

ATTACHMENT 3: WEST VIRGINIA RULE OF CIVIL PROCEDURE 4

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

RULE 3. COMMENCEMENT OF ACTION

(a) **Complaint.** A civil action is commenced by filing a complaint with the court.

(b) **Civil Case Information Statement.** Every complaint shall be accompanied by a completed civil case information statement in the form prescribed by the Supreme Court of Appeals.

(c) **Divorce Complaints.** Every divorce complaint involving spousal support, child support, child custody, or child visitation shall be accompanied by an application for services pursuant to Title IV-D of the Social Security Act¹ and no hearing shall be conducted, except upon motion for emergency temporary relief, until an application for services pursuant to Title IV-D of the Social Security Act has been filed.

[Effective July 1, 1960; amended effective July 1, 1978; July 1, 1992; September 1, 1994; April 6, 1998.]

¹ 42 U.S.C.A. § 651 et seq.

RULE 4. SUMMONS

(a) **Form.** The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

(b) **Issuance.** Upon the filing of the complaint, the clerk shall forthwith issue a summons to be served as directed by the plaintiff. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

(c) Service With Complaint; by Whom Made.

(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for directing the clerk in the manner of service of the summons and complaint within the time allowed under subdivision (k).

(2) Service may be effected by any person who is not a party and who is at least 18 years of age.

(3) At the request of the plaintiff and upon payment of the applicable fees and costs of service, the clerk shall:

(A) Deliver the summons and complaint to the sheriff for service as directed by the plaintiff; or

(B) Make service by either certified mail or by first class mail as directed by plaintiff; or

(C) Forward a copy of the summons and complaint to the Secretary of State, as statutory attorney-in-fact, for service as specified by any applicable statute.

(d) **Manner of Service.** Personal or substitute service shall be made in the following manner:

(1) **Individuals.** Service upon an individual other than an infant, incompetent person, or convict may be made by:

(A) Delivering a copy of the summons and complaint to the individual personally; or

(B) Delivering a copy of the summons and complaint at the individual's dwelling place or usual place of abode to a member of the individual's family who is above the age of sixteen (16) years and by advising such person of the purport of the summons and complaint; or

(C) Delivering a copy of the summons and complaint to an agent or attorney-in-fact authorized by appointment or statute to receive or accept service of the summons and complaint in the individual's behalf; or

(D) The clerk sending a copy of the summons and complaint to the individual to be served by certified mail, return receipt requested, and delivery restricted to the addressee; or

(E) The clerk sending a copy of the summons and complaint by first class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 14 and a return envelope, postage prepaid, addressed to the clerk.

The plaintiff shall furnish the person making service with such copies of the complaint or order as are necessary and shall advance the costs of service. For service by certified mail, the plaintiff shall pay to the clerk a fee of twenty dollars for each complaint to be served. For service by first class mail, the plaintiff shall pay to the clerk a fee of five dollars for each complaint to be served.

Service pursuant to subdivision (d)(1)(D) shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a return envelope showing refusal of the registered or certified mail by the defendant. If delivery of the summons and complaint pursuant to subdivision (d)(1)(D) is refused, the clerk, promptly upon receipt of the notice of such refusal, shall mail to the defendant, by first class mail, postage prepaid, a copy of the summons and complaint and a notice that despite such refusal, the case will proceed and that judgment by default will be rendered against the defendant unless the defendant appears to defend the suit. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by or delivery was refused by an unauthorized person. The notice and acknowledgment of receipt of the summons and complaint

pursuant to subdivision (d)(1)(E) shall be executed in the manner prescribed on Form 14. Unless good cause is shown for failure to complete and return the notice and acknowledgment of receipt of summons and complaint pursuant to subdivision (d)(1)(E) within twenty (20) days after mailing, the court may order the payment of cost of personal service by the person served. Service pursuant to subdivision (d)(1)(E) shall not be the basis for entry of default or a judgment by default unless the record contains a notice and acknowledgment of receipt of the summons and complaint. If no acknowledgment of service pursuant to subdivision (d)(1)(E) is received by the clerk within twenty (20) days after the date of mailing, service of such summons and complaint shall be made under subdivisions (d)(1)(A), (B), (C), or (D).

(2) *Infants and Incompetents Under 14 Years.* Upon an infant or incompetent younger than 14 years of age, by delivering a copy of the summons and complaint to the infant's or incompetent's guardian or conservator resident in the State; or, if there be no such guardian or conservator, then to either the infant's or incompetent's father or mother if they be found. If there is no such guardian or conservator and if the father or mother cannot be found, service of the summons and complaint shall be made upon a guardian ad litem appointed under Rule 17(c). But if any of the persons upon whom service is directed to be made by this paragraph is a plaintiff, then service shall be upon the person who stands first in the order named in this paragraph who is not a plaintiff.

(3) *Infants and Incompetents 14 Years or Older.* Upon an infant or incompetent 14 years of age or older, by making service as provided in paragraph (2) above, and in addition by making service upon the infant or incompetent as provided in paragraph (1) above.

(4) *Convicts.* Upon a person confined in the penitentiary of this or any other state, or of the United States, by delivering a copy of the summons and complaint to that person's committee, guardian, or like fiduciary resident in the State; or, if there be no such committee, guardian, or like fiduciary, or if the committee, guardian, or like fiduciary is a plaintiff, service of process shall be made upon a guardian ad litem appointed under Rule 17(c).

(5) *Domestic Private Corporations.* Upon a domestic private corporation,

(A) by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to an officer, director, or trustee thereof; or, if no such officer, director, or trustee be found, by delivering a copy thereof to any agent of the corporation including, in the case of a railroad company, a depot or station agent in the actual employment of the company; but excluding, in the case of an insurance company, a local or soliciting agent; or

(B) by delivering or mailing in accordance with paragraph (1) above a copy thereof to any agent or

attorney in fact authorized by appointment or by statute to receive or accept service in its behalf.

(6) *Domestic Public Corporations.*

(A) Upon a city, town, or village, by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to its mayor, city manager, recorder, clerk, treasurer, or any member of its council or board of commissioners;

(B) Upon a county commission of any county or other tribunal created to transact county business, by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any commissioner or the clerk thereof or, if they be absent, to the prosecuting attorney of the county;

(C) Upon a board of education, by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to the president or any member thereof or, if they be absent, to the prosecuting attorney of the county;

(D) Upon any other domestic public corporation, (i) by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any officer, director, or governor thereof, or (ii) by delivering or mailing in accordance with paragraph (1) above a copy thereof to an agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf.

(7) *Foreign Corporations and Business Trusts Qualified to Do Business.* Upon a foreign corporation, including a business trust, which has qualified to do business in the State, by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint as provided in Rule 4(d)(5).

(8) *Foreign Corporations and Business Trusts Not Qualified to Do Business.* Upon a foreign corporation, including a business trust, which has not qualified to do business in the State,

(A) by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any officer, director, trustee, or agent of such corporation; or

(B) by delivering or mailing in accordance with paragraph (1) above copies thereof to any agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf.

(9) *Unincorporated Associations.* Upon an unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to any officer, director, or governor thereof, or by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service in its behalf; or, if no such officer, director, governor, or appointed or statutory agent or attorney in fact be found, then by delivering or mailing in accordance with paragraph (1) above a copy of the summons and complaint to any member of such association and

publishing notice of the pendency of such action once a week for two successive weeks in a newspaper of general circulation in the county wherein such action is pending. Proof of publication of such notice is made by filing the publisher's certificate of publication with the court.

(e) Constructive Service.

(1) *Service by Publication.* If the plaintiff files with the court an affidavit:

(A) That the defendant is a foreign corporation or business trust for which no officer, director, trustee, agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had; or

(B) That the defendant is a nonresident of the State for whom no agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had; or

(C) That the plaintiff has used due diligence to ascertain the residence or whereabouts of the defendant, without effect; or

(D) That process, delivered to the sheriff of the county in which the defendant resides or is, has twice been delivered to such officer and has been returned without being executed; or

(E) That there are or may be persons, other than those named in the complaint as plaintiff and defendant, interested in the subject matter of the action, whose names are unknown to the plaintiff and who are made defendants by the general description of unknown defendants;

then the clerk shall enter an order of publication against such named and unknown defendants. Every order of publication shall state the title of the action; the object thereof; the name and address of the plaintiff's attorney, if any; that a copy of the complaint may be obtained from the clerk; and that each named and unknown defendant must appear and defend on or before a date set forth in the order, which shall be not fewer than 30 days after the first publication thereof; otherwise, that judgment by default will be rendered against the defendants at any time thereafter. Every such order of publication shall be published once a week for two successive weeks (or for such period as may be prescribed by statute, whichever period is longer) in a newspaper of general circulation in the county wherein such action is pending. Proof of service by publication is made by filing the publisher's certificate of publication with the court.

(2) *Service by Mailing.* When plaintiff knows the residence of a defendant upon whom service has been unsuccessfully attempted as described in Rule 4(e)(1)(D), or when plaintiff knows the residence of a nonresident defendant or the principal office of a nonresident defendant foreign corporation or business trust for which no officer, director, trustee, agent, or appointed or statutory agent or attorney in fact is found in the State upon whom service may be had, plaintiff shall obtain constructive service of the summons and

complaint upon such defendant by the method set forth in Rule 4(d)(1)(D). The summons in such instance shall notify the defendant that the defendant must appear and defend within thirty days of the date of mailing pursuant to Rule 4(d)(1)(D); otherwise, that judgment by default will be rendered against the defendant at any time thereafter. However, service pursuant to Rule 4(d)(1)(D) shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a return envelope showing refusal of the certified mail by the defendant. If delivery of the summons and complaint sent by certified mail is refused, the clerk, promptly upon notice of such refusal, shall mail to the defendant, first class mail, postage prepaid, a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against defendant unless defendant appears to defend the suit. If plaintiff is unable to obtain service of the summons and complaint upon such defendant by use of the method set forth in Rule 4(d)(1)(D), then, upon affidavit to such effect filed with the court, the clerk shall issue an order of publication, and the procedures described in subdivision (e)(1) shall be followed to effectuate constructive service.

(f) *Personal Service Outside State.* Personal service of a copy of the summons and complaint may be made outside of this State on any defendant. If any such defendant be then a resident of this State and if the plaintiff shall during the pendency of the action file with the court an affidavit setting forth facts showing that the defendant is such a resident, such service shall have the same effect as personal service within this State and within the county of the defendant's residence; otherwise, such service shall have the same effect as constructive service. In either case, the summons shall notify the defendant that the defendant must appear and defend within 30 days after service, otherwise judgment by default will be rendered against the defendant at any time thereafter.

(g) *Summons; Service Thereof in Addition to Constructive Service.* The plaintiff may, at any time before judgment, have a copy of the summons and complaint served on a defendant in the manner provided by subdivisions (d) or (f) of this rule, although constructive service under subdivision (e) of this rule has been made. After such service under subdivision (d) of this rule, the action shall proceed as in other cases of personal or substituted service within the State; and after such service under subdivision (f) of this rule, the action shall proceed as in other cases of personal or constructive service.

(h) *Process Part of Record.* Summonses, complaints, proofs of service and returns endorsed thereon, all orders and notices served or published, all proofs of service and certificates of publication, and all other papers filed relating to such process, orders, and notices, are a part of the record of an action for all purposes.

(i) **Proof of Service or Publication.** The person serving the process or order or publishing a notice or order shall make proof of service or publication to the court promptly and in any event within the time during which the person served must respond to the process, notice, or order. If service is made by a person other than the sheriff or clerk, that person shall make proof thereof by affidavit. Failure to make proof of service or publication within the time required does not affect the validity of the service of the process, notice, or order.

(j) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process, notice, or order, or proof of service or publication thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process, notice, or order issued or was entered.

(k) **Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. [Effective July 1, 1960; amended effective July 1, 1978; October 1, 1988; January 1, 1990; July 1, 1990; January 1, 1995; April 6, 1998; October 26, 1998; January 24, 2007, eff. July 1, 2007.]

RULE 4.1 SERVICE OF OTHER PROCESS

(a) **Generally.** Whenever an order of court provides for service of a rule, or of an order in lieu of summons or a rule, upon a party, service shall be made in the manner provided in Rule 4(d), unless the order prescribes a different mode of service. Rule 45 governs the service of subpoenas.

(b) **Process Part of Record.** Original, mesne, and final writs and process of every nature, and proofs of service and returns endorsed thereon, and all orders and notices served or published, and all proofs of service and certificates of publication and all other papers filed in relation to such process, orders, and notices, are a part of the record of an action for all purposes.

[Adopted effective April 6, 1998.]

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) **Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every

written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. For purposes of this rule, guardians ad litem are considered parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) **Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party; or by mailing it to the attorney or party at the attorney's or party's last-known address or, if no address is known, by leaving it with the clerk of the court; or by facsimile transmission made to the attorney or party pursuant to the West Virginia Supreme Court of Appeals Rules for Filing and Service by Facsimile Transmission. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some member of the person's family above the age of 16 years. Service by mail is complete upon mailing.

(c) **Same: Numerous Defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing: Certificate of Service.**

(1) All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service.

(2) Unless filing is required by the court on motion or upon its own initiative, depositions, interrogatories, requests for admissions, requests for production and entry, and answers and responses thereto shall not be filed. Unless required to be filed for issuance of a subpoena for a deposition, a notice of deposition need not be filed. Certificates of service of discovery materials shall be filed.

(3) Unless otherwise stipulated or ordered, the party taking the deposition or obtaining any material through discovery is responsible for its custody, preservation, and delivery to the court if needed or ordered. Such