



**The New Playbook:
The Revised Rules of Civil Procedure and
What Practicing Attorneys Need to Know**

**THE WEST VIRGINIA CIVIL RULES
COMMITTEE**

Marc E. Williams

Amanda J. Taylor

C. Casey Forbes

Rules of Civil Procedure

- Federal Rules of Civil Procedure first adopted in 1937
- West Virginia Rules of Civil Procedure first adopted in 1959

The West Virginia Rules of Civil Procedure govern practice and proceedings (non-substantive) in most civil litigation throughout the State.

Prior to the Rules of Civil Procedure, courts and parties relied on common law and local practice. State-wide rules provided consistency, reliability, and understanding in the process.



“Now! *That* should clear up a few things around here!”

RCP – Amendment History

Since adoption in 1959, more than a dozen orders have been entered amending the West Virginia Rules of Civil Procedure:

- November 6, 1967
- June 1, 1978
- June 2, 1988
- June 22, 1988
- November 29, 1989
- January 1, 1990
- June 24, 1992
- July 20, 1994
- October 26, 1994
- December 6, 1994
- **February 19, 1998**
- October 26, 1998
- January 24, 2007
- March 8, 2017
- January 31, 2024

The last substantial update to the RCP was by order entered on February 19, 1998.

The West Virginia Civil Rules Committee

In **2013**, a six-member committee was appointed to review and propose revisions to the Rules of Civil Procedure based on updates to case law, federal rules, advancements in technology, and other considerations. Members were Prof. Charles DiSalvo, S. Douglas Adkins, Esq., E. Kay Fuller, Esq., Deborah L. McHenry, Esq., Louis J. Palmer, Esq., Jr., and Michael B. Victorson, Esq. In **2014**, that committee proposed substantial amendments, but the amendments were not adopted at that time.

In **2019**, then-Chief Justice Beth Walker renewed the West Virginia Civil Rules Committee—appointing a committee of five attorneys from both sides of the civil bar and one circuit court judge—to continue that work. The 2019 committee considered a variety of factors in their proposals, including the prior committee’s submission.



The West Virginia Civil Rules Committee



Judge Joseph Reeder (chair)



Anthony Majestro



Tom Hurney



Zak Ritchie



Amanda Taylor



Marc Williams

Committee's Methodology

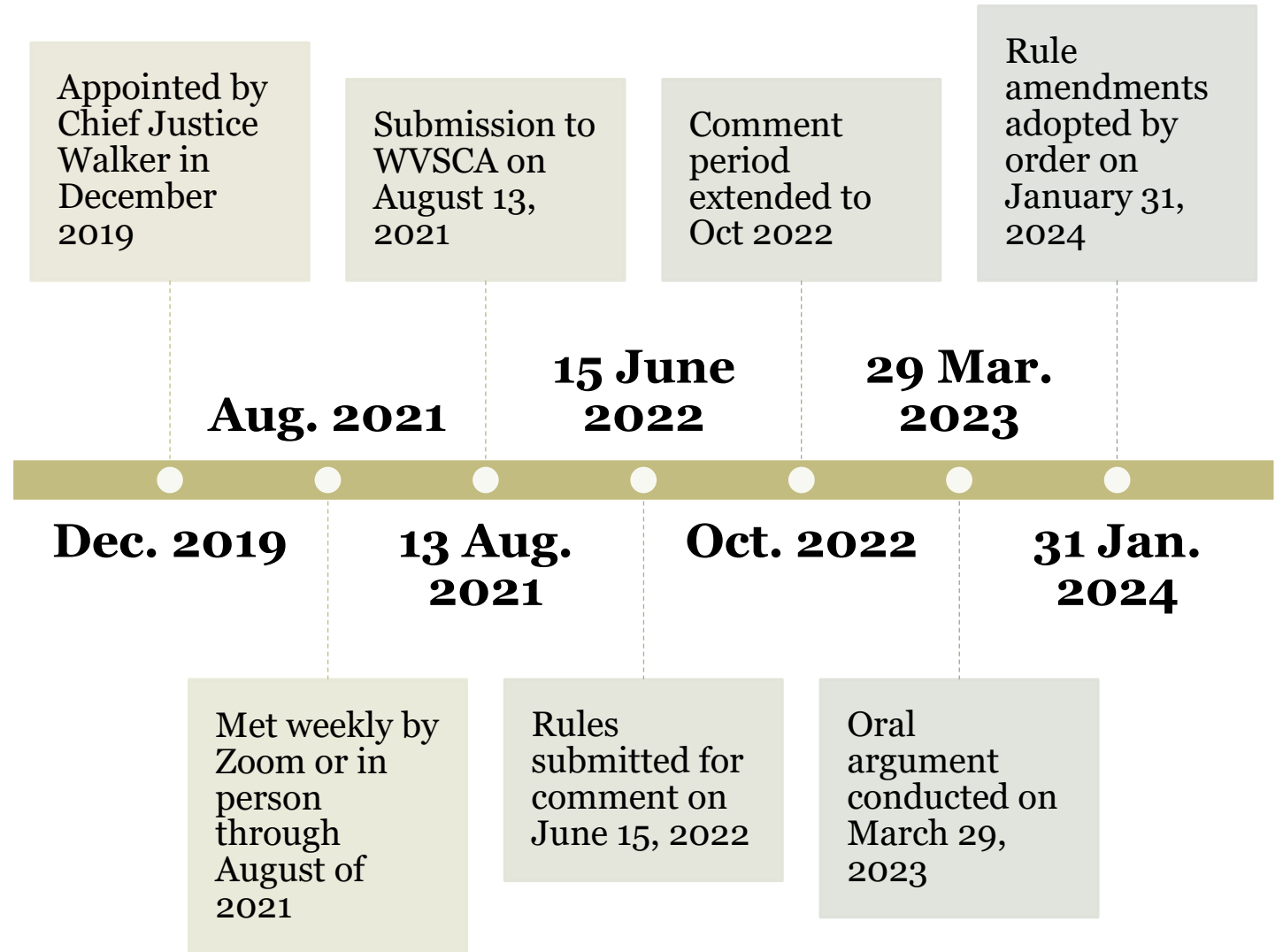
- § Review every rule in the context of the mandate of Rule 1.
- § Use 2014 Committee Report as a reference
- § Try to maintain consistency between state and federal rules, when possible.
- § Maintain aspects of state court practice when appropriate.
- § Took into account all of the constituent groups.
- § All committee recommendations had to be unanimous.

I. Scope, Purpose and Construction

Rule 1. Scope and purpose of rules.

These rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, with the qualifications and exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Committee Timeline



January 31, 2024, Order

- 164-page order adopting amendments to the West Virginia Rules of Civil Procedure.
- Two concurring/dissenting opinions
- Strike and Insert Version.
- On Court's website: www.courtswv.gov
- Effective January 1, 2025.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on January 31, 2024, the following order was made and entered:

Re: Adoption of Amendments to the West Virginia Rules of Civil Procedure, No. 21-Rules-12

In 2019, the Court established a committee to review and revise the West Virginia Rules of Civil Procedure ("the Committee"). The Committee was composed of the following members: The Honorable Joseph K. Reeder, Judge of the Circuit Court of Putnam County, Marc E. Williams, Esq., Thomas J. Hurney, Jr., Esq., Anthony J. Majestro, Esq., J. Zak Ritchie, Esq., and Amanda J. Taylor, Esq. On August 13, 2021, the Committee submitted proposed amendments to the Court for consideration.

On June 15, 2022, the Court published the Committee's proposed amendments for public comment for a period of ninety days, with an extension of thirty days granted at the request of the West Virginia Association for Justice. The Court received nineteen public comments from interested individuals and organizations.

On March 29, 2023, the Court held oral argument in this matter. Individuals and organizations who filed comments on certain proposed amendments, as well as members of the Committee, were given the opportunity to appear and present their positions to the Court.

Having carefully reviewed and considered the Committee's proposed amendments, the comments received from the public, and the positions presented at oral argument, the Court adopts the following amendments to the West Virginia Rules of Civil Procedure. Justice Hutchison and Justice Wooton concur, in part, and dissent, in part, from the issuance of this order, for the reasons set forth in their separate statements appended hereto and made a part hereof.

The effective date of these amendments is January 1, 2025.

Insertions are indicated by underscoring and deletions by strikethrough.

West Virginia Rules of Civil Procedure

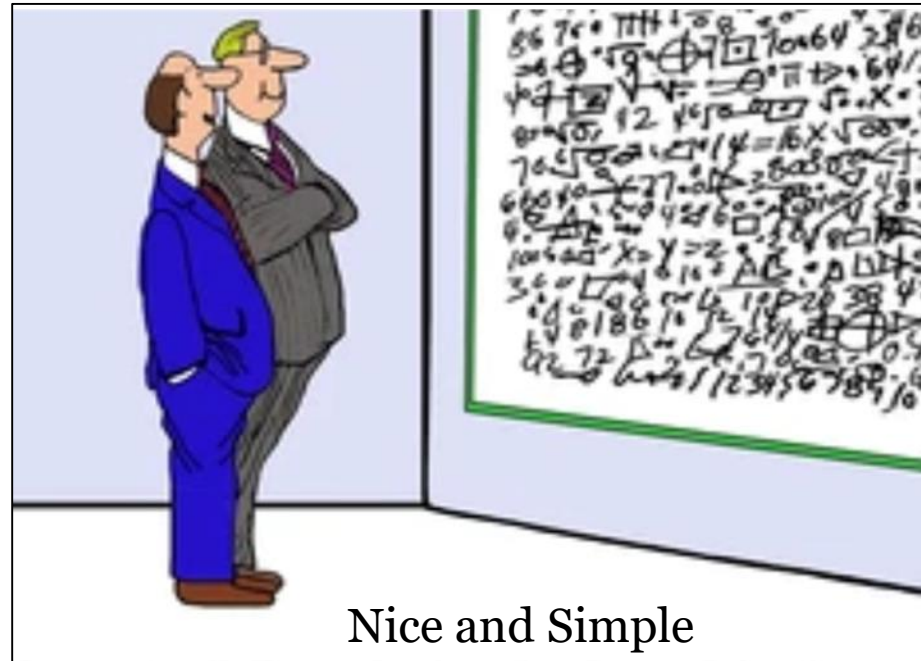
I. ~~Scope, Purpose and Construction~~ of Rules – One Form of Action.

Rule 1. ~~Scope and purpose of rules.~~

These rules govern the procedure in all ~~civil actions and proceedings in West Virginia~~ trial courts of record in all actions, suits, or other judicial proceedings of a civil nature ~~whether cognizable as cases at law or in equity, with the qualifications and exceptions,~~

Structure and Substance

The Committee provided updates to the structure of the rules in addition to considering the content. The Committee's proposed revisions included a complete reorganization of many rules for readability and citation.



STRUCTURE

Current Rule 15(a)

(a) Amendments. - A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.

Revised Rule 15(a)

(a) Amendments before trial.

(1) Amending as a matter of course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e) or (f), whichever is earlier.

Substance

The process largely remains the same. However, the substance of the rules has changed in several areas. Highlights:

- **Rule 5.2, Privacy Protection**
- **Rule 6, Motions**
- **Rule 11, Law Firm Responsibility**
- **Rule 12, Defenses, Motions, Hearing**
- **Rule 16, Pretrial Conferences and Scheduling Orders**
- **Rule 23, Class Actions, Residual Funds**
- **Rule 26, Discovery**
- **Rule 30, Depositions**
- **Rule 33, Interrogatories**
- **Rule 38, Time for Request for Jury Trial**
- **Rule 48, Juries, Verdict, Polling**
- **Rule 50, Judgment as Matter of Law**
- **Rule 53, Discovery Commissioners**
- **Rule 56, Summary Judgment**
- **Rule 59, Motion for New Trial**
- **Rules 72/73, Abrogated**
- **Rules 78, Submission on Brief**
- **Rule 81, Apply to Habeas, Unless Inconsistent**
- **Rule 86, Effective Date**

Rule 5.2: Privacy (new)



Rule 5.2 provides for confidential filings:

- The party shall identify the portion of a document that is intended to be kept confidential.
- Any party may file a motion to unseal, if necessary.
- Response to motion to unseal within ten days.
- Personal identifiers or initials are to be used.

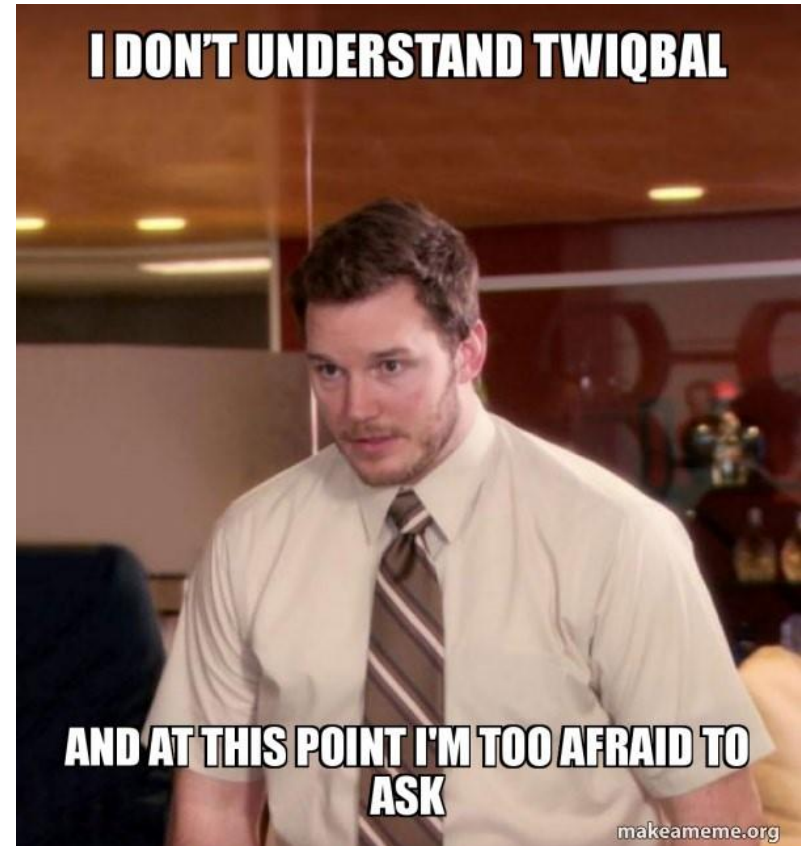
Rule 6: Changes to Motion Practice

- Count every day – weekends and holidays
- Standard briefing schedule on motions:
 - Notice of hearing 14 days.
 - 21 days for a response.
 - 7 days for a reply.
 - Judicial discretion as to briefing and hearing schedule, ruling without hearing.
 - Response no longer tied to hearing date.



Rule 8: Pleading Standard

- Rule is amended to be consistent with the federal rule, but....
- Heightened pleading standard for federal court NOT adopted.
- Maintains existing “fair notice” standard.



Rule 11: Signing of pleadings, motions and other documents; representations to court; sanctions

Law firms jointly responsible for sanctions:

(1) ~~(e)~~ Sanctions.—*In general.* If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, ~~subject to the conditions stated below,~~ impose an appropriate sanction upon the ~~attorneys~~ any attorney, law ~~firms~~ firm or ~~parties~~ party that ~~have~~ violated subdivision (b) ~~or are~~ the rule or is responsible for the violation. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates and employees.

Rule 12: Defenses, Motion, Hearing

- Responsive pleadings or motion to dismiss due 30 days after service of summons and complaint.
Currently, 20 days.
- Responsive pleading due 14 days after the court acts on a Rule 12 motion or more definite statement when motion for more definite statement granted.
- Motion to strike deadline changed from 20 days to 21 days.

Rule 15: Amended and supplemental pleadings

- Amendment permitted *without* motion 21 days after service, responsive pleading, or motion to dismiss under Rules 12 (b), (e), or (f).
- Other amendments require consent or court order.
- Response to amended pleading due 14 days after service.

Rule 16: Pretrial conferences, scheduling, management

- Scheduling Order **must** be issued:
 - 90 days after any defendant is served with the complaint, or
 - 60 days after any defendant has appeared.
- Rule 16(b)(4): “**Required contents** of the order. The scheduling order **shall**: (i) limit the time to join other parties, (ii) limit the time to amend the pleadings, (iii) limit the time to complete discovery, and (iv) limit the time to file motions...”

Rule 23: Class Action Procedure

- Adopts FRCP procedure for class actions.
- “At an early practicable time after a person sues or is sued as a class representative, the court shall determine by order whether to certify the action as a class action.”
- Cy Pres distributions are 25% to Legal Aid and 75% to Legal Aid or another group that benefits from purpose of the class.



Rule 26: Changes to Discovery -- Scope

- Rule 26(f) report and pre-discovery status conference. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).
- Eliminates “reasonably likely to lead to the discovery of admissible evidence.” New standard is “relevant to the subject matter involved in the pending action,” but information “need not be admissible to be discoverable.”
- Proportionality language from FRCP is not adopted, but is included as a defense to discovery.



Changes to Discovery – Mandatory Disclosures

- Rule 26(a)(1) adopts mandatory initial disclosures for cases over \$25,000; certain matters excluded from mandatory disclosure.
- Rule 26(a)(3) pretrial disclosures 30 days before trial (witnesses lists, trial depositions to be used, and exhibits).



Changes to Discovery – Rule 26(a)(2) Expert Disclosures

- Expert reports are required for retained experts. Reports must be signed and contain opinions, facts/data considered, summary exhibits, qualifications including list of publications and depositions for past 4 years, and statement of compensation paid.
- Drafts of expert reports and communications between experts and counsel **are not** discoverable unless communications related to compensation, facts or data that attorney provided, or assumptions attorney provided.
- Disclosure for non-retained experts must state the subject matter on which the witness is expected to present expert evidence and a summary of the facts and opinions to which the witness is expected to testify.



Rule 30: Depositions

- Rule 30(b)(6) is restored – notice or subpoena to organization.
- Parties required to meet and confer on the topics in the 30(b)(6) notice.
- Allows depositions to be taken by electronic or remote means.
- One day of 7-hour time limit for depositions.
- No presumptive limit on number of depositions.



Rule 33: Interrogatories

- Number of permissible interrogatories limited to 25 (including subparts).
- No longer allowed to file discovery with a complaint.



Rule 34: Producing documents, **electronically stored information** and tangible things, or entering onto land for inspection and other purposes

ESI

- Includes “designated documents or electronically stored information....”
- Request “may specify the form or forms in which [ESI] is to be produced.”
- Copies of documents or ESI in lieu of inspection.
- Permits objection to “requested form” for ESI production.
- ESI to be produced “in a form or forms in which it is ordinarily maintained or in a reasonable usable form.....”

Rule 36: Requests for Admissions

Reorganized.

Eliminates 45 day period after service (due to new Rule 26 requirements).

Rule 37:
Failure to
make
disclosures or
to cooperate
in discovery;
sanctions

- Parties: Motion for an order to parties “shall be made in the court where the action is pending....”
- Nonparties: Motion for an order to a “nonparty shall be made in the circuit court where the discovery is or will be taken.”
- Related to depositions: Party may “complete or adjourn” before moving for an order.
- Motion granted: Court “shall” award costs unless it was filed without good faith attempt to obtain discovery; answer/response/objection “substantially justified”; or award of expenses would be “unjust.”
- Motion denied: court “may” award costs unless motion “substantially justified” or award of expenses would be “unjust.”

Rule 38: Jury trial of right

- Right to jury on “any issue triable of right by jury.”
- Written demand may be included in pleading no later than 14 days after last pleading directed to the issue.
- Demand filed in accordance with Rule 5(d) (filing; certificate of service).
- Jury trial waived unless demand properly served and filed.
- Jury demand “may be withdrawn only if parties consent.”

Rule 38. Jury trial of right.

(a) **Right preserved.**— The right of trial by jury as declared by the Constitution or statutes of the State shall be preserved to the parties inviolate.

(b) **Demand.**— ~~Any party may demand a trial by jury of~~ On any issue triable of right by a jury ~~by~~, a party may demand a jury trial by:

(1) serving ~~upon~~ the other parties ~~with a written demand therefor—~~which may be included in writing at any time after the commencement of the action and ~~not pleading—~~no later than 14 days after the service of the last pleading directed to ~~such the issue; is served;~~ and

(2) filing the demand as required by Rule 5(d). ~~Such demand may be indorsed upon a pleading of the party—in accordance with Rule 5(d).~~

(c) ~~Same.~~ **Specification of (c) Specifying issues.**— ~~In the its demand, a party may specify the issues which the party that it wishes so to have tried by a jury; otherwise the party shall be deemed it is considered to have demanded a jury trial by jury for on all the issues so triable. If the party has demanded a jury trial by jury for on only some of the issues, any other party may—~~within 14 days after service of being served with the demand or such lesser ~~within a shorter time as ordered by the court may order, may~~—serve a demand for trial by a jury of trial on any other or all of the ~~factual issues of fact in the action.~~

(d) **Waiver; withdrawal.**— Subject to the provisions of Rule 39(b), ~~the failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial triable by jury. A demand for trial by jury made as herein provided, or a timely motion or request pursuant to Rule 39(b), may not be withdrawn without the consent of the parties. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.~~

Rule 39. Trial by jury or by the court.

(a) ~~By jury.~~ **When a demand is made.** When a jury trial by jury has been demanded as provided in ~~under~~ Rule 38 or a timely motion or request therefor has been made

Rule 45: Subpoenas

- Largely consistent with FRCP.
- Motions to Quash to be filed in the court **where the subpoena was issued.**
- ESI covered with **clawback** provision.
- If an **objection** is made to a subpoena, compliance is **not required until the objection is resolved.**



Rule 48:
Juries,
verdict;
polling

- Parties may stipulate that jury consist of any number less than six.
- Verdict “shall be **unanimous** and shall be **returned by six members.**”
- **After verdict is returned** but before discharge, court “shall” on a party’s request or “may on its own” “**poll the jurors individually.**”
- “**If the poll reveals a lack of unanimity or lack of assent** by the number of jurors that the parties stipulated to, **the court may direct the jury to deliberate further or may order a new trial.**”

Rule 50: Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings

(a) Judgment as a matter of law.

(1) ~~If during a trial by jury~~ *In general.* If a party has been fully heard on an issue during a jury trial and ~~there is no~~ the court finds that a reasonable jury would not have a legally sufficient evidentiary basis for a reasonable jury to find for that the party on that issue, the court may determine:

(A) resolve the issue against that the party; and may

(B) grant a motion for judgment as a matter of law against ~~that the party~~ with respect to on a claim or defense that ~~cannot,~~ under the controlling law, can be maintained or defeated without only with a favorable finding on that issue.



Rule 53: Discovery Commissioners

- Debate over ability of discovery commissioners to make decisions without approval of a judicial officer
- Debate over the question of whether a judge can delegate a judicial function to a non-judicial officer
- Recognizes the ubiquitous nature of discovery commissioners and attempts to define the role



Procedures for Discovery Commissioners

- Discovery commissioners can be appointed only in complex cases. Parties can object to appointment. Commissioners may hold hearings and set procedures for proceedings.
- Following submission, Commissioners must file and serve report and non-binding recommendation to court.
- Parties may object to R&R. Failure to object is a waiver.
- Court must then adopt or reject recommendation by order.

Rule 54. Judgments; costs.

- Maintains circuit court's discretion to certify questions for appeal under Rule 54(b) where "there is no just reason for delay."
- Otherwise, "any order or form of decision, however designated, that adjudicates **fewer than all the claims** or the rights and liabilities of **fewer than all the parties**, including in a multiparty case the dismissal of all the claims against fewer than all the parties, **does not end the action.....**"

Rule 56: Summary Judgment

- Court may not grant SJ *sua sponte* without giving **notice to the parties** (following existing law).
- Court's order may be for reasons other than those argued.



Rule 59: New Trial Motions

Deadline for motion for new trial changed from 10 days to 28 days.



**Motion for a
New Trial**

Rule 86: Effective Date

The revised rules take effect on

January 1, 2025

unless the use of the revised rules in a pending matter would not be just and practicable.

Civil Procedure Forms

The Committee also proposed several new or amended forms.

Those forms are currently under review.

READ THE RULES!!

Questions?