or filed with the stipulation. The stipulation shall be clear and concise. Separate items shall be stated in separate paragraphs, and shall be appropriately lettered or numbered. Exhibits attached to a stipulation shall be numbered serially, i. e., 1, 2, 3, etc. The exhibit number shall be followed by "P" if offered by the petitioner, e. g., 1-P; "R" if offered by the respondent, e. g., 2-R; or "J" if joint, e. g., 3-J.

47.3. *Filing.* – Executed stipulations prepared pursuant to this section, and related exhibits, shall be filed by the parties at or before commencement of the evidential hearing in the case, unless

the presiding administrative law judge in the particular case shall otherwise specify. A stipulation when filed need not be offered formally to be considered in evidence.

47.4. *Objections.* – Any objection to all or any part of a stipulation should be noted in the stipulation, but the presiding administrative law judge will consider any objection to a stipulated matter made at the commencement of the trial or for good cause shown made during the evidentiary hearing.

47.5. *Binding effect.* – A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the presiding administrative law judge or agreed upon by those parties. The presiding administrative law judge will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending case and not for any other purpose, and may not be used against any of the parties thereto in any other case or proceeding.

§ 121-1-48. Cases consolidated for hearing.

With respect to a common matter in cases consolidated for trial, the reference to a "party" shall mean any party to any of the consolidated cases involving such common matter.

§ 121-1-49. Prehearing conference.

49.1. *Required.* – Except in small claim cases and except as otherwise ordered by the presiding administrative law judge, a prehearing conference shall be held in all proceedings before the office of tax appeals.

49.2. *Filing of prehearing statement.* – Not less than five (5) days before the prehearing conference, each party shall exchange and file with the executive director a prehearing statement in a form determined by the office of tax appeals.

49.3. *Purpose of prehearing.* – The purposes of the prehearing conference are as follows:

49.3.1.To specify all sums in controversy and the particular issues to which they relate.

49.3.2. To specify the factual and legal issues to be litigated.

49.3.3. To consider the formal amendment of all petitions and answers or their amendment by prehearing order, and, if desirable or necessary, to order that the amendments be made.

49.3.4. To consider the consolidation of petitions for hearing, the separation of issues, and the order in which issues are to be heard.

49.3.5. To consider admissions of fact to avoid unnecessary proofs, including the level of assessment and authenticity of documents, such as statutes, ordinances, charters, and regulations.

49.3.6. To identify all witnesses.

49.3.7. To identify all exhibits in support of the main case or defense and admit the authenticity of exhibits if possible.

49.3.8. To estimate the time required for hearing.

49.3.9. To discuss the possibility of settlement, including settlement efforts to date.

49.3.10. To consider all other matters that may aid in the disposition of the proceeding.

49.4. *Scheduling of prehearing conference.* – When a case is ready for prehearing conference, as determined by the presiding administrative law judge, the executive director shall schedule the matter for a prehearing conference at a time and place to be designated by the presiding administrative law judge.

49.5. *Notice of prehearing conference.* – Not less than fourteen (14) days before a prehearing conference, unless otherwise ordered by the presiding administrative law judge, the executive director shall send notice of the time, date, and place of the prehearing conference to all parties.

49.6. The presiding administrative law judge who conducts the prehearing conference shall inquire of the parties as to whether or not all claims arising out of the appealed finding, ruling, determination, decision, or order have been joined. The answers to the inquiry and each finding, ruling, determination, decision, or order pertaining to the claims shall be included in the summary of the results of the conference.

49.7. *Order summarizing results.* – The presiding administrative law judge who conducts the prehearing conference shall prepare, and cause to be served upon the parties or their representatives, not less than seven (7) days in advance of the hearing, an order summarizing the results of the conference, specifically covering each of the items stated in this section. The summary of results controls the subsequent course of the proceeding unless modified at or before the hearing by the presiding administrative law judge to prevent manifest injustice.

49.8. *Limitation on discovery after prehearing conference.* – Discovery shall not be conducted after completion of the prehearing conference, unless otherwise ordered by the presiding administrative law judge.

49.9. *Failure to appear.* – Failure to appear at a duly scheduled prehearing conference may result in the dismissal of the appeal or the scheduling of a default hearing as provided in section 54 of this rule.

§ 121-1-50. Motion to dismiss.

50.1. *Motion.* – The following defenses to a claim for relief set forth in a pleading, at the option of the pleader, may be made in a motion to dismiss rather than in a responsive pleading:

50.1.1. The office of tax appeals lacks jurisdiction of the subject matter of the petition;

50.1.2. The office of tax appeals lacks jurisdiction over the petitioner;

50.1.3. The petitioner lacks legal capacity to petition;

50.1.4. There is an action pending between the same parties on the same controversy in a court of any state or the United States; the administrative law judge need not dismiss on this ground, but may make such order as justice requires;

50.1.5. The petition may not be maintained because of the expiration of an applicable statute of limitation;

50.1.6. The petition may not be maintained because of release, payment, discharge in bankruptcy, or the like;

50.1.7. The petition fails to state a cause or claim upon which relief may be granted; or

50.1.8. The office of tax appeals should not proceed in the absence of a joinder of a person who should be a party.

50.2. *Service and filing.* – A motion to dismiss shall be served on the other party or parties and filed with the executive director of the office of tax appeals along with a certificate of service or other proof of service.

50.3. *Initiation by chief administrative law judge.* – The chief administrative law judge on his or her own motion may, upon notice to the parties, issue an order dismissing the petition on the ground that:

50.3.1. The office of tax appeals lacks jurisdiction of the subject matter of the petition; or

50.3.2. The office of tax appeals lacks jurisdiction over the petitioner.

50.3.3. The petitioner has failed to prosecute the petition.

The notice of intent to dismiss shall inform the parties of the facts and the reasons providing the basis for the intended dismissal. The notice of intent to dismiss shall also provide the parties with twenty (20) days in which to file written comments opposing the proposed dismissal. The opposing party shall serve a copy of the written comments on the other party or parties in the proceeding and a certificate of service shall be attached to the written comments filed with the office of tax appeals.

§ 121-1-51. Disposition on the pleadings.

51.1. *General.* – After the pleadings are closed, but within such time as not to delay the evidentiary hearing, any party may move for disposition on the pleadings. The motion shall be filed and served in accordance with the requirements otherwise applicable. See sections 36 and 40 of this rule. The motion shall be disposed of before the evidentiary hearing unless the office of tax appeals determines otherwise.

51.2. *Matters outside pleadings.* – If, on a motion for disposition on the pleadings, matters outside the pleadings are presented to and not excluded by the office of tax appeals, the motion shall be treated as one for summary disposition and shall be disposed of as provided in section 52 of this rule, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by section 52.

§ 121-1-52. Summary judgment.

52.1. *General.* – Either party may move, with supporting materials outside the pleadings, for a summary disposition in the moving party's favor upon all or any part of the legal issues in controversy. Such motion may be made at any time commencing twenty (20) days after the pleadings are closed, but within such time as not to delay the evidentiary hearing.

52.2. *Motion and proceedings thereon.* The motion shall be filed and served in accordance with the requirements otherwise applicable. An opposing written response, with supporting materials outside the pleadings, shall be filed within such period as the presiding administrative law judge may direct. A decision shall thereafter be rendered if the pleadings and answers to interrogatories, depositions, admissions, or any other acceptable materials, such as affidavits, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. A partial summary judgment may be made which does not dispose of all the issues in the case.

52.3. *Case not fully adjudicated on motion.* – If, on motion under this section, a decision is not rendered upon the whole case or for all the relief asked and an evidentiary hearing is necessary, the presiding administrative law judge may ascertain, by examining the pleadings and the materials supporting the motion and by interrogating the parties or their representatives, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The presiding administrative law judge may thereupon make an order specifying the

facts that appear to be without substantial controversy, including the extent to which the relief sought is not in controversy, and directing such further proceedings in the case as are just. At the evidentiary hearing of the case, the facts so specified shall be deemed established, and the hearing shall be conducted accordingly.

52.4. *Form of affidavits; further testimony; defense required.* – Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or filed therewith. The presiding administrative law judge may permit affidavits to be supplemented or opposed by answers to interrogatories, depositions, further affidavits, or other acceptable materials, to the extent that other applicable conditions in this rule are satisfied for utilizing such procedures. When a motion for summary disposition is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of such party's pleading, but such party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for the evidentiary hearing. If the adverse party does not so respond, then a decision, if appropriate, may be entered against such party.

52.5. *When affidavits are unavailable.* – If it appears from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify such party's opposition, then the presiding administrative law judge may deny the motion or may order a continuance to permit affidavits to be obtained or other steps to be taken or may make such other order as is just. If it appears from the affidavits of a party opposing the motion that such party's only legally available method of contravening the facts set forth in the supporting affidavits of the moving party is through cross-examination of such affiants or the testimony of third parties from whom affidavits cannot be secured, then such a showing may be deemed sufficient to establish that the facts set forth in such supporting affidavits are genuinely disputed.

52.6. *Affidavits made in bad faith.* – If it appears to the satisfaction of the presiding administrative law judge at any time that any of the affidavits presented pursuant to this section are presented in bad faith or for the purpose of delay, then the presiding administrative law judge may order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable counsel's fees, and any offending party or counsel may be adjudged guilty of contempt or otherwise disciplined by a circuit court in an appropriate proceeding brought for that purpose.

§ 121-1-53. Submission without evidentiary hearing.

53.1. *General.* – Any case not requiring an evidentiary hearing for the submission of evidence (as, for example, where sufficient facts have been admitted, stipulated, established by deposition, or included in the record in some other way) may be submitted at any time by motion of the parties filed with the office of tax appeals. The parties need not appear before an administrative law judge, when the case is submitted in this manner.

53.2. *Burden of proof.* – The fact of submission of a case, under subsection 53.1 of this rule, does not alter the burden of proof, or the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof.

§ 121-1-54. Default and dismissal.

54.1. *Default.* – If any party has failed to plead or otherwise proceed as provided by this rule or as required by the presiding administrative law judge, then such party may be held in default by the presiding administrative law judge either on motion of another party or on the initiative of the presiding administrative law judge. Thereafter, the presiding administrative law judge may enter a decision against the defaulting party, upon such terms and conditions as the presiding administrative law judge may deem proper, or may impose such sanctions (*see*, e. g., section 198 of this rule) as the presiding administrative law judge may deem appropriate. The presiding administrative law judge may, in his or her discretion, conduct a hearing to ascertain whether a default has been committed, to determine the decision to be entered or the sanctions to be imposed, or to ascertain the truth of any matter.

54.2. *Dismissal.* – For failure of a petitioner properly to prosecute or to comply with this rule or any order of the office of tax appeals or for other cause which the presiding administrative law judge deems sufficient, the presiding administrative law judge may dismiss a case at any time and enter a decision against the petitioner. The presiding administrative law judge may, for similar reasons, decide against any party any issue as to which such party has the burden of proof, and such decision shall be treated as a dismissal for purposes of subsections 54.3 and 54.4 of this rule.

54.3. *Setting aside default or dismissal.* – For reasons deemed sufficient by the presiding administrative law judge and upon motion expeditiously made, the presiding administrative law judge may set aside a default or dismissal or the decision rendered thereon.

54.4. *Effect of decision on default or dismissal.* – A decision rendered upon a default or in consequence of a dismissal, other than a dismissal for lack of jurisdiction, shall operate as an adjudication on the merits.

§ 121-1-55. Motions and other matters.

55.1. *Hearing on motion.* – If a hearing is to be held on a motion or other matter, apart from an evidentiary hearing on the merits, then such hearing ordinarily will be held at Charleston, West Virginia, unless the presiding administrative law judge, on his or her own motion or on the motion of a party, shall direct otherwise. As to hearings at other places, *see* subdivision 62.3.2 of this rule. The parties will be given notice of the place and time of hearing.

55.2. In the discretion of the presiding administrative law judge, the hearing on a motion may be held by telephone or by use of videoconferencing equipment, with one or all of the parties.

55.3. *Failure to attend.* – The office of tax appeals may hear a matter ex parte where a party fails to appear at such a hearing or fails to participate by telephone or videoconferencing equipment when such is permitted. With respect to attendance at such hearings, *see* section 59 of this rule.

§ 121-1-56. Notice of hearing.

56.1 *General.* – After a petition is docketed by the executive director of the office of tax appeals, the parties shall receive written notice of the date, place, and time of the evidentiary hearing.

56.2. *Standing prehearing order.* – In order to facilitate the orderly and efficient disposition of all cases, at the direction of the chief administrative law judge, the executive director shall include with the notice of hearing a standing prehearing conference order or other instructions for hearing preparation. Unexcused failure to comply with any such order may subject a party or a party's counsel to sanctions. *See, e. g.*, section 130 of this rule.

56.3. *Calendar call.* – Each case set for evidentiary hearing will be called at the time and place scheduled. When more than one case is scheduled for hearing at the same time, counsel or the parties shall indicate their estimate of the time required for evidentiary hearing. The cases for evidentiary hearing will thereupon be heard in due course, but not necessarily in the order listed.

§ 121-1-57. Continuances.

57.1. *General.* – The hearing of a case or matter scheduled for hearing on a calendar may be continued by an administrative law judge with the office of tax appeals upon motion or on his or her own initiative.

57.2. *Motion for continuance.* – A motion for continuance shall be in writing and inform the office of tax appeals of the position of the other parties with respect thereto, either by endorsement thereon by the other parties or by a representation of the moving party. A motion for continuance based upon the pendency in the office of tax appeals or a court of a related case or cases shall include the name and docket number of any such related case, the names of counsel for the parties in such case, and the status of such case, and shall identify all issues common to any such related case.

57.3. *Continuances disfavored.* – The office of tax appeals looks generally with disfavor upon a request (motion) for a continuance (postponement) of a scheduled hearing. Especially disturbing is a request for a continuance that is made on short notice or that is made repeatedly in the same matter. To prevent these and other abuses, the policy of the office of tax appeals on continuance of hearings is as follows.

57.3.1. *General.* – Except for continuances required due to acts of God, serious illness of counsel, or other significant, unforeseen circumstances, a continuance will not be granted unless a request (motion) by any party, including the tax commissioner, is made: (1) both in writing and by telephone call to an administrative law judge; (2) for good cause; and (3) timely, that is, not

less than seven (7) calendar days prior to the scheduled hearing date; and (4) with the already-obtained written agreement of the person representing the adverse party.

57.3.2. *Good cause* for granting an otherwise proper and timely request for a continuance of a hearing does not include a scheduling conflict, including one involving a conflict with a proceeding in another matter in court, unless the request for the continuance is made immediately upon learning of the conflict.

57.3.3. *Court reporter fee.* – Should a party, less than twenty-four hours before a scheduled hearing, file a motion requesting a continuance and it is granted for very exceptional circumstances, the office of tax appeals may condition the continuance upon the party's written agreement that the party will pay the fee that the court reporter charges for cancellation of the hearing with less than twenty-four (24) hours' notice.

57.3.4. *New hearing date.* – When a motion for a continuance of a hearing is granted, the office of tax appeals ordinarily will thereafter contact the representatives of the parties to attempt to arrive at a mutually agreeable date and time for resetting the hearing during the normal business hours of the office of tax appeals.

57.3.5. *Length of continuance.* – A continuance of a hearing that is granted will be for a period of time no longer than ninety (90) days. A general, or open-ended, continuance of a hearing, for any reason, will almost never be granted.

57.3.6. *Limit on number of continuances.* – No more than one continuance will be granted to a party in any matter.

57.3.7. *Continuance pending resolution.* – Any attempt at resolution of the matter without a hearing and decision by the office of tax appeals, while highly encouraged, should be commenced immediately upon filing of the petition, and should not be initiated shortly before the hearing. If a proper and timely request for a continuance of the hearing is made and granted to allow the parties to finalize the attempted resolution, the parties must completely finalize the resolution before the re-set hearing date. In addition, prior to the re-set hearing date, the parties must also file a written motion, executed by the both parties or their representatives, to remove the matter from the hearing docket. Otherwise, the re-set hearing will be held.

57.3.8. The office of tax appeals reserves the authority to make any adjustment to a provision of this hearing continuance policy that is necessary for very exceptional circumstances, such as an act of God, serious illness of a representative, party or witness, or other significant, unforeseen circumstances.

§ 121-1-58. Place of evidentiary hearing.

58.1. *Designation of place of evidentiary hearing.* – The evidentiary hearing shall be held at Charleston, West Virginia, unless the petitioner, at the time of filing the petition, shall file a designation of place of evidentiary hearing showing the place at which the petitioner would prefer

the evidentiary hearing to be held. If the petitioner has not filed such designation, the tax commissioner, at the time the answer is filed, may file a designation showing the place of evidentiary hearing preferred by the tax commissioner. The parties shall be notified of the place at which the evidentiary hearing will be held. For a list of places at which the office of tax appeals holds evidentiary hearings, *see* subsection 62.3.2.

58.2. *Accessibility.* – The hearing shall be conducted in a location that is accessible to mobility-impaired individuals. Accessible parking shall also be available.

58.3. *Special needs.* – A person who has a disability and who needs to be accommodated for effective participation in a hearing shall contact the executive director of the office of tax appeals in writing or telephonically not less than 7 days before the scheduled hearing date.

58.4. *Motion to change place of evidentiary hearing.* – If a party desires a change in the designation of the place of trial, then the party shall file a motion to that effect, stating fully the reasons therefor. A motion made after the notice of hearing has been issued, but less than twenty days before the hearing, will ordinarily be deemed dilatory and will be denied unless the grounds for a change in the designation arose during that period or there was good reason for not making the motion sooner.

§ 121-1-59. Proceedings conducted by videoconferencing.

59.1. *General.* – At the discretion of the chief administrative law judge and with the consent of the parties, the office of tax appeals may utilize videoconferencing to conduct any evidentiary or non-evidentiary hearing, prehearing conference or other proceeding before the office of tax appeals, and may permit any witness to testify or be deposed by videoconferencing.

59.2. *Documents.* – Any document filed in a proceeding conducted by videoconferencing may be transmitted by electronic facsimile; signatures on a document transmitted by electronic facsimile shall have the same force and effect as original signatures.

59.3. *Conduct of proceeding.* – Proceedings conducted by videoconferencing shall be conducted in the same manner as if the parties had appeared in person, and the presiding administrative law judge may exercise all powers consistent with the proceeding. The presiding administrative law judge shall begin all proceedings conducted by videoconferencing by stating on the record identities of all counsel, parties, and witnesses present in the hearing room and at the remote site.

59.4. *Videoconferencing system requirements.* – Any system used for conducting proceedings by videoconferencing shall meet the following standards:

59.4.1. The persons communicating must be able to simultaneously see and speak to one another;

59.4.2. The signal transmission must be live;

59.4.3. The signal transmission must be secure from unauthorized acquisition;

59.4.4. Any other standards established by the West Virginia supreme court of appeals for videoconferencing systems used in judicial proceedings in this state.

§ 121-1-60. Consolidation; separate evidentiary hearings.

60.1. *Consolidation.*

60.1.1. *Common facts or law.* – When cases involving a common question of law or fact are pending before the office of tax appeals, the presiding administrative law judge may, with the consent of the petitioners, order a joint hearing of any or all the matters in issue, or order all the cases consolidated, and he or she may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay or duplication.

60.1.2. *Absence of common issue or facts.* – Similar action may be taken where cases involve different tax liabilities of the same parties, notwithstanding the absence of a common issue.

60.2. *Motion to consolidate.* – Unless otherwise permitted by the office of tax appeals for good cause shown, a motion to consolidate cases may be filed only after all the tax commissioner's answers have been filed. The caption of a motion to consolidate shall include all of the names and docket numbers of the cases sought to be consolidated arranged in chronological order (*i.e.*, the oldest case first). Unless otherwise ordered, the caption of all documents subsequently filed in consolidated cases shall include all of the docket numbers arranged in chronological order, but may include only the name of the oldest case with an appropriate indication of other parties.

60.3. *Separate hearings.* – The office of tax appeals, in furtherance of convenience or to avoid prejudice, or when separate hearings will be conducive to expedition or economy, may order a separate hearing of any one or more claims or defenses or issues, or of the tax liability of any party or parties. The office of tax appeals may enter appropriate orders or decisions with respect to any such claims, defenses, issues, or parties that are tried separately. As to severance of parties or claims, see subsection 42.2 of this rule.

§ 121-1-61. Evidentiary hearings in cases, other than small claim cases.

61.1. In all cases, except small claim cases to which the provisions of section 110 of this rule apply, the chief administrative law judge shall schedule a hearing for a date that is within forty-five (45) days after the due date of the tax commissioner's answer to the petition, unless both of the parties, under section 128 of this rule, have already elected to submit the case on documents only and without a hearing in person or by a representative.

61.2. The chief administrative law judge, by a written order promptly entered, may, however, determine that, for good cause stated in that order, the matter should be set for a date that

is later than this normal forty-five (45) day period. The office of tax appeals may not delay the scheduling of such a hearing on the ground that a reply to the answer will or may be filed.

61.3. The chief administrative law judge shall notify the parties of the date, time, and place of the hearing by a written notice served at least twenty (20) days in advance of the hearing.

61.3.1. Notice of the hearing shall be served by personal or substituted service or by certified mail.

61.3.2. Service of notice of the hearing by personal or substituted service is valid if made by any method authorized by the West Virginia rules of civil procedure for trial courts of record.

61.3.3. Service of notice of the hearing by certified mail is valid if accepted by the party, or if addressed to and mailed to the party's usual place of business or usual place of abode or last known address and accepted by any person. If service of notice of the hearing by certified mail, as set forth in the immediately preceding sentence, is returned as "refused," "unclaimed," or "not deliverable," for whatever reason not involving error on the part of the office of tax appeals, the office of tax appeals shall then serve notice of the hearing by first-class mail, postage prepaid, to the same address, and the date of the United States postmark for this first-class mailing is the date of service of notice of the hearing.

§ 121-1-62. Conduct of hearing.

62.1. The hearing shall be conducted by an administrative law judge employed by the office of tax appeals.

62.2. The administrative law judge is authorized to:

62.2.1. Administer oaths and affirmations;

62.2.2. Sign and issue subpoenas and subpoenas duces tecum prepared by a party;

62.2.3. Rule upon various prehearing motions relating to discovery and the like;

62.2.4. Regulate the course of the hearings, set the date, time, and place for continued hearings, and fix the time for filing of legal briefs and other documents;

62.2.5. Rule upon questions of evidence at the hearing;

62.2.6. Issue decisions and other appropriate orders after hearings; and

62.2.7. Otherwise preside generally over the prehearing, hearing, and posthearing processes.

62.3. *Location of hearing.*

62.3.1. The office of tax appeals normally conducts hearings at its principal office in Charleston, West Virginia. The notice of the hearing will give the exact address for this office.

62.3.2. The office of tax appeals may hold hearings from time to time at other locations in the State of West Virginia, based primarily upon the number of pending cases from a given geographic region of the State. For example, the office of tax appeals may, at its discretion, but with the convenience of taxpayers or other petitioners primarily in mind, hold hearings in Bluefield, Bridgeport, Martinsburg, or Wheeling, or in other towns selected by the office of tax appeals. These "mobile docket" hearings usually are held in rooms in public facilities provided by the respective county commissions for temporary use by the office of tax appeals.

62.3.3. The office of tax appeals may also hold hearings from time to time using videoconferencing equipment.

62.4. *Recording of evidence at hearing.*

62.4.1. The evidence at a hearing, except a small claim hearings to which the provisions of section 110 of this rule apply, will be recorded by an audio recording device suitable for use in court proceedings in this state or will be stenographically reported and transcribed by a qualified court reporter selected by the office of tax appeals.

62.4.2. To assist in preparing proposed findings of fact or complete legal briefs, a party may purchase a copy of the evidentiary hearing transcript by paying the reasonable cost of transcription.

62.4.3. Due primarily to physical space limitations, but also in the interest of preventing distractions at the hearing, the office of tax appeals ordinarily will not permit the parties to videotape the evidentiary hearing. Any request for such permission must be by a detailed written motion addressed to the chief administrative law judge and must be received by him or her no later than seven (7) days prior to the scheduled hearing. The chief administrative law judge shall rule promptly on this motion, either orally or in writing or both.

62.5. *De novo hearing.* – The evidentiary hearing before the office of tax appeals is de novo, that is, it is not actually an appeal from an existing record, but an original proceeding at which the evidentiary record is made. Under statutory and case law all evidence must be introduced at this hearing, and any subsequent appeal by a party to a circuit court will be exclusively on the record made before the office of tax appeals.

62.6. *Hearing procedures.* – Hearings before the office of tax appeals are conducted, generally, following the contested case procedures set forth in W. Va. Code § 29A-5-1 *et seq.*, to the extent those procedures are not inconsistent with the provisions of article 10A of chapter 11 of the West Virginia Code, the article creating the office of tax appeals.

62.7. *Hearings not open to public.* – Hearings before the office of tax appeals are not open to the public and are not subject to the open governmental proceedings act, W. Va. Code § 6-9A-1 *et seq.*, unless a statute explicitly states to the contrary.

62.8. *Petitioner goes first.* – At the hearing the burden of proof is on the taxpayer or other petitioner, unless an applicable statute provides otherwise. Accordingly, the taxpayer or other petitioner usually will present evidence first.

62.9. At the hearing, the parties may:

62.9.1. Call and examine witnesses, who must testify under oath or by affirmation;

62.9.2. Introduce exhibits;

62.9.3. Cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination;

62.9.4. Impeach any witness regardless of which party first called the witness to testify; and

62.9.5. Rebut any evidence against them.

62.10. In presenting its case in response, the tax commissioner's legal representative shall introduce a copy of all relevant documents not previously part of the record or not introduced by the taxpayer or other petitioner, including any audit findings and supporting schedules, and related federal tax documents.

62.11. In the discretion of the administrative law judge, affidavits as to relevant facts may be received, for whatever value they may have, in lieu of the oral testimony of the persons making such affidavits.

62.12. *Objections to evidence.* – Objections to evidentiary offers may be made, and they and the rulings thereon shall be noted in the record.

62.13. *Inquiry by ALJ.* – The administrative law judge may ask questions of the parties or of witnesses for the purpose of clarifying the record.

62.14. *Substitution of copies for originals.* – When books, records, papers, or other documents have been received in evidence, the substitution of a copy thereof may be permitted.

62.15. *Return of original exhibits.* – When original exhibits have been received in evidence, the party who offered such exhibits may be permitted to withdraw them after the determination of the administrative law judge becomes final.

62.16. *Stipulations.*

62.16.1. To expedite the presentation of evidence, a stipulation as to the evidence is strongly encouraged, provided the interests of parties will not be substantially prejudiced thereby. *See*, section 47 of this rule. Although objections to a particular part of a stipulation should be noted therein, the presiding administrative law judge will rule on any objection to irrelevancy of stipulated facts made at the hearing.

62.16.2. The presiding administrative law judge may, in the interest of justice, allow the parties to make posthearing evidentiary submissions within time restrictions fixed by the administrative law judge.

62.17. *Argument.* – After all of the parties have completed the submission of the evidence, they may orally argue the applicability of the law to the facts.

62.18. *Legal briefs.*

62.18.1. The administrative law judge may order the parties to file legal briefs within the time permitted by the administrative law judge.

62.18.2. A party filing a legal brief shall serve a copy of a brief on the other party at the time the brief is submitted to the administrative law judge to and proof of service on the other party shall be attached.

62.19. *Proposed findings of fact and conclusions of law required.*

62.19.1. Unless otherwise directed by the presiding administrative law judge, in every case, whether or not complete legal briefs are submitted, the parties shall submit written proposed findings of fact and conclusions of law within the time restrictions fixed by the administrative law judge.

62.19.2. If legal briefs are submitted, the proposed findings of fact and conclusions of law shall also be set forth in the briefs.

62.19.3. The proposed findings of fact shall refer, whenever possible, to the relevant pages of the transcript of the hearing and exhibits.

62.19.4. A copy of the proposed findings of fact and conclusions of law shall be served on the other party at the time the proposed finding of fact and conclusions of law are filed with the administrative law judge, which shall proof of service shall be attached.

62.20. *Records of OTA are exempt from FOIA.* – Records pertaining to petitions filed with the office of tax appeals are not subject to disclosure under the state freedom of information act, W. Va. Code § 29B-1-1 *et seq.*, as provided in W. Va. Code § 11-10A-10(g).

§ 121-1-63. Burden of proof.

63.1. *General.* - The burden of proof shall be upon the petitioner, except as otherwise provided by statute or legislative rule.

63.2. *Fraud.* - In any case involving the issue of fraud with intent to evade tax, the burden of proof in respect of that issue is on the respondent, and that burden of proof is to be carried by clear and convincing evidence.

63.3. *Transferee liability.* - The burden of proof is on the respondent to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax.

63.4. *Other.* The burden of proof in cases that do not arise under the West Virginia tax procedure and administration act, W. Va. Code § 11-10-1 *et seq.*, is on the person designated in the applicable statute.

§ 121-1-64. Evidence.

64.1. *General.* - Hearings before the office of tax appeals are relatively informal in the sense that the technical rules of evidence applicable to trials in the courts of record are not binding in hearings before the office of tax appeals. For example, the office of tax appeals may admit and give probative effect to evidence of a type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs, subject to relevance and materiality. Irrelevant, immaterial, or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law.

64.1.1. Witnesses in a proceeding shall swear or affirm before the presiding administrative law judge to give full and truthful testimony.

64.1.2. If a witness is not testifying as an expert witness, then his or her testimony in the form of opinions or inferences is limited to opinions or inferences that are rationally based on the perception of the witness and that are helpful to a clear understanding of his or her testimony or the determination of a fact in issue.

64.2. *Ex parte statements.* - Ex parte affidavits, statements in briefs, and unadmitted allegations in pleadings do not constitute evidence. As to allegations in pleadings not denied, see subsections 30.4 and 32.3 and 32.4 of this rule.

64.3. *Depositions.* - Testimony taken by deposition shall not be treated as evidence in a case until offered and received in evidence. Error in the transcript of a deposition may be corrected by agreement of the parties, or by the office of tax appeals on proof it deems satisfactory to show an error exists and the correction to be made.

64.4. *Documentary evidence.*

64.4.1. *Copies.* - A copy is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the copy in lieu of the original. Where the original is admitted in evidence, a clearly legible copy may be substituted later for the original or such part thereof as may be material or relevant, upon leave granted in the discretion of the presiding administrative law judge.

64.4.2. *Return of exhibits.* – Exhibits may be disposed of as the office of tax appeals deems advisable. A party desiring the return at such party's expense of any exhibit belonging to the party, shall, within ninety (90) days after the decision of the case by the office of tax appeals has become final, make written application to the executive director, suggesting a practical manner of delivery. If the application is not timely made, the exhibits in the case will be destroyed.

64.5. *Interpreters.* – The parties ordinarily will be expected to make their own arrangements for obtaining and compensating interpreters. However, the office of tax appeals may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation, which compensation shall be paid by one or more of the parties or otherwise as the office of tax appeals may direct.

64.6. *Expert witness reports.*

64.6.1. Unless otherwise permitted by the presiding administrative law judge upon timely request, any party, including the state tax department, who calls an expert witness, including a tax examiner, shall cause that witness to prepare a written report for submission to the office of tax appeals and to the opposing party. The report shall set forth the qualifications of the expert witness and shall state the witness' opinion and the facts or data on which that opinion is based. The report shall set forth in detail the reasons for the conclusion, and it will be marked as an exhibit, identified by the witness, and received in evidence as the direct testimony of the expert witness, unless the presiding administrative law judge determines that the witness is not qualified as an expert. Additional direct testimony with respect to the report may be allowed to clarify or emphasize matters in the report, to cover matters arising after the preparation of the report, or otherwise at the discretion of the presiding administrative law judge. After the notice of hearing is issued by the executive director, each party who calls any expert witness shall serve on each other party, and shall submit to the office of tax appeals, not later than ten (10) days before the day of evidentiary hearing, a copy of all expert witness reports prepared pursuant to this subdivision 64.6.1. An expert witness' testimony will be excluded altogether for failure to comply with the provisions of this subdivision 156.6.1, unless the failure is shown to be due to good cause and unless the failure does not unduly prejudice the opposing party, such as by significantly impairing the opposing party's ability to cross-examine the expert witness or by denying the opposing party the reasonable opportunity to obtain evidence in rebuttal to the expert witness' testimony.

64.6.2. The presiding administrative law judge ordinarily will not grant a request to permit an expert witness to testify without a written report where the expert witness' testimony is based on third-party contacts, comparable sales, statistical data, or other detailed, technical

information. The office of tax appeals may grant such a request, for example, where the expert witness testifies only with respect to industry practice or only in rebuttal to another expert witness.

§ 121-1-65. Exceptions unnecessary.

Formal exceptions to rulings or orders of the office of tax appeals are unnecessary. It is sufficient that a party at the time the ruling or order of the office of tax appeals is made or sought, makes known to the office of tax appeals the action which such party desires the office of tax appeals to take or such party's objection to the action of the office of tax appeals and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice such party.

§ 121-1-66. Exclusion of proposed witnesses from hearing room until called to testify.

66.1. *Exclusion.* – At the request of a party, the presiding administrative law judge shall order witnesses excluded from the hearing room so that they cannot hear the testimony of other witnesses. The presiding administrative law judge may also make the order on his or her own motion. This subsection 66.1 does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person who is designated as the party's representative by its attorney or other person representing the party, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

66.2. *Sanctions.* – The presiding administrative law judge shall include in the record the name of any witness who remains within hearing of the proceedings after his or her exclusion has been directed. Additionally, any person (witness, counsel, or party) who willfully violates instructions issued by the administrative law judge with respect to such exclusion may be subject to the sanctions the administrative law judge, in his or her discretion, deems to be appropriate under the circumstances.

§ 121-1-67. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice. The presiding administrative law judge, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or otherwise admissible. The presiding administrative law judge's determination shall be treated as a ruling on a question of law.

§ 121-1-68. Subpoenas for persons, papers or other tangible things.

68.1. *In general.* – Upon the written request of any party, the administrative law judge assigned to the matter, or, if an administrative law judge has not been assigned yet, the chief administrative law judge, may issue subpoenas to require the attendance of witnesses at an administrative hearing or subpoenas duces tecum to require the production of books, records, or other tangible things at a deposition or hearing.

68.1.1. A request for a subpoena or for a subpoena duces tecum shall be made in writing at least ten (10) days in advance of the hearing.

68.1.2. All requests by parties for issuance of subpoenas or subpoenas duces tecum shall contain a statement acknowledging that the requesting party agrees to pay any and all fees for service of such subpoenas and for the attendance of witnesses.

68.1.3. All subpoenas and subpoenas duces tecum shall be issued in the name of the office of tax appeals.

68.1.4. A party requesting their issuance must see that they are properly served.

68.2. *Preparation of subpoenas.* – The party requesting the subpoena or subpoena duces tecum shall prepare the same for consideration by and the signature of the administrative law judge. The party may prepare subpoenas or subpoenas duces tecum forms that are generally used in proceedings before the circuit courts of this state, with any appropriate modifications.

68.3. *Signature of ALJ.* – If the administrative law judge determines that the subpoenas or subpoenas duces tecum should be issued as requested, the administrative law judge will sign the prepared subpoenas and deliver the same to the party making such request. Service of the subpoenas and subpoenas duces tecum are the responsibility of the person making the request.

68.4. *Service of subpoena.* – The party requesting issuance of a subpoena or subpoena duces tecum shall see that it is properly served. Every subpoena or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person over eighteen (18) years of age, or by registered or certified mail.

68.5. *Proof of service.*

68.5.1. Except as provided in subdivision 68.5.2, proof of service of a subpoena or subpoena dues tecum shall be made to the executive director of the office of tax appeals by written statement of the date and manner and the name of the person served, that is certified by the person who made the service.

68.5.2. A return receipt card or other return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail.

68.6. *Fee for service.* – Any person who serves a subpoena or subpoena duces tecum shall be entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this state. Fees for the attendance and travel of witnesses subpoenaed shall be the same as for witnesses before the circuit courts of this state.

68.6.1. All fees related to any subpoena or subpoena duces tecum issued at the instance of the state tax department or other agency, without the request of an interested party, shall

be paid by the state tax department or other agency that asked that the subpoena or subpoena duces tecum be issued.

68.6.2. All fees related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asked that the subpoena or subpoena duces tecum be issued.

68.7. *Duties in responding to a subpoena duces tecum.*

68.7.1. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories stated in the subpoena duces tecum.

68.7.2. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as hearing preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

68.7.3. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place for production or inspection unless commanded to appear for the deposition or evidentiary hearing.

68.8. *Protection of persons subject to subpoenas.*

68.8.1. A party, or the party's representative responsible for the issuance and service of a subpoena, shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

68.8.2. A person commanded to produce and permit inspection and copying may, within three (3) days after service of the subpoena duces tecum file with the executive director of the office of tax appeals and serve upon the party, or the party's representative specified in the subpoena, written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to a subsequent order issued by the administrative law judge who signed the subpoena duces tecum or a circuit court order. Within five (5) days after an objection is filed with the office of tax appeals, the administrative law judge shall hold a hearing, which may be a conference telephone call to the parties, or their representatives, after which he or she shall forthwith issue an order that (1) directs compliance with the subpoena duces tecum, as originally issued, (2) quashes the subpoena, or (3) modifies the subpoena. The administrative law judge may quash or modify the subpoena duces tecum if it:

a. Fails to allow a reasonable time for compliance;

b. Requires a person to travel for deposition to a place other than the county in which the person resides or is employed or transacts business or at a place fixed by order of the court;

c. Requires disclosure of privileged or other protected matter and no exception or waiver applies; or

d. Subjects the person to undue burden.

If the subpoena duces tecum (1) requires disclosure of a trade secret or other confidential research, development or commercial information, or (2) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the office of tax appeals may, to protect a person subject to or affected by the subpoena duces tecum, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the office of tax appeals may order the appearance or production upon specified conditions.

68.9. *Judicial relief from subpoena.* - Upon motion made promptly and in any event before the time specified in a subpoena or subpoena duces tecum for compliance therewith, the circuit court of the county in which the hearing is to be held, or the judge thereof in vacation, may grant any relief with respect to the subpoena or subpoena duces tecum, which the court, under the West Virginia rules of civil procedure for trial courts of record, could grant, and for any of the same reasons, with respect to a subpoena or subpoena duces tecum issued from that court.

68.9.1. Judicial relief may be sought without first exhausting the administrative remedy allowed under subsection 164.8 of this section.

68.9.2. Judicial relief may be sought after the administrative law judge issues his or her order under subsection 68.8 of this section.

68.10. *Compelling compliance with subpoena.*

68.10.1. In case of disobedience or neglect of any subpoena or subpoena duces tecum served by any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the party serving the subpoena may, upon notice to the person commanded to produce, institute proceedings, in the circuit court of the county of this state in which the deposition is to be taken or the administrative hearing is to be held, for a court order to compel compliance.

68.10.2. The office of tax appeals may compel the attendance of witnesses and the production of books, records or papers in response to a subpoena or subpoena duces tecum. In case of disobedience or neglect of any subpoena or subpoena duces tecum served by any person, or the refusal of any witness to testify to any matter regarding which he or she may be lawfully

interrogated, the circuit court of the county in which the hearing is being held, or the judge thereof in vacation, upon application by the office of tax appeals shall compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from that circuit court or a refusal to testify therein.

§ 121-1-69. Failure to appear or to adduce evidence.

69.1. *Attendance at hearings.* – The unexcused absence of a party or a party's legal counsel or other representative when a case is called on for hearing will not be ground for delay. The case may be dismissed for failure properly to prosecute, or the evidentiary hearing may proceed and the case be regarded as submitted on the part of the absent party or parties.

69.2. *Failure of proof.* – Failure to produce evidence, in support of an issue of fact as to which a party has the burden of proof and which has not been conceded by such party's adversary, may be ground for dismissal or for determination of the affected issue against that party. Facts may be established by stipulation in accordance with section 47 of this rule, but the mere filing of such stipulation does not relieve the party, upon whom rests the burden of proof, of the necessity of properly producing evidence in support of facts not adequately established by such stipulation. As to submission of a case without evidentiary hearing, see section 52 of this rule.

§ 121-1-70. Record of proceedings.

70.1. *General.* – Evidentiary hearings before the office of tax appeals shall be recorded or otherwise reported, and a transcript thereof shall be made if, in the opinion of the administrative law judge presiding at a hearing, a permanent record is deemed appropriate. Transcripts shall be supplied to the parties and other persons at such charges as may be fixed or approved by the office of tax appeals.

70.2. *Transcript as evidence.* – Whenever the transcript of the testimony of a witness at a evidentiary hearing before the office of tax appeals is duly certified by the person who reported the testimony for the office of tax appeals, it is admissible in evidence at a later hearing.

§ 121-1-71. Legal briefs.

71.1. *General.* – Legal briefs shall be filed after the evidentiary hearing or submission of a case, except as otherwise directed by the presiding administrative law judge. In addition to or in lieu of briefs, the presiding administrative law judge may permit or direct the parties to make oral argument or file memoranda or statements of authorities. The office of tax appeals may return without filing any brief that does not conform sufficiently overall to the requirements of this section.

71.2. *Time for Filing Briefs.* – Briefs may be filed simultaneously or seriatim, as the presiding administrative law judge directs. The following times for filing briefs shall prevail in the absence of any different direction by the presiding administrative law judge:

71.2.1. *Simultaneous briefs.* – Opening briefs within thirty (30) days after the conclusion of the evidentiary hearing, and answering briefs ten (10) days thereafter.

71.2.2. *Seriatim briefs.* – Opening brief within thirty (30) days after the conclusion of the evidentiary hearing, answering brief within thirty (30) days thereafter, and reply brief within ten (10) days after the due date of the answering brief.

71.3. *Additional rules for briefs.*

71.3.1. *Extension of time.* – A motion for extension of time for filing any brief shall be made in writing prior to the due date and shall recite that the moving party has advised the party's adversary and whether or not the adversary party objects to the motion. As to the effect of extensions of time, see section 8 of this rule.

71.3.2. *Failure to file.* – A party who fails to file an opening brief shall not be permitted to file an answering or reply brief except on leave granted by the presiding administrative law judge.

71.3.3. *Delinquent brief.* – Delinquent briefs will not be accepted by the office of tax appeals unless accompanied by a motion setting forth the reason(s) for the delay that the presiding administrative law judge deems sufficient to account for the delay.

71.3.4. *Late filed simultaneous brief.* – In the case of simultaneous briefs, the office of tax appeals may return, without filing, a delinquent brief received from a party after the party's adversary's brief was served upon the party.

71.4. *Service.* – The party submitting the brief is responsible for promptly serving a copy on each adversarial party.

71.5. *Number of copies filed.* – A signed original and one conforming copy of each brief, plus a certificate showing service on each adversarial party, shall be filed with the executive director of the office of tax appeals.

71.6. *Form and content.* – All briefs should conform to the requirements of section 13 of this rule and should contain the following in the order indicated:

71.6.1. On the first page, a table of contents with page references, followed by a list of all citations arranged alphabetically as to cited cases and stating the pages in the brief at which cited. Citations should be in italics when printed or computer generated and underscored when typewritten.

71.6.2. A statement of the nature of the controversy, the tax involved, and the issues to be decided.

71.6.3. Proposed findings of fact (in the opening brief or briefs), based on the evidence, in the form of numbered statements, each of which shall be complete and shall consist of a concise statement of essential fact and not a recital of testimony nor a discussion or argument relating to the evidence or the law. In each such numbered statement, there shall be inserted references to the pages of the transcript or the exhibits or other sources relied upon to support the statement. In an answering or reply brief, the party shall set forth any objections, together with the reasons therefor, to any proposed findings of any other party, showing the numbers of the statements to which the objections are directed; in addition, the party may set forth alternative proposed findings of fact.

71.6.4. A concise statement of each conclusion of law on which the party relies.

71.6.5. The argument, which sets forth and discusses the points of law involved and any disputed questions of fact.

71.6.6. The signature of counsel or the party submitting the brief. As to signature, see section 15 of this rule.

§ 121-1-72. Decisions of the office of tax appeals in cases, except small claim cases.

72.1. *Written decision required.* – In a case, except a small claim case to which the provisions of section 270 of this rule applies, the administrative law judge shall review the evidence and legal arguments presented by the parties and issue a written decision containing findings of fact and conclusions of law.

72.2. *Time to issue.* – The office of tax appeals shall issue its written decision within a reasonable time, not to exceed six (6) months, after the case is fully submitted for decision. A case is fully submitted for decision once (1) all post-hearing evidentiary submissions, if any, required by the administrative law judge are received, (2) all post-hearing submissions of proposed findings of fact and conclusions of law as required by this procedural rule are received, and (3) all required legal briefs are received by the administrative law judge. If a party fails to submit any of these documents by the date ordered by the administrative law judge, including any authorized extension of time, the record shall be closed on the day after the last day the party had to timely submit the document.

72.3. *Determination.* – In determining the outcome of a case, the office of tax appeals may affirm, reverse, modify or vacate an assessment of tax; may order the payment of or deny a refund, in whole or part; may authorize or deny a credit, in whole or part; or may grant other relief necessary or appropriate to dispose of the matter.

72.4. *Authentication.* – The office of tax appeals shall authenticate all of its decisions, orders, records, and proceedings with its official seal.

72.5. *Service of decision.* – Written notice of decisions, and written notice of other orders, of the office of tax appeals in regular (non-small claim) cases, and in small claim cases, shall be

served upon the parties either by personal or substituted service or by certified mail. Service of notice of decisions or other orders of the office of tax appeals by personal or substituted service is valid if made by any method authorized by the rules of the West Virginia rules of civil procedure for trial courts of record. Service of notice of decisions or other orders of the office of tax appeals by certified mail is valid if accepted by the party, or if addressed to and mailed to the party's usual place of business or usual place of abode or last known address and accepted by any person. If service of notice of decisions or orders by certified mail as set forth in the immediately preceding sentence is returned as "refused," "unclaimed," or "not deliverable" for whatever reason not involving error on the part of the office of tax appeals, the office of tax appeals shall then serve notice of the decision or order by first-class mail, sufficient postage prepaid, to the same address, and the date of the United States postmark for this first-class mailing is the date of service of notice of the decision or order.

§ 121-1-73. Computation by parties for entry of decision.

73.1. *Agreed computations.*

73.1.1. Where the office of tax appeals has filed or stated its opinion determining the issues in a case, it may withhold entry of its decision for the purpose of permitting the parties to submit computations pursuant to the office of tax appeals' determination of the issues, showing the correct amount of the liability or overpayment to be entered as the decision.

73.1.2. If the parties are in agreement as to the amount of the liability or overpayment to be entered as the decision pursuant to the findings and conclusions of the office of tax appeals, then they, or either of them, shall file promptly with the office of tax appeals an original and two copies of a computation showing the amount of the liability or overpayment and that there is no disagreement that the figures shown are in accordance with the findings and conclusions of the office of tax appeals. In the case of an overpayment, the computation shall also include the amount and date of each payment made by the petitioner.

73.1.3. After receipt of the subdivision 73.1.2 filing, the office of tax appeals will then enter its decision.

73.2. *Procedure in absence of agreement.*

73.2.1. If the parties are not in agreement as to the amount of the liability or overpayment to be entered as the decision in accordance with the findings and conclusions of the office of tax appeals, then either of them may file with the office of tax appeals a computation of the deficiency, liability, or overpayment believed by the party to be in accordance with the office of tax appeals' findings and conclusions. In the case of an overpayment, the computation shall also include the amount and date of each payment made by the petitioner.

73.2.2. The executive director will serve upon the opposite party, by regular mail or facsimile transaction, a notice of the filing accompanied by a copy of the computation. If, on or before a date specified in the executive director's notice, the opposite party fails to file an objection,

accompanied or preceded by an alternative computation, then the office of tax appeals may enter a decision in accordance with the computation already submitted.

73.2.3. If, in accordance with subdivision 73.2.1 of this section, computations are submitted by the parties which differ as to the amount to be entered as the decision of the office of tax appeals, then the parties may, at the office of tax appeals' discretion, be afforded an opportunity to be heard in argument thereon and the office of tax appeals will determine the correct liability or overpayment and will enter its decision accordingly.

73.3. *Limit on argument.* – Any argument under subdivision 73.2.3 of this section shall be confined strictly to consideration of the correct computation of the deficiency, liability, or overpayment resulting from the findings and conclusions made by the office of tax appeals. No argument will be heard upon or consideration given to the issues or matters disposed of by the office of tax appeals' findings and conclusions or to any new issues. This section may not be regarded as affording an opportunity for retrial or reconsideration.

§ 121-1-74. Effect of decision or other final order of office of tax appeals.

74.1. The administrative decision, or other final order of the office of tax appeals, becomes final and conclusive and is not subject to either administrative or judicial review, unless an appeal from the decision, or other final order of the office of tax appeals, is taken by a party to a circuit court of competent jurisdiction in this state within sixty (60) days after service thereof. *See* W. Va. Code § 11-10A-19.

74.2. *Amount owed tax commissioner.* – The amount, if any, owed by the taxpayer or other person shall be due and payable to the state tax department on the day following the date upon which the decision or other final order became final.

74.3. *Amount owed petitioner.* – The amount of overpayment by the taxpayer, if any, shall be promptly refunded or credited to the taxpayer, in accordance with the taxpayer's election.

§ 121-1-75. Publication of administrative decisions, except small claim decisions.

75.1. All administrative decisions, after they become final, except decisions in small claim cases, and all appealable orders of the office of tax appeals, shall be published in the state register after having been redacted to maintain confidentiality.

75.2. The office of tax appeals may also publish these redacted decisions on the internet.

75.3. Decisions in small claim cases will not be published because they have no precedential value.

§ 121-1-76. Harmless error.

No error in either the admission or exclusion of evidence, and no error or defect in any ruling or order, or in anything done or omitted by the office of tax appeals, or by any of the parties, is grounds for granting a new evidentiary hearing or for vacating, modifying, or otherwise disturbing a decision or order, unless refusal to take such action appears to the office of tax appeals to be inconsistent with substantial justice. The office of tax appeals, at every stage of a case, will disregard any error or defect that does not affect the substantial rights of the parties.

§ 121-1-77. Motion to correct clerical or computational mistakes.

77.1. *General.* -- A motion to correct clerical or computational mistakes may be filed within twenty (20) days after a written decision was served on the party, unless the chief administrative law judge, in his or discretion, shall otherwise permit. The moving party shall serve a copy of the motion on the other party or parties. A certificate or other proof of service shall be attached to the motion when it is filed.

77.2. *Hearing on motion.* – Within seven (7) work days after a party files a motion under this section, the office of tax appeals shall hold a hearing on the motion and within five (5) working days thereafter issue its written order ruling on the motion.

77.3. *Motion does not extend appeal time.* -- The filing of a motion under this section does not toll or extend the time for applying for judicial review of the written decision.

§ 121-1-78. Motion to reopen record.

78.1. *General.* -- A motion to reopen the record may be filed within twenty (20) days after a written decision was served on the party, unless the chief administrative law judge, in his or discretion, shall otherwise permit. The moving party shall serve a copy of the motion on the other party or parties. A certificate or other proof of service shall be attached to the motion when it is filed.

78.2. *Hearing on motion.* – Within seven (7) work days after a party files a motion under this section, the office of tax appeals shall hold a hearing on the motion and within five (5) working days thereafter issue its written order ruling on the motion. The only grounds on which this motion will be granted are:

78.2.1. Newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding; or

78.2.2. Fraud, misrepresentation, or other misconduct of an opposing party.

78.3. *Motion does not extend appeal time.* -- The filing of a motion under this section does not toll or extend the time for applying for judicial review of the written decision.

§ 121-1-79. Motion for reconsideration of findings or opinion.

79.1. *General.* -- Any motion for reconsideration of findings of fact or conclusions of law, with or without a new or further evidentiary hearing, may be filed within twenty (20) days after a written decision was served on the party, unless the chief administrative law judge, in his or discretion, shall otherwise permit. The moving party shall serve a copy of the motion on the other party or parties. A certificate or other proof of service shall be attached to the motion when it is filed.

79.2. *Hearing on motion.* – Within seven (7) work days after a party files a motion under this section, the office of tax appeals shall hold a hearing on the motion and within five (5) working days thereafter issue its written order ruling on the motion.

79.3. *Motion does not extend appeal time.* -- The filing of a motion under this section does not toll or extend the time for applying for judicial review of the written decision.

§ 121-1-80. Motion to vacate decision and hold a new hearing.

80.1. *Time for filing.* – A motion to vacate a written decision and hold a new evidentiary hearing, may be filed within twenty (20) days after the written decision was served on the party, unless the chief administrative law judge, in his or her discretion, shall otherwise permit. The moving party shall serve a copy of the motion on the other party or parties. A certificate or other proof of service shall be attached to the motion when it is filed.

80.2. *Content of motion.* – The motion shall demonstrate good cause as to why a new hearing shall be held. For purposes of this section, "good cause" means any of the following:

80.2.1. Error of law that, if corrected, would produce a different result;

80.2.2. Mistake of fact that, if corrected, would produce a different result;

80.2.3. Fraud; or

80.2.4. Any other reason the office of tax appeals deems sufficient and material.

80.3. *No extension of appeal period.* – The filing of a motion under this section does not toll or extend the time for applying for judicial review of the written decision.

80.4. *Reply to motion.* – The opposing party may file a response to the motion for a new hearing within seven (7) days after being served with a copy of the motion of the moving party.

80.5. *Hearing on motion.* – Within twenty (20) days after a party files a motion under this section, the office of tax appeals shall hold a hearing on the motion and within five (5) working days thereafter issue its written order ruling on the motion.

80.6. *New hearing.* – If the motion for a new hearing is granted, the order granting the new hearing shall withdraw or vacate the administrative decision that precipitated the filing of the motion. Notice of the day, time and place of the new hearing shall be given as in any other case. The new hearing shall not be limited to the evidence presented during the prior hearing.

§ 121-1-81. No joinder of motions under sections 75, 76 and 77.

Motions under sections 75, 76 and 77 of this rule shall be made separately from each other and may not be joined to or made part of any other motion.

§ 121-1-82. Judicial review of office of tax appeals decisions and orders.

82.1. Either the taxpayer or the commissioner, or both, may appeal the final decision or order of the office of tax appeals by taking an appeal to the circuit courts of this state within sixty days after being served with notice of the final decision or order.

82.2. The office of tax appeals may not be made a party in any judicial review of a decision or order it issued. *See* W. Va. Code § 11-10A-19(b).

82.3. *Venue.*

82.3.1. If the taxpayer appeals, the appeal may be taken in the circuit court of Kanawha County or in any county of this state:

a. Wherein the activity sought to be taxed was engaged in;

b Wherein the taxpayer resides; or

c. Wherein the will of the decedent was probated or letters of administration granted.

82.3.2. If the tax commissioner appeals, the appeal may be taken in Kanawha County: *Provided,* That the taxpayer shall have the right to remove the appeal to the county of this state:

a. Wherein the activity sought to be taxed was engaged in;

b. Wherein the taxpayer resides; or

c. Wherein the will of the decedent was probated or letters of administration granted.

82.3.3. In the event both parties appeal to different circuit courts, the appeals shall be consolidated. In the absence of agreement by the parties, the appeal shall be consolidated in the circuit court of the county in which the taxpayer filed the petition for appeal.

§ 121-1-83. Appeal taken by filing petition for appeal.

83.1. *Petition for appeal.* – The appeal proceeding is instituted by filing a petition for appeal with the circuit court, or the judge thereof in vacation, within the sixty days after the party is served with a copy of the decision or order being appealed, as provided in W. Va. Code § 11-10A-19(a).

83.2. *Service.* – A copy of the petition for appeal is to be served on all parties appearing of record, other than the party appealing, by registered or certified mail.

83.3. *Content.* – The petition for appeal must state whether the appeal is taken on questions of law or questions of fact, or both, and set forth with particularity the items of the decision objected to, together with the reasons for the objections.

§ 121-1-84. Appeal bond.

84.1. *Time for filing.* – If the appeal is of an assessment, except a jeopardy assessment for which security in the amount thereof was previously filed with the tax commissioner, then within ninety (90) days after the petition for appeal is filed, or sooner if ordered by the circuit court, the petitioner must file with the executive director of the circuit court a cash bond or a corporate surety bond approved by the executive director. The surety must be qualified to do business in this state.

84.2. *Condition of bond.* – The appeal bond must be conditioned upon the petitioner performing the orders of the court.

84.3. *Penalty of bond.*

84.3.1 The penalty of the appeal bond may not be less than the total amount of tax or revenue plus additions to tax, penalties and interest for which the taxpayer was found liable in the administrative decision of the office of tax appeals, except as provided in subdivision 214.3.2. of this subsection.

84.3.2. Notwithstanding subdivision 84.3.1, and in lieu of the bond, the tax commissioner, upon application of the petitioner, may upon a sufficient showing by the taxpayer, certify to the executive director of the circuit court that the assets of the taxpayer are adequate to secure performance of the orders of the court. If the tax commissioner refuses to certify that the assets of the taxpayer or other indemnification are adequate to secure performance of the orders of the court, then the taxpayer may apply to the circuit court for the certification.

84.4. No bond may be required of the tax commissioner.

§ 121-1-85. Proceeding in circuit court.

85.1. *General.* – The circuit court will hear the appeal as provided in section 29A-5-4 of the state administrative procedures act, W. Va. Code § 29A-1-1, etc. seq.

85.2. *Review.* – The circuit court's review is conducted without a jury and upon the record made before the office of tax appeals, except that in cases of alleged irregularities in procedure before the office of tax appeals, not shown in the record, testimony thereon may be taken by the court. The court may hear oral arguments and require briefs.

85.3. *Decision.*

85.3.1. The circuit court may affirm the order or decision of the office of tax appeals or remand the case for further proceedings before the office of tax appeals. The circuit court must reverse, vacate, or modify the order or decision of the office of tax appeals if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

a. In violation of constitutional or statutory provisions;

b. In excess of the statutory authority or jurisdiction of the agency;

c. Made upon unlawful procedures;

d. Affected by other error of law;

e. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

f. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

85.3.2. When the appeal is to review a decision or order on a petition for refund or credit, the court may determine the legal rights of the parties, but in no event shall it enter a judgment for money.

85.4. *Appeal to West Virginia supreme court of appeals.* – Either party may appeal to the supreme court of appeals as provided in article 6 of the state administrative procedures act, W. Va. Code § 29A-6-1 *et seq.*

85.5. Unless the tax commissioner appeals an adverse court decision, the commissioner, upon receipt of the certified order of the court, shall promptly correct his or her assessment or issue his or her requisition on the treasury or establish a credit for the amount of an overpayment.

§ 121-1-86. Preparation of the record on appeal.

86.1. *General.* – Upon receiving written notice of any appeal by a party from a decision or other final order of the office of tax appeals, to a circuit court in this state, the office of tax appeals shall be responsible for seeing that the record of the case is prepared for submission to the circuit court within the time required by the court.

86.2. *Contents.* – The record for appeal shall consist of a copy of the office of tax appeals' original file, including, but not limited to, the following items:

86.2.1. A certified list of docket entries showing the dates of filing and the nature of all documents filed and the date and disposition of all proceedings conducted.

86.2.2. All papers, including, but not limited to, all of the following items:

a. Petitions,

b. Pleadings,

c. Notices,

d. Stipulation,

e. Motions,

f. Briefs,

g. Intermediate rulings,

h. The decision or order being appealed,

i. The original transcript(s) of the hearing(s), and

j. Original exhibits.

86.3. *Payment of costs.* – The reasonable cost of preparing the record shall be paid by the party appealing to circuit court. If both parties appeal to circuit court, the reasonable cost of preparing the record shall be shared equally by both parties.

86.4. *Index of record.* – At the time the executive director forwards the record on appeal to the clerk of the circuit court, the executive director shall forward to each of the parties a copy of the index to the record on appeal.

§ 121-1-87. Appeals from interlocutory orders.

87.1. *General.* – For the purpose of seeking the review of any order of the office of tax appeals, which is not otherwise immediately appealable, a party may request the office of tax appeals to include, or the office of tax appeals may on its own motion include, a statement in such order that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation.

87.1.1. Any such request by a party shall be made by motion, which shall set forth with particularity the grounds therefor and note whether there is any objection thereto.

87.1.2. Any order by the office of tax appeals that includes the above statement shall be entered upon the records of the office of tax appeals and served forthwith by the executive director.

87.2. *Venue.* – The circuit court, to which an appeal from an interlocutory order may be taken, is the same as that for appeals of decisions and final orders of the office of tax appeals. *See* subsection 82.3 of this rule.

87.3. *Stay of proceeding.* – Unless so ordered by the circuit court, proceedings in the office of tax appeals shall not be stayed by virtue of any interlocutory order that is or may be the subject of an appeal.

§ 121-1-88. Procedures for mediation.

Section 89 through 101 of this rule shall govern mediation of proceedings before the office of tax appeals.

§ 121-1-89. Mediation defined.

Mediation is an informal, non-adversarial process whereby a neutral third person, the mediator, assists parties to a dispute to resolve by agreement some or all of the differences between them. In mediation, decision-making authority remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually acceptable settlement by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring settlement alternatives, and other similar means. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute.

§ 121-1-90. Selection of cases for mediation.

Upon motion of any party, or by stipulation of the parties, the office of tax appeals may refer a case to mediation. Upon entry of an order referring a case to mediation, the parties shall have

ten (10) days within which to file a written objection, specifying the grounds. The office of tax appeals shall promptly consider any such objection, and may modify its original order for good cause shown. A case ordered for mediation shall remain on the office of tax appeals' hearing docket.

§ 121-1-91. Listing of mediators.

The West Virginia State Bar maintains and makes available to circuit courts, interested parties, and the public a listing of persons willing and qualified to serve as mediators in the circuit courts. The mediator selected by the parties may come from this list.

§ 121-1-92. Selection of mediator.

Within fifteen (15) days after entry of an order or stipulation referring a case to mediation, the parties, upon approval of the office of tax appeals, may choose their own mediator, who may or may not be a person listed on the State Bar listing. In the absence of such agreement, the office of tax appeals shall designate the mediator from the State Bar listing, either by rotation or by some other neutral administrative procedure established by administrative order of the chief administrative law judge.

§ 121-1-93. Compensation of mediator.

If the parties by their own agreement choose a mediator who requires compensation, then the parties shall by written agreement determine how the mediator will be compensated. If the office of tax appeals designates the mediator, then it shall, whenever possible, select a mediator who is willing to serve without compensation. If it has established a budget approved by the Legislature for this purpose, the office of tax appeals may reimburse a volunteer mediator for reasonable and necessary expenses, according to the Governor's travel regulations. If a volunteer mediator is not available, then the office of tax appeals shall inquire of the parties whether they are willing to pay the fees of a mediator. If so, then either the parties by stipulation or the office of tax appeals shall select the mediator, and the parties by written agreement shall determine how the mediator will be compensated.

§ 121-1-94. Mediator disqualification.

94.1. A mediator shall disqualify himself or herself in a proceeding in which the mediator's impartiality might reasonably be questioned, including, but not limited to, instances where:

94.1.1. The mediator has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

94.1.2. The mediator served as a lawyer in the matter in controversy, or a lawyer with whom the mediator previously practiced law served during such association as a lawyer concerning the matter, or the mediator has been a material witness concerning it;

94.1.3. The mediator knows that he or she, individually or as a fiduciary, or the mediator's spouse, parent or child, wherever residing, or any other member of the mediator's family residing in the mediator's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has more than a de minimis interest that could be substantially affected by the proceeding;

94.1.4. The mediator or the mediator's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

a. is a party to the proceeding, or an officer, director or trustee, of a party;

b. is acting as a lawyer in the proceeding;

c. is known by the mediator to have a more than de minimis interest that could be substantially affected by the proceeding;

d. is, to the mediator's knowledge, likely to be a material witness in the proceeding.

94.2. A mediator shall keep informed about the mediator's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the mediator's spouse and minor children.

94.3. *Certain terms defined.* – As used in this section, the following terms mean:

94.3.1. "De minimis" denotes an insignificant interest that could not raise reasonable questions as to the mediator's impartiality.

94.3.2. "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

a. ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the mediator participates in the management of the fund or a proceeding pending or impending before the mediator could substantially affect the value of the interest;

b. service by a mediator as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, or civic organization, or service by a judge's spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;

c. a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest is not an economic interest in the

organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

d. ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the mediator could substantially affect the value of the securities.

e. "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

f. "Knowingly," "knowledge," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

g. "Member of the mediator's family" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

h. "Member of the mediator's family residing in the mediator's household" denotes any relative of a mediator by blood or marriage, or a person treated by a mediator as a member of the mediator's family, who resides in the mediator's household.

i. " Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece.

94.4. Any party may move the office of tax appeals to disqualify a mediator for good cause. In the event a mediator is disqualified, the parties or the office of tax appeals shall select a replacement in accordance with sections 92 and 93 of this rule.

§ 121-1-95. Provision of preliminary information to the mediator.

The office of tax appeals may require the parties to provide pertinent information to the mediator prior to the first mediation session. Such information may include, but is not limited to: (1) copies of pleadings, transcripts, or other litigation-related documents, or (2) a confidential statement summarizing a party's position on the issues, status of settlement discussions, and what relief would constitute an acceptable settlement.

§ 121-1-96. Time frames for conduct of mediation.

Unless otherwise agreed by the parties and the mediator or ordered by the office of tax appeals, the first mediation session shall be conducted within thirty (30) days after appointment of the mediator. Mediation shall be completed within forty-five (45) days after the first mediation session, unless extended by agreement of the parties and the mediator or by order of the office of tax appeals. The mediator is empowered to set the date and time of all mediation sessions, upon reasonable notice to the parties.

§ 121-1-97. Appearances; sanctions.

The following persons, if furnished reasonable notice, are required to appear at any mediation session scheduled by the mediator, unless excused by the mediator or the office of tax appeals: (1) each party or the party's representative having full authority to settle without further consultation; and (2) each party's counsel of record. If a party or its representative counsel fails to appear at a duly noticed mediation session without good cause, the office of tax appeals, upon motion, may impose sanctions, including an award of reasonable mediator and attorney fees and other costs against the responsible party.

§ 121-1-98. Participation.

No party may be compelled by this rule, the office of tax appeals, or the mediator to settle a case involuntarily or against the party's own judgment or interest. All parties involved in mediation, however, and their respective representatives and counsel, shall be prepared to negotiate openly and knowledgeably about the case in a mutual effort to reach a fair and reasonable settlement.

§ 121-1-99. Confidentiality of mediation process.

Mediation shall be regarded as confidential settlement negotiations. A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. A mediator shall keep confidential from opposing parties information obtained in an individual session unless the party to that session or the party's counsel authorizes disclosure. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.

§ 121-1-100. Immunity.

A person acting as mediator under this rule shall have immunity in the same manner and to the same extent as an administrative law judge.

§ 121-1-101. Enforceability of settlement agreement.

If the parties reach a settlement and execute a written agreement, the agreement is enforceable in the same manner as any other written contract.

§ 121-1-102. Report of mediator.

Within ten (10) days after mediation is completed or terminated, the mediator shall report to the office of tax appeals the outcome of the mediation. With the consent of the parties, the mediator may identify any pending motions, discovery, or issues which, if resolved, would facilitate the possibility of settlement.

§ 121-1-103 through § 121-1-109. [Reserved.]

§ 121-1-110. Small claim cases.

110.1. *General.* -- The office of tax appeals may handle certain cases as small claim cases as provided in W. Va. Code § 11-10A-11. Small claim cases are handled more informally than other cases. The administrative law judge's decision in a small claim case is not subject to further administrative or judicial review.

110.2. *Eligible cases.* -- Generally, the following cases are eligible for handling as small claim cases and shall be handled as small claim cases upon the written request of the petitioner provided the office of tax appeals concurs in the election:

110.2.1. Those cases in which the amount in controversy does not exceed $10,000 for any one taxable year. For this purpose, the "amount in controversy" means the total amount of tax and any additions or penalties, but excluding interest, for any one taxable year that is in controversy.

110.2.2. Unless the amount in controversy for any one tax year exceeds $10,000, the following matters, even without request, shall be handled as small claim cases, unless the chief administrative law judge, in the interest of justice, determines otherwise:

a. Cases in which the total amount in controversy, excluding interest, is less than $1,000;

b. Cases involving estimated tax assessments;

c. Cases involving assessment or refund of business registration tax;

d. Cases involving assessment or refund of corporate license tax;

e. Cases in which the amount of the tax owed, if any, is not in controversy and the only issue is a request for waiver or abatement of additions, penalties, or interest;

f. Cases involving West Virginia state tax changes based upon federal tax audit changes.

110.3. *Commencement of small claim process.* -- A small claim proceeding before the office of tax appeals contesting a notice of assessment or denial, in whole or in part, of a claim for refund or credit of any tax collected by the tax commissioner under the West Virginia tax procedure and administration act, W. Va. Code § 11-10-1 *et seq.*, or any appeasable order issued by the tax commissioner, shall be initiated by timely filing a written small claim petition that succinctly states:

110.3.1. The nature of the case;

110.3.2. The facts on which the appeal is based; and

110.3.3. Each question presented for review by the office of tax appeals.

110.4. *Answer.* -- Within five days of receipt of a timely filed petition pursuant to subsection 110.3 of this section, the executive director of the office of tax appeals shall provide the tax commissioner with a copy of the small claim petition. The tax commissioner shall file a written answer to the petition within forty (40) days of his or her receipt of the petition. The answer shall succinctly state:

110.4.1. The nature of the case;

110.4.2. The facts relied upon by the commissioner; and

110.4.3. An answer to each question presented for review.

The tax commissioner shall serve the petitioner or the petitioner's representative, if a representative is identified in the petition with a copy of the answer. A certificate of service or other proof of service shall be attached to the answer filed with the clerk of the office of tax appeals.

110.5. *Appearance and representation.*

110.5.1. *Petitioner.* -- The petitioner may appear before the office of tax appeals in his or her own behalf, or may be represented by an attorney or by any other person as he or she may choose.

1105.2. *Tax commissioner.* -- In a small claim case, the state tax department will ordinarily not be represented by legal counsel. The state tax department may be represented in a small claim case by an employee of the department who is not a lawyer but who is familiar with the facts of the case.

110.6. *Disposition of small claim cases.* -- A small claim case will generally be decided based upon the content of the small claim petition and any other relevant documentary evidence submitted by the parties in accordance with time restrictions fixed by an administrative law judge.

110.7. *Scheduling of hearing.* -- The office of tax appeals will not schedule a hearing in a small claim case, until sixty (60) days after the petition was filed, or the petitioner or the state tax department earlier advises that administrative law judge that issues in controversy cannot be resolved without a hearing.

110.8. *Notice of small claim hearing.* -- If a small claim petition is set for hearing, the chief administrative law judge shall provide written notice of the date, time and place of the hearing to the petitioner, to the petitioner's representative of record, if any, and to the relevant part of the state tax department, at least twenty (20) days in advance of the small claim hearing, which must be

heard within ninety (90) days after the small claim petition is filed, unless set later than that ninety (90)-day period for good cause.

110.9. *Discovery not available.* -- Prehearing discovery and other prehearing processes available in other cases are not available in small claim cases. The parties are strongly encouraged to contact each other after the petition is filed and to diligently work to resolve the matters in controversy without a small claim hearing.

110.10. *Continuances.* -- The office of tax appeals ordinarily will not grant a continuance (postponement) of a small claim hearing, and will grant no more than one continuance for good cause shown in writing at least seven (7) calendar days prior to the scheduled small claim hearing.

110.11. *Small claim hearing.* -- The administrative law judge shall conduct any small claim hearing as informally as possible, consistent with orderly procedure.

110.11.1. The petitioner has the burden of proof, and must bring to a small claim hearing two (2) copies of any and all relevant documents that the petitioner wants considered.

110.11.2. Any non-lawyer representative of the State Tax Department attending a small claim hearing must also bring two (2) copies of any and all relevant documents that he or she wants considered.

110.11.3. A small claim hearing will not be recorded.

110.11.4. All testimony at a small claim hearing will be under oath or by affirmation.

110.11.5. The administrative law judge and any non-lawyer representative of the state tax department attending the small claim hearing may ask questions of the petitioner or of his or her representative or witness(es), and the petitioner or his or her representative may ask relevant questions of the state tax department's non-lawyer representative.

110.11.6. After a small claim hearing the parties will not be required to submit proposed findings of fact and conclusions of law, except to the extent the administrative law judge, in his or her discretion, otherwise orders.

110.12. *Written decision.* -- In a small claim case the administrative law judge shall issue and serve upon the parties a brief written decision, explaining succinctly the basis for the determination.

110.13. *Time for issuance of decision.* -- The administrative law judge shall issue the small claim decision within ninety (90) days after the case was fully submitted for decision, that is, within ninety (90) days after the case was fully submitted on documents only, or within ninety (90) days after any small claim hearing was held and any and all posthearing evidentiary submissions (and any posthearing submissions of written argument) were received by the office of tax appeals.

110.14. *Decision not appealable.* -- A decision in a small claim case is final and conclusive upon issuance, and is not subject to any further administrative or judicial review.

110.14.1. The amount, if any, found to be owed by the petitioner to the state tax department shall be paid within thirty (30) days after notice of the small claim decision is received by petitioner or the petitioner's representative, if any.

110.14.2. The amount, if any, of overpayment by the petitioner determined by a small claim decision shall be promptly refunded or credited to the petitioner.

110.15. *No precedential value.* -- A decision in a small claim case is not precedent for any other contested matter.

110.16. *Decision not published.* -- A decision in a small claim case will not be filed in the State Register or published elsewhere.

APPENDIX I.

FORM 1

CERTIFICATE OF SERVICE BY REGULAR MAIL

CERTIFICATE OF SERVICE

I, _____, do hereby certify that a true and exact copy of the foregoing _____ [describe here the document, e.g., brief, motion to dismiss, etc.] was served by United States mail, postage prepaid, addressed as follows:

_____ [list name and mailing address of

_____ each person so served]

_____

_____ [Signature of person making certification]

[Type or print underneath signature the name of person]

FORM 2

PETITION FOR REASSESSMENT

BEFORE THE WEST VIRGINIA OFFFICE OF TAX APPEALS
815 Quarrier Street, Suite # 200, Charleston, WV 25301
Telephone: (304) 558-1666; Fax: (304) 558-1670

Docket No. (to be completed by OTA): _____

Date OTA Sent Copy of Petition to State Tax Department (to be completed by OTA): _____

[Petition must be computer-generated, typed, or legibly printed. It need not be notarized.]

[An original of the petition and 1 other exact copy must be submitted at the same time, if filing is by hand delivery or by regular mail; if filed electronically or faxed, an original of the petition is sufficient.]

[A legible copy of the notice of assessment MUST be attached to the original and to the copy of petition.]

Date that Petitioner -Taxpayer (not any representative) RECEIVED the notice of assessment (MUST be completed by Petitioner in all cases): _____

Name of Petitioner (Taxpayer): _____
Doing Business as (if applicable): _____

Mailing address of Petitioner: _____
(street address & any p.o. box or drawer & zip code) _____
_____

Telephone no. of Petitioner (including area code): _____

Fax no. (if any) of Petitioner (including area code): _____

E-mail address (if any) of Petitioner: _____

State (or Federal) Taxpayer I.D. No. or Social Security No.: _____

Type of Tax: _____

Part of State Tax Department Involved (Auditing, Internal Auditing, etc.): _____

Tax Year(s) or Period: _____

Amounts in controversy: (being disputed) Tax: $ _____ Interest: $ _____
Additions: $ _____ Penalties: $ _____

Alleged Error(s) of Fact (if any):
(as specific as possible)
(attach extra sheets if necessary)

(1) _____
_____

(2) _____
_____

Other Alleged Errors (Errors of Law, Accounting, etc.):
(as specific as possible)
(attach extra sheets, if necessary)

(1) _____
_____
_____
_____

(2) _____
_____
_____
_____

(3) _____
_____
_____
_____

Specific Relief Sought by Petitioner:
(attach extra sheets, if necessary)

(1) _____
_____

(2) _____
_____

(3) _____
_____

The Petitioner may represent himself or herself before the West Virginia Office of Tax Appeals or may authorize another person to represent him or her. A representative may not engage in the unauthorized practice of law (for example, by conducting a direct examination of his or her witness; or by arguing the interpretation of an ambiguous statute, regulation, etc.; or by arguing that a statute, regulation, etc., is unconstitutional). An attorney, including in-house counsel for any corporation, who is not authorized to practice law in the State of West Virginia must comply with Rule 8.0 of the Rules for Admission to the Practice of Law, promulgated by the West Virginia Supreme Court of Appeals (see State Court Rules volume of the W. Va. Code), including engaging a "responsible local attorney." This responsible local attorney's name, West Virginia State Bar membership number, and signature must be included in this petition.

For any authorized representative, the Petitioner must enclose with the petition a legible copy of the power of attorney form, Form WV-2848, available on the internet at http://www.state.wv.us/taxrev/uploads.wv2848.pdf.

I have enclosed the required power of attorney form: ___ Yes (check)

PETITION FOR REASSESSMENT

Name of Petitioner's Authorized Representative: _____

Occupation of Representative (lawyer, c.p.a., etc.): _____

Mailing address of Representative _____
(street address & any p.o. box or drawer & zip code) _____
_____

Telephone no. of Representative (including area code): _____

Fax no. (if any) of Representative (including area code): _____

E-mail address (if any) of Representative: _____

Name, mailing address, telephone no., fax no. (if any), _____
e-mail address (if any), & WV State Bar _____
membership no. of any "responsible local _____
attorney": _____
_____
_____
_____
_____

In a non-small claim case, a Petitioner may request, in the petition, to have his or her case submitted for a written, appealable decision on documents only and without being heard in person.

This Petitioner desires to waive his or her right to be heard in person and to submit the case for a written decision on documents only: ___ Yes ___ No (check one)

[To be completed by OTA: ____ Request granted ____ Request denied]

The West Virginia Office of Tax Appeals usually holds hearings in Charleston, West Virginia. Occasionally, the Office of Tax Appeals may decide to hold hearings at certain regional locations in this State, depending primarily upon the volume of cases requested to be heard in a region and the travel budget. Please mark your requested preference for the hearing location:

____ Charleston ____ Bridgeport ____ Bluefield ____ Wheeling ____ Martinsburg

[To be completed by OTA: ____Request granted ____Request denied]

Certain cases may be eligible for more informal handling as small claim cases. Decisions in small claim cases are final and conclusive and are **NOT** subject to any further administrative or judicial review. A non-lawyer usually represents the State Tax Department in small claim cases.

Unless the West Virginia Office of Tax Appeals determines otherwise, small claim cases are submitted on documents only and without a hearing in person.

A taxpayer may request handling of his or her case as a small claim if the amount in controversy (excluding interest), for any one taxable year, does not exceed $10,000.

I request that my case, eligible for small claim treatment, be handled using small claim procedures; I realize that the law does not allow me to appeal a small claim decision:

____ (check if you request small claim treatment)

[To be completed by OTA: ____ Request granted ____Request denied]

Certain types of cases will be handled as small claim cases, without a request, unless the Office of Tax Appeals determines otherwise. These types of cases include: (1) all cases in which the total amount of the tax assessment or the total amount of the tax refund or credit claim is less than $1,000; (2) all cases involving estimated tax assessments; (3) all business registration tax and corporate license tax assessment or refund matters; (4) all cases involving not the tax itself but only requests for waiver or abatement of additions, penalties, or interest; and (5) cases involving federal tax audit changes.

Within 5 days after a complete and proper petition is timely filed, the West Virginia Office of Tax Appeals will provide a copy of the petition to the State Tax Department. Within 40 days after receiving a copy of such a petition, the State Tax Department will file and serve an answer to the petition.

In a non-small claim case the Petitioner or his or her representative should contact the State Tax Department's legal representative at telephone number (304) 558-5330, to discuss the case. Please wait, however, at least two weeks or so after filing the petition to contact the Division's legal representative, to allow time for a specific legal representative to be assigned and for him or her to become acquainted enough with the case to discuss it intelligently in a preliminary manner.

In a small claim case the Petitioner or his or her representative should contact the part of the State Tax Department that issued the notice of assessment, at the telephone number of that part of the State Tax Department set forth in the notice of assessment. This call to discuss the small claim case with the non-lawyer employee of the State Tax Department should be made immediately after filing the petition.

The Petitioner and the Petitioner's authorized representative, if any, and any responsible local attorney, must sign and date this petition immediately below the following statement, which they have read and understand:

The Petitioner and any authorized representative of the Petitioner, including any responsible local attorney, affirm that all of the material factual information set forth by them in this petition is true, correct, and complete, based upon the information available to them at this time; the Petitioner and any authorized representative of the Petitioner are aware that any willfully false representation set forth in this petition is a misdemeanor punishable according to law.

Petitioner	Date
Petitioner's Authorized Representative (if any)	Date
Petitioner's Responsible Local Attorney (if any)	Date

FORM 3

PETITION FOR REFUND

BEFORE THE WEST VIRGINIA OFFFICE OF TAX APPEALS
815 Quarrier Street, Suite # 200, Charleston, WV 25301
Telephone: (304) 558-1666; Fax: (304) 558-1670

Docket No. (to be completed by OTA): _____

Date OTA Sent Copy of Petition to State Tax Department (to be completed by OTA): _____

[Petition must be computer-generated, typed, or legibly printed. It need not be notarized.]

[An original of the petition and 1 other, exact copy must be submitted at the same time, if filing is by hand delivery or by regular mail; if filed electronically or by fax, an original of the petition is sufficient.]

[A legible copy of the State Tax Department's letter denying the claim for refund in whole or in part, or of the notice of assessment being paid with the petition under protest in whole or in part, MUST be attached to the original and to the copy of the petition. If the State Tax Department has not ruled on a claim for refund, attach a copy of the claim for refund and note the date it was filed with the State Tax Department.]

Date that Petitioner -Taxpayer (not any representative) RECEIVED the refund claim denial letter or notice of assessment being paid now under protest (MUST be completed by Petitioner in all cases):

_____

Name of Petitioner (Taxpayer): _____
Doing Business as (if applicable): _____

Mailing address of Petitioner: _____
(street address & any p.o. box or drawer & zip code) _____
_____

Telephone no. of Petitioner (including area code): _____

Fax no. (if any) of Petitioner (including area code): _____

E-mail address (if any) of Petitioner: _____

State (or Federal) Taxpayer I.D. No. or Social Security No.: _____

Type of Tax: _____

Part of State Tax Department Involved (Auditing, Internal Auditing, etc.): _____

Tax Year(s) or Period: _____

PETITION FOR REFUND

Refund sought (after claim denied or not ruled on): Amount of tax: $_____ plus any statutory interest

– or –

Assessment now paid under protest: Tax: $_____ Interest: $_____
Additions: $_____ Penalties: $_____
(Show only amounts being contested; attach remittance for uncontested portion of assessment)

Alleged Error(s) of Fact (if any):
(as specific as possible)
(attach extra sheets if necessary)

(1) _____
_____

(3) _____
_____

Other Alleged Errors (Errors of Law, Accounting, etc.):
(as specific as possible)
(attach extra sheets, if necessary)

(1) _____
_____
_____
_____

(2) _____
_____
_____
_____

(3) _____
_____
_____
_____

Specific Relief Sought by Petitioner:
(attach extra sheets, if necessary)

(1) _____
_____

(2) _____
_____

(3) _____
_____

The Petitioner may represent himself or herself before the West Virginia Office of Tax Appeals or may authorize another person to represent him or her. A representative who is not authorized to practice law in this state may not engage in the unauthorized practice of law (for example, by conducting a direct examination of his or her witness; or by arguing the interpretation of an ambiguous statute, regulation, etc.; or by arguing that a statute, regulation, etc., is unconstitutional). A lawyer, including in-house counsel for any corporation, who is not authorized to practice law in the State of West Virginia must comply with Rule 8.0 of the Rules for Admission to the Practice of Law, promulgated by the West Virginia Supreme Court of Appeals (see State Court Rules volume of the W. Va. Code), including engaging a "responsible local attorney." This responsible local attorney's name, West Virginia State Bar membership number, and signature must be included in this petition.

For any authorized representative, the Petitioner must enclose with the petition a legible copy of the power of attorney form, Form WV-2848, available on the internet at http://www.state.wv.us/taxrev/uploads.wv2848.pdf.

I have enclosed the required power of attorney form: ___ Yes (check)

Name of Petitioner's Authorized Representative: _____

Occupation of Representative (lawyer, c.p.a., etc.): _____

Mailing address of Representative
(street address & any p.o. box or drawer & zip code) _____

Telephone no. of Representative (including area code): _____

Fax no. (if any) of Representative (including area code): _____

E-mail address (if any) of Representative: _____

Name, mailing address, telephone no., fax no. (if any), e-mail address (if any), & WV State Bar membership no. of any "responsible local attorney": _____

In a non-small claim case, a Petitioner may request, in the petition, to have his or her case submitted for a written, appealable decision on documents only and without being heard in person.

This Petitioner desires to waive his or her right to be heard in person and to submit the case for a written decision on documents only: ___ Yes ___ No (check one)

[To be completed by OTA: ____ Request granted ____ Request denied]

The West Virginia Office of Tax Appeals usually holds hearings in Charleston, West Virginia. Occasionally, the Office of Tax Appeals may decide to hold hearings at certain regional locations in this State, depending primarily upon the volume of cases requested to be heard in a region and the travel budget. Please mark your requested preference for the hearing location:

____ Charleston ____ Bridgeport ____ Bluefield ____ Wheeling ____ Martinsburg

[To be completed by OTA: ____Request granted ____Request denied]

Certain cases may be eligible for more informal handling as small claim cases. Decisions in small claim cases are final and conclusive and are **NOT** subject to any further administrative or judicial review. A non-lawyer usually represents the State Tax Department in small claim cases.

Unless the West Virginia Office of Tax Appeals determines otherwise, small claim cases are submitted on documents only and without a hearing in person.

A taxpayer may request handling of his or her case as a small claim if the amount in controversy (excluding interest), for any one taxable year, does not exceed $10,000.

I request that my case, eligible for small claim treatment, be handled using small claim procedures; I realize that the law does not allow me to appeal a small claim decision:

____ (check if you request small claim treatment)

[To be completed by OTA: ____ Request granted ____Request denied]

Certain types of cases will be handled as small claim cases, without a request, unless the Office of Tax Appeals determines otherwise. These types of cases include: (1) all cases in which the total amount of the tax assessment or the total amount of the tax refund or credit claim is less than $1,000; (2) all cases involving estimated tax assessments; (3) all business registration tax and corporate license tax assessment or refund matters; (4) all cases involving not the tax itself but only requests for waiver or abatement of additions, penalties, or interest; and (5) cases involving federal tax audit changes.

Within 5 days after a complete and proper petition is timely filed, the West Virginia Office of Tax Appeals will provide a copy of the petition to the State Tax Department. Within 40 days after receiving a copy of such a petition, the State Tax Department will file and serve an answer to the petition.

In a non-small claim case the Petitioner or his or her representative should contact the State Tax Department's legal representative at telephone number (304) 558-5330, to discuss the case. Please wait, however, at least two weeks or so after filing the petition to contact the Division's legal representative, to allow time for a specific legal representative to be assigned and for him or her to become acquainted enough with the case to discuss it intelligently in a preliminary manner.

In a small claim case the Petitioner or his or her representative should contact the part of the State Tax Department that issued the refund claim denial letter or the notice of assessment being paid now under protest, at the telephone number of that part of the State Tax Department set forth in the refund claim denial letter or in the notice of assessment. This call to discuss the small claim case with the non-lawyer employee of the State Tax Department should be made immediately after filing the petition.

The Petitioner and the Petitioner's authorized representative, if any, and any responsible local attorney, must sign and date this petition immediately below the following statement, which they have read and understand:

The Petitioner and any authorized representative of the Petitioner, including any responsible local attorney, affirm that all of the material factual information set forth by them in this petition is true, correct, and complete, based upon the information available to them at this time; the Petitioner and any authorized representative of the Petitioner are aware that any willfully false representation set forth in this petition is a misdemeanor punishable according to law.

_____ _____

Petitioner Date

_____ _____

Petitioner's Authorized Representative (if any) Date

_____ _____

Petitioner's Responsible Local Attorney (if any) Date

FORM 4

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

SUBPOENA/SUBPOENA DUCES TECUM

_____ Petitioner,

v. **Docket No.:**_____

W. Va. State Tax Department, Respondent

TO: [If the list of the persons/entities subpoenaed is too numerous to fit in this area, type "See Attached List" and attach list, titled "Persons/Entities Subpoenaed".]

YOU ARE HEREBY COMMANDED [mark all that apply]

_____ to appear in the Office of Tax Appeals at the place, date and time specified below to

_____ testify in the taking of a deposition in the above-styled case; or

_____ testify in a hearing in the above-styled case.

_____ to produce and permit inspection of and copying of designated books, documents or tangible things in your possession, custody or control, as follows:

[If the number of items is too numerous to fit in this area, type "See Attached List- Production/Inspection" and attach list, titled "Production/Inspection".]

_____ to permit inspection of premises located at place, date and time specified below.

Place of Appearance/Inspection:

_____

_____

_____

Date of Appearance/Inspection:

_____ AM / PM

Time of Appearance/Inspection:

_____ AM / PM

Issued by:

_____

Title _____

Signature: _____

Date Issued: _____

Please type or print the name and office address of person requesting this subpoena

_____

_____

_____

_____

Telephone No: _____

Signature: _____

Bar Identification No: _____
(if applicable)

FORM 5

RETURN OF SERVICE OF

SUBPOENA/SUBPOENA DUECES TECUM

_____ was summoned on _____ at _____ by delivering a copy of this subpoena to him or her, and if a witness for the petitioner, by tendering fees and mileage to him or her pursuant to Section 121-1-164 of the Rules of Practice and Procedure Before the Office of Tax Appeals.

Dated _____ Signed _____

Subscribed and sworn to before me this _____ day of _____, 200__.

_____

Name Title

APPENDIX II.

W. Va. Trial Court Rule 12

12. FILING AND SERVICE BY FACSIMILE TRANSMISSION.

12.01 Applicability.

All courts within the state shall maintain a facsimile machine within the office of the clerk, shall accept the filing of pleadings and other documents, and may send documents by facsimile transmission to the extent expressly provided for in these rules and not in conflict with statutes or other court rules.

12.02 Definitions.

(a) *Courts.* The term "courts" is defined as the supreme court of appeals, circuit courts, and magistrate courts.

(b) *Facsimile Transmission.* The term "facsimile transmission" is defined as the transmission of a document by a system that encodes the document into electronic signals, transmits these electronic signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(c) *Facsimile Transaction.* The term "facsimile transaction" is defined as the facsimile transmission of a document to or from a court.

(d) *Service by Facsimile Transmission.* The term "service by facsimile transmission" is defined as transmission of a motion, notice, or other document to an attorney, attorney-in-fact, or a party under these rules.

(e) *Facsimile Machine.* The term "facsimile machine" is defined as a machine that can send and receive on plain paper a facsimile transmission using the international standard for scanning, coding, and transmitting established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution.

(f) *Fax.* The term "fax" is defined as a facsimile transmission as defined in TCR 12.02(b).

12.03 General provisions.

(a) *Availability of Facsimile Services.* Each circuit clerk shall have a facsimile machine available for court-related business during regular business hours and such additional hours as may be established by the chief judge. Each magistrate clerk shall have a facsimile machine available for court-related business twenty-four (24) hours per day, seven (7) days per week.

(b) *Form and Format.* All documents conveyed via facsimile transmission must conform in form and format to existing standards established by applicable statutes or rules of court. They should be received on, or the receiver shall make any necessary photocopies on, eight and one-half (8 1/2) by eleven (11) inch, twenty (20)-pound alkaline plain paper of archival quality, and satisfy all other requirements of these rules.

(c) *Page Limitation.* No facsimile transmission over twenty (20) pages in length (including the cover sheet) shall be accepted unless prior consent is given by the court or by the clerk of the court.

(d) *Oversized Documents.* Facsimile transmission of, or involving, any original document larger than eight and one-half (8 1/2) by eleven (11) inch is prohibited unless prior consent is given by the court or by the clerk of the court.

(e) *Facsimile Cover Sheet.* The sender must provide his or her or the entity's name, address, telephone number, facsimile number, the document(s) being transmitted by caption and matter, and the number of pages (including the cover sheet), and must provide clear and concise instructions as needed concerning processing.

(f) *Signatures.* (1) Presumption of Authenticity. Any signature appearing on a facsimile copy of a court pleading or other document shall be presumed to be authentic.

(2) Inspection of Originally Signed Document or Certified Copy. Upon demand by the receiver, the sender of a fax shall make available to the receiver for inspection the original physically signed document or, if the court is the sender, a certified copy of the original physically signed document.

(g) *Verification of Receipt.* Court personnel shall verify, either orally or in writing, the receipt of documents filed by facsimile transmission upon proper inquiry by the sender.

(h) *Filing Effective upon Receipt of Transmission.* A facsimile copy of a pleading or other document shall be deemed filed when it is received in its entirety on a clerk's facsimile machine without regard to the hours of operation of the clerk's office. Upon receiving a faxed filing, the clerk of the court shall note on the facsimile copy the filing date, in the same manner as with pleadings or other documents filed by mail or in person.

(i) *Payment of Fees.* (1) Any required filing or other fee shall be paid by mail or in person following a facsimile filing as follows: the required fee, accompanied by a copy of the facsimile filing cover sheet, shall be deposited with the court not later than seven (7) calendar days after the filing by fax.

(2) The clerk of the court may decline to process the pleading or other document until receipt of any required filing fee, and the court shall withhold the entry of judgment pending receipt of fees.

(3) If any required fee is not received by the court within seven (7) calendar days after the filing by fax, the filing shall be voidable and no further notice need be given any party.

(j) *Filing of Original.* The filing of the original shall not be required, unless otherwise ordered by the court or directed by the clerk of the court.

(k) *Retention of Original.* If filing of the original is not required, the sender must retain the original physically signed document in his or her possession or control.

(l) *Photocopying Charges.* The sender shall be responsible for any photocopying charges associated with the processing of any document filed by facsimile transmission.

(m) *Transmission Error.* If there is an error in any facsimile transmission, the clerk shall not accept or note the document as filed until a corrected, acceptable document is received.

(n) *Notice of Transmission Error; Risk of Use of Facsimile Transmission.* If the receiver discovers or suspects a transmission error, the receiver shall notify the sender as soon as possible. The sender bears any risk of using facsimile transmission to convey any document to a court. The potential receiver bears any risk of receiving any document by facsimile transmission from a court.

(o) *Nunc Pro Tunc Filing.* If the attempted facsimile transmission is not accepted as filed with the court because of a transmission error or other deficiency, the sending party may move acceptance nunc pro tunc by filing a written motion with the court. The motion shall be accompanied by the activity report or other documentation in order to

verify the attempted transmission. The court, in the interest of justice, and upon the submission of appropriate documentation, may entertain the motion and hold a hearing in its discretion.

(p) *Facsimile Receipt and Transmission; Fees.* The clerk may send or receive facsimile transmissions involving court-related business. With the exception of transmissions by or for parties authorized to receive the services of the court without cost, the clerk shall charge $2.00 per page transmitted at the request of any person other than a judicial officer or employee.

12.04 Filing and Service of Documents in Civil Actions by Facsimile Transmission.

(a) *Method of Filing.* Except for mental hygiene applications or where otherwise prohibited by law or court rule, a party may file any document in a civil action, other than a complaint or petition, by facsimile transmission to any clerk's office having a facsimile machine. The clerk shall accept the document as filed if the filing and the document comply with these and other applicable rules and statutes.

(b) *Service.* Service of any document in a civil action, other than original process, may be made by facsimile transmission subject to the provisions of these rules, other applicable rules and statutes, and W.Va. R.Civ.P. 5 or Rule 8 of the Rules of Civil Procedure for Magistrate Courts.

(c) *When Service Complete.* Service by fax is complete upon receipt of the entire document by the receiver's facsimile machine.

(d) *Proof of Service.* Where service is made by facsimile transmission, proof of service shall be made by affidavit of the person making service or by certificate of an attorney. Attached to such affidavit or certificate shall be a copy of the sender's facsimile machine transmission record.

12.05 Facsimile Transmission of Domestic Violence Petitions and Protective Orders.

(a) *Petitions.* (1) Verified petitions for protective orders may be filed by fax. If transmission is made to the magistrate court after regular business hours, the on-call magistrate shall be notified before the transmission occurs.

(2) In addition to the information required by TCR 12.03(e), the fax cover sheet accompanying a domestic violence petition for a protective order shall include the telephone number where the petitioner may be reached.

(3) Any action taken by the judge or magistrate on a faxed petition shall be communicated as soon as feasible to the petitioner by return fax or other method.

(b) *Protective Orders.* (1) *Temporary Orders.* A temporary protective order may issue based solely on the representations contained in a verified petition properly filed by fax.

(2) *Distribution to Law-Enforcement Agencies.* Any temporary or final protective order issued pursuant to the provisions of W.Va. Code " 48-2A-1 et seq. may be faxed to appropriate law-enforcement agencies to satisfy the statutory requirements for transmission of such documents by the court. The petition upon which a temporary order is issued shall be faxed to law-enforcement agencies with the temporary protective order.

(3) *Service of Process.* Any temporary or final protective order faxed to law-enforcement agencies shall be valid for their use in making personal service on the respondent named in the order.

APPENDIX III.

Rules 26 through 34 and 36 and 37
West Virginia Rules of Civil Procedure for Trial Courts of Record

Rule 26. General provisions governing discovery.

(a) *Discovery methods.* – Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examination; and requests for admission.

(b) *Discovery scope and limits.* – Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* – Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that:

(A) The discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(B) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(C) The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by

reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial preparation: materials.* – Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) A written statement signed or otherwise adopted or approved by the person making it; or

(B) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(4) (A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may depose any person who has been identified as an expert whose opinions may be presented at trial.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result:

(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and

(ii) With respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) *Protective orders.* – Upon motion by a party or by the person from whom discovery is sought, including a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the court;

(6) That a deposition after being sealed be opened only by order of the court;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be open as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) *Timing and sequence of discovery.* – Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses.* – A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to:

(A) The identity and location of persons having knowledge of discoverable matters, and

(B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(A) The party knows that the response was incorrect when made, or,

(B) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

If supplementation is not made as required by this Rule, the court, upon motion or upon its own initiative, may impose upon the person who failed to make the supplementation an appropriate sanction as provided for under Rule 37.

(f) *Discovery conference.* – At any time after commencement of an action the court may direct the attorneys for the parties to appear before it personally or by telephone for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and the party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes; establishing a plan and schedule for discovery; setting limitations on discovery, if any; and, determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response, or objection, and that to the best of the attorney's or party's knowledge, information, and belief formed after a reasonable inquiry it is:

(1) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate

sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 27. Depositions before action or pending appeal.

(a) *Before action.*

(1) *Petition.* – A person who desires to perpetuate his own testimony or that of another person regarding any matter may file a verified petition in any court wherein a complaint might be filed as to such matter or in any court having general civil jurisdiction in the county where any expected adverse party resides.

The petition shall be entitled in the name of the petitioner and shall show: 1, That the petitioner expects that the petitioner, or the petitioner's personal representative, distributees, heirs, legatees, or devisees will be a party to an action cognizable in any court but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and service.* – The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served in the manner provided in Rule 4(d) for service of process; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor, incompetent, or convict the provisions of Rule 17(c) apply.

(3) *Order and examination.* – If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of deposition.* – If a deposition to perpetuate testimony is taken under these rules, or if, although not so taken, it would be admissible in a federal district court, it may be used in any

action involving the same subject matter subsequently brought in any court of this State, in accordance with the provisions of Rule 32(a).

(b) *Pending appeal.* – If an appeal has been granted from a judgment of any court or before the granting of an appeal if the time for filing a petition for an appeal has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion for leave to take the depositions, upon the same notice and service thereof as if the action were pending. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in further proceedings in the action in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the court.

(c) Perpetuation by action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 28. Persons before whom depositions may be taken.

(a) *Within the United States.* – Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of this State or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31, and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) *In foreign countries.* – Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States or of this State, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely for the reason that it is not a verbatim

transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the State under these rules.

(c) *Disqualification for interest.* – No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) *Depositions for use in foreign jurisdictions.* – Whenever the deposition of any person is to be taken in this State pursuant to the laws of another state or of the United States or of another country for use in proceedings there, any court having general civil jurisdiction in the county wherein the deponent resides or is employed or transacts his business in person may, upon petition, make an order directing issuance of a subpoena as provided in Rule 45, in aid of the taking of the deposition.

Rule 29. Stipulations regarding discovery procedure.

(a) *Deposition procedure.* – Unless the court orders otherwise, the parties may agree that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

(b) *Modification of scheduling order and discovery procedures or limitations.* – Unless the Court orders otherwise, a scheduling order may be modified only as follows:

(1) Time limits set forth in a scheduling order for the joinder of other parties, amendment of pleadings, filing of motions, and completion of discovery, and any date or dates set forth therein for conferences before trial, a final pretrial conference, and for trial may be modified for cause by order of the court.

(2) Subject to paragraph (3), stipulations to modify discovery procedures or limitations will be valid and will be enforced as if established by order of the court, provided the stipulations are in writing, signed by the parties making them or their counsel, timely filed with the clerk of the court, and do not affect the time limits specified in subparagraph (1).

(3) A private agreement to extend discovery beyond the discovery completion date as set in a scheduling order will be respected by the court if the extension does not affect the other time limits specified in subparagraph (1). A discovery dispute which arises from such a private agreement to extend discovery beyond a discovery completion date need not, however, be resolved by the court.

Rule 30. Depositions upon oral examination.

(a) *When depositions may be taken; when leave required.* – After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of examination: General requirements; special notice; method of recordings; production of documents and things; deposition of organization; deposition by telephone.*

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is expected to leave the State and be unavailable for examination in this State unless deposed before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

(3) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(4) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(5) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning to each unit of recorded tape or other recording medium. The appearance or demeanor of the deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(6) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(7) A party may in a notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.

(8) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the state and at the place where the deponent is to answer questions propounded to the deponent.

(c) *Examination and cross-examination; record of examination; oath; objections.* – Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the West Virginia Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(3) of this rule.

(d) *Schedule and duration; motion to terminate or limit examination.*

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rules 26(b)(1) if needed for a fair examination of the deponent or if the deponent to another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(3) At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the circuit court of the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Review by witness; changes; signing.* – If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) *Certification and filing by officer; exhibits; copies; notice of filing.*

(1) The officer shall certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it to the attorney who arranged for the transcript or recording, who shall store in under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them that person may:

(A) Offer copies to be marked for identification and annexed to the depositions and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or

(B) Offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition.

Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless ordered otherwise by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) *Failure to attend or to serve subpoena; expenses.*

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party attorney in attending, including reasonable attorney's fees.

Rule 31. Depositions upon written questions.

(a) *Serving questions; notice.*

(1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(2) A party must obtain leave of court if the person to be examined is confined in prison or if, without the agreement or written stipulation of the parties, the person to be examined has already been deposed in the case under Rule 30.

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Officer to take responses and prepare record.* – A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

(c) *Notice of filing.* – When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

Rule 32. Use of depositions in court proceedings.

(a) *Use of depositions.* – At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the West Virginia Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. A deposition shall not be used against a party if the party, having received fewer than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other parts which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of this State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the West Virginia Rules of Evidence.

(b) *Objections to admissibility.* – Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any

deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Form of presentation.* – Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(d) *Effect of errors and irregularities in depositions.*

(1) *As to notice.* – All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to disqualification of officer.* – bjection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to completion and return of deposition.* – Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Rule 33. Interrogatories to parties.

(a) *Availability.* – Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 40 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b).

Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(b) *Answers and objections.*

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after the service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) *Scope; use at trial.* – Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(d) *Option to produce business records.* – Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* – Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* – The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspections shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) *Persons not parties.* – A person not a party to the action may be compelled to produce documents and things or to submit to an inspection provided in Rules 45.

Rule 36. Requests for admission.

(a) *Request for admission.* – A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that the party has made reasonable inquiry and that the information known or readily obtainable by the party's is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) *Effect of admission.* – Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining that party's action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

Rule 37. Failure to cooperate in discovery; sanctions.

(a) *Motion for order compelling discovery.* – A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* – An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the circuit court of the county where the deposition is being taken. An application for an order to a person who is not a party shall be made to the circuit court of the county where the discovery is being, or is to be, taken.

(2) *Motion.* – If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or action without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or incomplete answer or response.* – For purposes of this subdivision, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

(4) *Expenses and sanctions.*

(A) If the motion is granted, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's answer, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.*

(1) *Sanctions by court where deposition is taken.* – If a deponent fails to be sworn or to answer a question after being directed to do so by the circuit court of the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* – If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to supplement as provided for under Rule 26(e), or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others are the following:

(A) An order that the matters regarding which the order was made 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;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this paragraph, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* - If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* - If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under paragarphs (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) *Failure to participate in the framing of a discovery plan.* – If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Form of presentation.* – Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

(d) *Effect of errors and irregularities in depositions.*

(1) *As to notice.* – All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to disqualification of officer.* – Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to completion and return of deposition.* – Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RESPONSE TO COMMENTS RECEIVED ON PROPOSED RULES OF PRACTICE AND PROCEDURE BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

Comment # 1: The West Virginia Society of Certified Public Accountants, through its Committee on State and Local Taxes, and the West Virginia [Registered] Public Accountants Association, objected to certain portions of section 32 of the Rule, involving the unauthorized practice of law in representing a taxpayer before the West Virginia Office of Tax Appeals.

Response: The proposed language on this point has been left intact, due primarily to the positive comments received on this point from the Unlawful Practice Committee of the West Virginia State Bar, an arm of the West Virginia Supreme Court of Appeals. The latter has generally defined the practice of law in this State, including the practice of law before executive or administrative agencies. It has not been alleged that any federal agency has exercised any relevant authority to override the definition provided by the West Virginia Supreme Court of Appeals as to what constitutes the practice of law and the manner of practicing law before a West Virginia state government administrative tribunal. In any event, section 32 of the proposed rule [section 17 of the adopted rule] was not intended in any way to disparage the established competency of certified or registered public accountants as to many aspects of state tax work. On the other hand, the Office of Tax Appeals must be very careful not to run afoul of the provisions of the West Virginia Supreme Court of Appeals by condoning the unlawful practice of law before OTA. Certified public accountants should also be careful not to violate, unintentionally, their applicable professional standards with respect to this subject.

The Society's comment on this point also erroneously states that the Office of Tax Appeals remains a division of the State Tax Division for all functions other than issuing decisions. The Office of Tax Appeals is completely separate from the State Tax Division, for all purposes, and is part of the larger, umbrella agency known as the Department of Tax and Revenue for budgetary (and other centralized administrative) purposes only. See W. Va. Code §§ 11-10A-1 & -3 [2002].

Comment # 2: The West Virginia Society of Certified Public Accountants and the West Virginia State Tax Division objected to some of the relatively short timeframes for some of the prehearing procedures, such as discovery.

Response: Most of the timeframes for prehearing procedures have been left intact, due primarily to the fact that the evidentiary hearing will be held in most regular cases involving discovery, within 180, not 90, days, after the petition is filed with the Office of Tax Appeals, in light of the general hearing continuance policy set forth in section 136 of the proposed rule [section 57 of the adopted rule].

Comment # 3: The West Virginia Society of Certified Public Accountants and, to a somewhat lesser extent, the West Virginia State Tax Division asserted that some of the procedures, especially some of the prehearing procedures, result in a more expensive and more complicated process than the prior process for administrative litigation of West Virginia state tax matters.

Response: Most of the procedures have been left intact, as it is believed that the availability of more prehearing procedures, for example -- not all of which are required in every case -- will result in many more state tax matters being resolved prior to the evidentiary hearing, saving time and expense overall, compared with the prior practice. It is also believed that the availability of more prehearing procedures, such as required counsel and prehearing conferences and usually required stipulations, will result in the narrowing of issues and curtailing surprise, both of which improve the quality of the evidentiary hearing for the parties.

On the other hand, a few of the Comments on this point, have been adopted, at least to a certain extent. For example, section 144 of the proposed rule, on hearing disclosure memoranda, has been deleted, as covered sufficiently by subsection 120.7 of the proposed rule [subsection 49.7 of the adopted rule], on the ALJ's order summarizing the prehearing conference. Similarly, for example, proposed rule sections 146 (stipulations), and 110 (bill of particulars) and 112 (requests for admissions), have been deleted as covered sufficiently by proposed rule sections 114 (stipulations, as simplified), and 100 (general discovery) [sections 47 and 46 of the adopted rule], respectively. Also, the formal requirements for papers in general and for briefs, set forth, respectively, in proposed rule sections 28 and 170 [sections 15 and 71 of the adopted rule], have been relaxed somewhat.

Comment # 4: The West Virginia Society of Certified Public Accountants criticized certain aspects of section 232, on mediation. The main thrust of the criticism is that other alternative dispute resolution mechanisms are better and should reside with the State Tax Division, not with the Office of Tax Appeals. The Society also encourages the use of certified public accountants as mediators.

Response: This section has been left intact. Mediation is not intended to displace the alternative dispute resolution mechanisms established by the State Tax Division in a completely separate set of rules. See W. Va. Code § 11-10-23 [2002]. Instead, these Rules before the Office of Tax Appeals intend mediation to be available as an optional method of resolving a matter that is already before OTA. Section 232 of the proposed rule [section 89 of the adopted rule] already authorizes the parties to select a mediator who is not on the State Bar's list, and this person could be a certified public accountant.

Comment # 5: The West Virginia Society of Certified Public Accountants claimed that several parts of this procedural Rule are unlawful substantive pronouncements, particularly those parts that touch areas covered by the State Freedom of Information Act, such as providing for charges for copies of decisions and for non-publication of small claim decisions.

Response: These parts of the Rule have been left virtually intact. It is believed that the claims on this point are without merit. For example, the matters addressed are procedural, not substantive, matters and do not conflict with the governing act, the OTA Act.

On the other hand, language has been added to subsection 50.3 of the proposed rule [subsection 25.3 of the adopted rule] to clarify that West Virginia law overrides any conflicting choice of law with respect to the capacity of an out-of-state fiduciary (a procedural matter). Similarly, language has been added to the beginning of section 20 of the proposed rule [section

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11 of the adopted rule] to clarify that, for example, bingo and charitable raffle license matters are open to the public.

Comment # 6: A former State Tax Commissioner and current state tax practitioner criticized the requirement of the Rule for the taxpayer-petitioner to state specific objections to the State Tax Division's actions, as the notices of tax assessment or tax refund claim denial letters usually do not contain sufficiently specific reasons for the assessment or refund denial. This person also suggested an optional, hybrid, small-claim- like procedure (but with right of appeal to courts) for controversies involving less than $50,000 total but in excess of $10,000 per year.

Response: Paragraph "h." of subdivision 40.3.3 of the proposed rule [subdivision 21.3.3.h of the adopted rule] has been changed to require specificity in the petition, "as much as possible." Likewise, this change has been made to the forms for petitions for reassessment and for refund, set forth as Forms 2 and 3 in Appendix I to the Rule.

On the other hand, it is believed that no statutory authority exists for the suggested additional, hybrid, small-claim-like procedure for certain cases.

Comment # 7: Most of the few persons submitting comments also referred to the several cross-reference and clerical errors in the Proposed Rule (which was filed without in-depth proofreading, in order to facilitate review and comments sooner).

Response: These have been corrected. For example, only one copy of a petition is usually required (never two) (as before, only an original is needed if the petition is filed by fax or electronically) and erroneous references to "clerk" and "executive secretary" have been changed to "executive director." Other examples include: Filings of papers with OTA are clarified to be with the executive director always (not with the Chief ALJ in some cases), and many of the references to actions by OTA in general are clarified by referring specifically to actions by an administrative law judge (not, implicitly, by the support staff). It is also noted that the finalized Rule has a valuable index.

Note: Beginning on the next page is a chart that lists each section of the proposed rule and its disposition in the adopted rule.

COMPARISON OF TABLE OF CONTENTS for PROPOSED OTA RULE WITH TABLE OF CONTENTS FOR THE ADOPTED OTA PROCEDURAL RULE

Proposed	Adopted	Subject
§ 121-1-1.	121-1-1.	General.
§ 121-1-2.	121-1-2.	Definitions.
§ 121-1-4.	121-1-3.	Name of office, location and business hours.
§ 121-1-6.	121-1-4.	Jurisdiction of office of tax appeals
§ 121-1-8.	121-1-5.	Timely filing.
§ 121-1-10.	121-1-6.	Computation of time.
§ 121-1-12.	121-1-7.	West Virginia legal holidays.
§ 121-1-14.	121-1-8.	Enlargement or reduction of time.
§ 121-1-16.	121-1-9.	Office records.
§ 121-1-18.	121-1-10.	Confidentiality of records and information.
§ 121-1-20.	121-1-11.	Proceedings not open to public.
§ 121-1-22.	121-1-12.	Seal; authenticating records; judicial notice.
§ 121-1-24.	121-1-13.	Payment of fees or charges.
§ 121-1-26.	121-1-14.	Disability of administrative law judge.
§ 121-1-28.	121-1-15.	Form and style of papers.
§ 121-1-30.	121-1-16.	Docketing of cases.
§ 121-1-32.	121-1-17.	Appearances and representation of parties.
§ 121-1-34.	121-1-18.	Encouraged resolution of controversies by the parties.
§ 121-1-36.	121-1-19.	Counsel conference.
§ 121-1-38.	121-1-20.	Ex parte communications.
§ 121-1-40.	121-1-21.	Commencement of proceedings.

§ 121-1-42.	Deleted	Petitions.
§ 121-1-44.	121-1-22.	Filing of petition.
§ 121-1-46.	121-1-23.	Special rule for appeal of jeopardy assessment.
§ 121-1-48.	121-1-24.	Service of papers.
§ 121-1-50.	121-1-25.	Proper parties; capacity.
§ 121-1-52.	121-1-26.	Processing of filed petition.
§ 121-1-54.	121-1-27.	Scheduling of hearing.
§ 121-1-56 through 121-1-58	[Reserved]	Deleted.
§ 121-1-60.	121-1-28.	General rules of pleading.
§ 121-1-62.	121-1-29.	Form of pleading.
§ 121-1-64.	121-1-30.	Signing of pleadings.
§ 121-1-66.	121-1-31.	Answer.
§ 121-1-68.	121-1-32.	Reply.
§ 121-1-70.	Deleted	Joinder of issues.
§ 121-1-72.	Deleted	Amendment of pleadings.
§ 121-1-74.	121-1-33.	Pleading special matters.
§ 121-1-76.	121-1-34.	Defenses and objections made by pleading or motion.
§ 121-1-78.	121-1-35.	Amended and supplemental pleadings.
§ 121-1-80.	121-1-36.	Motions.
§ 121-1-82.	121-1-37.	Motion for more definite statement.
§ 121-1-84.	121-1-38.	Motion to strike.
§ 121-1-86.	121-1-39.	Motion to dismiss
§ 121-1-88.	121-1-40.	Motions – timely filing and joinder of motions.

§ 121-1-90.	121-1-41.	Parties.
§ 121-1-92.	121-1-42.	Permissive joinder of parties.
§ 121-1-94.	121-1-43.	Misjoinder of parties.
§ 121-1-96.	121-1-44.	Intervention.
§ 121-1-98.	121-1-45.	Substitution of parties; change or correction in name.
§ 121-1-100.	121-1-46.	Depositions and discovery.
§121-1-110.	Deleted	Bill of particulars.
§121-1-112.	Deleted	Request for admissions.
§ 121-1-114.	121-1-47.	Stipulations for evidentiary hearing.
§ 121-1-116.	121-1-48.	Cases consolidated for hearing.
§ 121-1-118.	[Reserved]	Deleted
§ 121-1-120.	121-1-49.	Prehearing conference.
§ 121-1-122.	121-1-50.	Motion to dismiss.
§ 121-1-124.	121-1-51.	Disposition on the pleadings.
§ 121-1-126.	121-1-52.	Summary judgment.
§ 121-1-128.	121-1-53.	Submission without evidentiary hearing.
§ 121-1-130.	121-1-54.	Default and dismissal.
§ 121-1-132.	121-1-55.	Motions and other matters.
§ 121-1-134.	121-1-56.	Notice of hearing.
§ 121-1-136.	121-1-57.	Continuances.
§ 121-1-138	[Reserved]	Deleted
§ 121-1-140.	121-1-58.	Place of evidentiary hearing.
§ 121-1-142.	121-1-59.	Proceedings conducted by videoconferencing.

§ 121-1-144.	Deleted	Hearing disclosure memorandum.
§ 121-1-146.	Deleted.	Mandatory stipulations for hearing, except small claims.
§ 121-1-148.	121-1-60.	Consolidation; separate evidentiary hearings.
§ 121-1-150.	121-1-61.	Evidentiary hearings in cases, other than small claim cases.
§ 121-1-152.	121-1-62.	Conduct of hearing.
§ 121-1-154.	121-1-63.	Burden of proof.
§ 121-1-156.	121-1-64.	Evidence.
§ 121-1-158.	121-1-65.	Exceptions unnecessary.
§ 121-1-160.	121-1-66.	Exclusion of proposed witnesses from hearing room until called to testify.
§ 121-1-162.	121-1-67.	Determination of foreign law.
§ 121-1-164.	121-1-68.	Subpoenas for persons, papers or other tangible things.
§ 121-1-166.	121-1-69.	Failure to appear or to adduce evidence.
§ 121-1-168.	121-1-70.	Record of proceedings.
§ 121-1-170.	121-1-71.	Legal briefs.
§ 121-1-172 through 121-1-178 [Reserved.]		Deleted
§ 121-1-180.	121-1-72.	Decisions of the office of tax appeals in cases, except small claim cases.
§ 121-1-182.	121-1-73.	Computation by parties for entry of decision.
§ 121-1-184.	121-1-74.	Effect of decision or other final order of office of tax appeals.
§ 121-1-186.	121-1-75.	Publication of administrative decisions, except small claim decisions.
§ 121-1-188	[Reserved.]	Deleted
§ 121-1-190.	121-1-76.	Harmless error.

§ 121-1-192.	121-1-77.	Motion to correct clerical or computational mistakes.
§ 121-1-194.	121-1-78.	Motion to reopen record.
§ 121-1-196.	121-1-79.	Motion for reconsideration of findings or opinion.
§ 121-1-198.	121-1-80.	Motion to vacate decision and hold a new hearing.
§ 121-1-200.	121-1-81.	No joinder of motions under sections [~~92, 194, 196 and 198~~] 75, 76 and 77.
§ 121-1-210.	121-1-82.	Review of office of tax appeals decisions and orders.
§ 121-1-212.	121-1-83.	Appeal taken by filing petition for appeal.
§ 121-1-214.	121-1-84.	Appeal bond.
§ 121-1-216.	121-1-85.	Proceeding in circuit court.
§ 121-1-218.	121-1-86.	Preparation of the record on appeal.
§ 121-1-220.	121-1-87.	Appeals from interlocutory orders.
§ 121-1-224 through 121-1-228 [Reserved.]		Deleted
§ 121-1-230.	121-1-88.	Procedures for mediation.
§ 121-1-232.	121-1-89.	Mediation defined.
§ 121-1-234.	121-1-90.	Selection of cases for mediation.
§ 121-1-236.	121-1-91.	Listing of mediators.
§ 121-1-238.	121-1-92.	Selection of mediator.
§ 121-1-240.	121-1-93.	Compensation of mediator.
§ 121-1-242.	121-1-94.	Mediator disqualification.
§ 121-1-244.	121-1-95.	Provision of preliminary information to the mediator.

§ 121-1-246.	121-1-96	Time frames for conduct of mediation.
§ 121-1-248.	121-1-97.	Appearances; sanctions.
§ 121-1-250.	121-1-98.	Participation.
§ 121-1-252.	121-1-99.	Confidentiality of mediation process.
§ 121-1-254.	121-1-100.	Immunity.
§ 121-1-256.	121-1-101.	Enforceability of settlement agreement.
§ 121-1-258.	121-1-102.	Report of mediator.
§ 121-1-260.	Deleted	General.
§ 121-1-262.	Deleted	Commencement of action for review of failure to abate interest, additions to tax or penalty.
§ 121-1-264.	Deleted	Other pleadings.
§ 121-1-266.	Deleted	Joinder of issue in action for review of failure to abate.
§ 121-1-268.	Deleted	Notice of date, time and place of evidentiary hearing.
	121-1-103 to 121-1-109 [Reserved]	
§ 121-1-270.	121-1-110.	Small claim cases.