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Appellate Procedure in West Virginia: Why Rule 4A's Expedited Petition Process Isn't Attractive to Attorneys

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APPELLATE PROCEDURE IN WEST VIRGINIA: WHY RULE 4A'S EXPEDITED PETITION PROCESS ISN'T ATTRACTIVE TO ATTORNEYS

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West Virginia is unusual in that it has no intermediate appellate court;[1] petitions for appeal of circuit court decisions go directly to the state's highest court, the West Virginia Supreme Court of Appeals. Appellate review in the supreme court of appeals is totally discretionary; there is no constitutional right of review.[2] Thus, all parties to a controversy seeking resolution by

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1. In 1950, thirteen states had intermediate appellate courts. Now, forty-one states have intermediate appellate courts. There are no intermediate appellate courts in Delaware, the District of Columbia, Maine, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. Natl. Ctr. for State Courts, *State Court Caseload Statistics* 15, 16, 34, 36, 37, 42, 48, 50, 54, 57, 59 (1997), *cited in* Peter L. Murray, *Maine's Overburdened Law Court: Has the Time Come for a Maine Appeals Court?* 52 Me. L. Rev. 43, 44 n. 3 (2000); Administrative Office of the Supreme Court of Appeals, *West Virginia Court System 2000 Annual Report* 4 (available at <http://www.state.wv.us/wvsca/2000AnnRprt.pdf> (published Sept. 2001)).

2. West Virginia does not have a death penalty. Thus, it is unlike other states where legislatures have created the right to appeal a death sentence. The appellate jurisdiction of the supreme court of appeals is statutorily created in West Virginia Code § 58-5-1 (2001). West Virginia Code § 58-5-4 establishes a four-month time frame for appeal after entry of judgment in a circuit court. Thus, Chapter 58, Article 5 of the Code is both procedural and jurisdictional in that it establishes jurisdiction for the appeal within the statutory timeframes for filing the appeal. *State ex rel. Johnson v. McKenzie*, 226 S.E.2d 721, 726 (W. Va. 1976). Similarly, jurisdiction for appellate review of decisions by administrative agencies is authorized by West Virginia Code § 29A-6-1 (1998). In all cases, review is discretionary.

the court must first petition the court for review.[3] Yet, the supreme court of appeals is one of the busiest in the country, prompting the National Center for State Courts to note that "West Virginia receives more appeals in their one-level appellate court than some states with two-tiered appellate court systems."[4] In fact, 3,029 petitions for appeal were filed with the court in year 2000, of which 578 were civil petitions.[5] Although the court ultimately rendered 1,459 final substantive decisions in all classes of cases,[6] its 28.5% rate of review for civil petitions demonstrates that the petitioner in a civil case has only a slightly better chance than one in four of having the petition accepted for appeal. In view of these odds, a less expensive process for petition seemingly would be attractive to lawyers, particularly those representing clients with weaker appellate cases or fewer dollars to spend.[7]

In fact, an expedited petition process does exist; it permits the lawyer to file the petition without the transcript of testimony taken in the lower court.[8] This option not only saves the petitioner the time associated with preparing and reviewing the transcript, but also saves the considerable expense of having the court reporter prepare the transcript. Yet, less than one percent of cases are filed this way,[9] indicating that lawyers believe that the expedited process is unnecessary or unwise. This article explains the expedited process and argues why more attorneys filing petitions in West Virginia should consider it. The article

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3. W. Va. R. App. P. 3 (2001). In 2000, the court granted 28.5% of the petitions for review in civil cases; it granted 20.6% of the petitions for review in criminal cases. *West Virginia Court System 2000 Annual Report, supra* n. 1, at 5.

4. *Id.* at 5 (quoting Natl. Ctr. for St. Cts., *Examining the Work of State Courts, 1999-2000*).

5. *Id.* at 6.

6. *Id.* at 5.

7. A discussion of criminal appeals is beyond the scope of this article, but the criminal and civil appellate processes in West Virginia differ very little. The most obvious difference is that the criminal petitioner must file a notice of appeal within thirty days of the sentencing order. A petitioner in a civil case does not file a notice of appeal.

8. W. Va. R. App. P. 4A.

9. A former clerk of the supreme court of appeals has said that less than one percent of appeals were filed using the Rule 4A mechanism while he was with the court. Ancil Ramey, CLE Presentation, *Appellate Practice in West Virginia* (May 1996) (CLE materials on file with author). The present clerk has no recollection of any case being filed this way during his three years of service with the court. Telephone Interview with Rory Perry, Clerk, W. Va. Sup. Ct. App. (Jan. 15, 2002) (notes on file with author).

also briefly summarizes the other alternatives for expediting appeals in West Virginia and suggests why attorneys favor those alternatives over the rule-based process for expediting the appeal at the petition stage.

I. THE EXPEDITED PETITION

The procedures governing both the usual and the expedited process of appeal from the circuit court are set out in the West Virginia Rules of Appellate Procedure. While Rule 4 outlines the usual steps for filing and transmitting a petition for appellate review, the supreme court of appeals has recognized the need for an alternative process of petitioning for appeal that is "inexpensive and expeditious."[10] The expedited process is described by Rule 4A.

The expedited appeal procedure under Rule 4A parallels the usual petition process of Rule 4 in many ways. Under either rule, the petitioner must designate the record within thirty days of entry of the final order prompting the appeal.[11] This requirement allows the circuit clerk to begin compiling the record in a timely manner. In either instance, the attorney must complete an extensive docketing statement, which gives an overview of the case. Finally, although there is no filing fee for the petition itself, the petitioner in either instance must pay, or post a bond to cover payment, for the expense of preparing and indexing the record, the fee for filing and certifying the record, and the cost of transmitting the appeal to the supreme court.

Despite these similarities in the rules for petitioning for appeal, lawyers should not be misled into believing that Rule 4A offers little advantage over Rule 4. The expedited petition can result in a substantial savings of time and money for the attorney who wants to quickly and inexpensively test the court's willingness to hear the appeal. The Rule 4A expedited process saves money because the petitioner does not have to pay for the transcript. Indigence is not a bar to obtaining a transcript in West Virginia because the petitioner can file an affidavit of indigency

10. W. Va. R. App. P. 4A (2001). The Rules of Appellate Procedure were adopted by the supreme court of appeals on December 18, 1979, and became effective on January 1, 1980.

11. W. Va. R. Civ. P. 73(a) (2001).

with the circuit clerk's office,[12] and if the circuit court approves the appeal on this basis, the state will pay for the transcript and the costs of preparing the record. Yet, many clients, although not indigent, do not have the money to pay for the transcript, which can run into thousands of dollars if it reflects multiple days of testimony.[13] Furthermore, plaintiffs' attorneys who have taken a case on a contingent fee basis should find this cost savings attractive at the petition stage simply because the odds are against having the appeal accepted.

Despite this financial incentive to use the Rule 4A process, attorneys are hesitant to forego providing a transcript for the appeal, and this hesitation may be rooted in Rule 4A's language granting permission to use a statement of the case in lieu of the transcript.[14] Rule 4A says that the petition for appeal must contain a thorough statement of facts "pertinent to the issues [the petitioner] raises."[15] The petitioner's attorney must certify that the facts are "faithfully represented and that they are accurately presented to the best of his ability."[16] Use of the expedited process "places the highest possible fiduciary duty upon a lawyer with regard to the court and intentional misrepresentation of any sort is grounds for disciplinary action."[17] While this language is strong, it is merely a directive to attorneys to take time to be thorough and accurate. Attorneys should not see it as an indication that the court favors the submission of a transcript, particularly since the adoption of Rule 4A reflects the court's clear indication that the transcript is not necessary. In fact, the court's practice is to rely upon the representations of counsel at the petition stage, even when a transcript is filed.[18] Therefore, the court does not disfavor the use

12. W. Va. R. App. P., app. B, II(A)(2); W. Va. R. App. P., app. B, Appellate Transcript Request form.

13. The Clerk's office of the West Virginia Supreme Court of Appeals offered these examples of transcript costs in cases presently pending: (1) a two-day proceeding, $596.75; (2) another two-day proceeding, $1,882.65; (3) a three-day proceeding, $1,670.90; and (4) a four-day proceeding, $2,929.85. E-mail from Rory Perry, Clerk of W. Va. Sup. Ct. App. (Jan. 18, 2001) (copy on file with author).

14. W.Va. R. App. P. 4A(c) (2001).

15. *Id.*

16. *Id.*

17. *Id.*

18. "Customarily, the record and transcript are not reviewed, but reliance is made upon the factual representations of counsel." Ramey, *supra* n. 9, at 32.

of the certified statement of the case; it merely desires the statement to be thorough and accurate so that it can fairly assess the merits of the petition.

The second benefit of using Rule 4A is that it can cut sixty days or more out of the timeline for resolution of the appeal. When the petitioner's attorney designates the record during the first thirty days after judgment, the circuit clerk is put on notice of the upcoming Rule 4A appeal and understands that the petition will be filed within Rule 4A's sixty-day window rather than the usual 120-day window. This short timeframe encourages the clerk to expeditiously prepare the record in anticipation of the early filing. The early filing date also forces the lawyer to begin the briefing process; when the record has been prepared, the lawyer need only add record citations to the petition. Of course, when the petition is filed, other parties to the action have thirty days to file a response brief. When the thirty days have lapsed, or when the response brief is filed (whichever occurs first), the circuit clerk immediately transmits the record, petition, and response brief to the supreme court of appeals. Thus, the time from judgment to transmission of the file should be approximately ninety days, whereas under the normal process of appeal described in Rule 4, the timeframe is approximately 150 days (120 days to file a petition and thirty days to file a response).

Abuse and neglect cases are also expedited, but under a different set of rules. Statutory law shortens the petition phase in these cases to sixty days and instructs petitioners to file under the Rule 4A process. [19] The bond for costs is waived to avoid financial impediments, and the supreme court of appeals gives priority to these appeals by accelerating the schedule for hearing the case. Finally, the petitioner may move to stay the proceedings below until the appeal is decided.

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19. The Code states that when a petition in a child abuse and neglect case is filed in a circuit court, it "shall, to the extent practicable, be given priority over any other civil action before the court . . . ." W. Va. Code § 49-6-2(d) (2001). Furthermore, "[f]ollowing the court's determination, it shall be inquired of the parents or custodians whether or not appeal is desired and the response transcribed. The evidence shall be transcribed and made available to the parties or their counsel as soon as practicable . . . . " *Id.* at § 49-6-2 (e). Rule 49 of the Rules of Procedure for Child Abuse and Neglect then accelerates the appeal process, and Rule 50 grants the right to ask the supreme court of appeals for a stay of the proceedings below. W. Va. R. P. Child Abuse & Neglect 49, 50 (2001).

An overview of the Rule 4 process (the "normal" process) further emphasizes the benefits of the Rule 4A expedited process. Under Rule 4, the attorney designates the record and requests the transcript within the first thirty days after entry of judgment.[20] The petitioner completes the Transcript Request form provided by the circuit clerk's office and distributes copies of it to the supreme court of appeals, the respondent, the circuit clerk, and the court reporter.[21] The petitioner asks the court reporter to estimate the length of the transcript and makes arrangements with the reporter to pay for it. Upon receiving the transcript request, the court reporter has forty-five days to prepare the transcript and file it with the circuit court. However, the reporter may ask the supreme court of appeals for an extension of time. The court routinely grants another fifteen days to file for good cause shown,[22] lengthening the preparation time to sixty days. If an attorney waits to receive the transcript before writing the petition, this sixty-day extension leaves the attorney only thirty days to write and file the petition before the four-month (120-day) appeal period expires. Most attorneys will then ask the circuit court to expand the 120-day appeal period to allow plenty of time for drafting the petition.

Of course, the respondent may pay for a copy of the transcript requested by the petitioner[23] and may also ask the reporter to supplement the transcript, as long as the respondent pays the cost of supplementation.[24] Then, when the petition is filed, the respondent has thirty days to submit a response brief. After this response is filed, the circuit clerk immediately transmits the petition, response, record, transcript, and docketing statement to the supreme court of appeals.

The Rule 4 petition process therefore takes at least 150 days from judgment to transmission of the file to the supreme court of appeals, but in actuality can take even longer if the reporter cannot complete the transcript within the sixty days.[25]

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20. W. Va. R. App. P., app. B, II(B)(1) (2001).

21. *Id.* at app. B, II(B)(3).

22. *Id.* at app. B, III(A).

23. *Id.* at app. B, II(C)(2).

24. *Id.* at app. B, II(C)(1).

25. Failure to timely complete the transcript should be a rare occurrence with the technology available to reporters today, but to encourage prompt preparation, the West

This slowdown in the petition process would not occur for the attorney under the Rule 4A expedited process where no transcript is needed.

When the response to the petition is filed under either Rule 4 or Rule 4A, the circuit clerk transfers the complete file to the supreme court of appeals. In the past, the court routinely granted a petitioner a ten-minute *ex parte* argument on the petition and then issued a decision on the petition the next day. Thus, if the court could docket the petitioner's oral argument on the next month's motion docket, the petitioner could have a decision within a month of transfer of the file. However, the court's increasing caseload has forced it to change this practice. Although an attorney may still request the opportunity to orally present the petition by noting the request in the docketing statement, most petitions are assigned to a writ clerk to review and present to the court. The timing for the clerk's presentation to the court and its ultimate decision on the petition varies with the workload of the court, normally taking thirty to ninety days.[26] However, in cases where the petitioner can demonstrate need for an early decision, the attorney can file a "Motion to Expedite," which, if granted, advances the presentation of the petition.[27] Thus, where Rule 4's normal process is used and the "Motion to Expedite" is granted, an attorney theoretically could have an answer on the petition within five months of beginning the appeal process, and in an even shorter time if Rule 4A were used.

Virginia Supreme Court of Appeals has established substantial automatic fee reductions for reporters who file late transcripts. Appendix B imposes an automatic ten percent reduction in the reporter's fee for a transcript filed after forty-five days, a twenty percent reduction for a transcript filed after sixty days, and a twenty percent reduction plus a withheld paycheck if the transcript is filed after ninety-five days. W. Va. R. App. P., app. B, IV(A) (2001). This incentive to meet deadlines works well, but because the rules also permit the reporter to request an extension of time for good cause, the reporter may request such an extension where the transcript is long or the reporter is tied up with other proceedings. In actual practice, however, a request for extension beyond sixty days is unusual. Perry Telephone Interview, *supra* n. 9.

26. Telephone Interview with Rory Perry, Clerk of the West Virginia Supreme Court of Appeals (Jan. 19, 2002) (notes on file with author).

27. *Id.*

In about fifteen percent of cases,[28] the court will have a question about the petition and will grant the request for oral presentment by the attorney. In granting the request, the court invites the attorney to attend one of the writ conferences where the court's clerks are presenting other cases. This conference usually occurs thirty to ninety days after the petition is filed, although some cases can be postponed for as long as six months if the attorney establishes scheduling conflicts that prohibit an earlier appearance.[29] When an attorney presents the petition, the court's practice is to give the petitioner an answer within a day. Thus, once the petition is set for oral presentation, the attorney knows precisely when the petition will be granted or denied.

In summary, the expedited process under Rule 4A can save at least two months in the petition process, as well as thousands of dollars in transcription costs if the petition is ultimately denied. The question then becomes, why do attorneys generally ignore it? The reasons are associated with the good working relations between the court and practicing members of the bar, as well as the alternative means available to attorneys to expedite an appeal.

II. POSSIBLE REASONS ATTORNEYS FOREGO RULE 4A'S EXPEDITED PROCESS

The foremost reason that many attorneys may elect not to use Rule 4A is that they perceive the four-month petition period to be precisely the right timeframe for processing the petition for appeal. Rule 4A was adopted before modern technology streamlined the preparation of legal documents and at a time when attorneys needed a faster way to file an appeal. According to the present clerk of the supreme court of appeals, the former filing period was a full year from date of judgment because of the difficulty of getting a transcript (and other court records). This lengthy period is understandable when one considers the burdens that must have been placed upon the court reporter who had to prepare transcripts with a typewriter or those early word

28. Eighty-five percent of petitions are prepared by clerks, leaving only fifteen percent of the cases for presentation by the petitioners. *Id.*

29. *Id.*

processors! The filing period was eventually shortened to eight months, and then again shortened to the present four months, largely because technology expedited the preparation of documents.[30] Today's busy practitioner may see the present four-month timeframe for filing the petition as manageable without being overly burdensome, and therefore the attorney sees no need for an earlier filing under Rule 4A.

Another reason Rule 4A may be overlooked is that the procedural rules are different for the cases that are most likely to raise issues demanding quick resolution, such as those involving children and families. The special procedural rules discussed above help explain why Rule 4A lost its appeal for cases presenting issues that must be quickly resolved, but why would attorneys in the standard civil case not utilize Rule 4A's cost and time-savings features? The answers lie somewhere between the procedural rules and the court's practice, because even in cases that present a less urgent need for a quick decision on the appeal, attorneys have devices to hasten the appeal process to final resolution.

The first mechanism for expediting the appeal involves a strategic decision about how to designate the record at the petition stage; the attorney may choose to designate only the documents relevant to the petition on appeal or may choose to designate the entire record. Although Rule 8 says that the designation should include only "matter relevant to the issues presented by the appeal,"[31] attorneys in West Virginia routinely designate the entire record at the petition stage. They do this because they are afraid of missing important documents and also because this tactic saves them time at the petition stage, because they do not have to do a careful review of the entire record.

If the entire record is designated during the petition process, the supreme court of appeals has all that is needed if the appeal is accepted. However, if the appeal is accepted on less than a complete record, the court returns the record to the circuit clerk, and all parties to the appeal have a total of forty-four days

30. Perry e-mail, *supra* n. 13.

31. "The designations . . . should include only matter relevant to the issues presented by the appeal. When, in the opinion of the Supreme Court, unnecessary matter has been designated, it may withhold or divide costs as justice may require." W. Va. R. App. P. 8(d) (2001).

to review and supplement the record.[32] Placing the entire record before the court saves these forty-four days plus the thirty days given to the clerk to prepare and forward the redesignated record.[33] For this and other reasons, most attorneys now designate the entire record for appeal.

A second way the attorney can expedite the appeal upon having the petition granted is to use the original record. Although the rules indicate that reproduction is the normal procedure after the appeal is granted,[34] in actual practice the current court "actively discourage[s] reproduction of the record"[35] in civil cases. The cost of copying the record can run into thousands of dollars, and the court realizes that this is a burden to the parties. Therefore, it readily grants an attorney's motion to proceed on the original record without reproduction.[36] In fact, the supreme court of appeals has now proposed new rules to reflect the current unofficial procedure.[37] In the meantime, the appellant may forego reproduction by waiving it in the docketing statement filed with the petition for appeal or by filing a "motion for leave to move to reverse" when the petition is granted. The motion asks the court, for good cause, to hear the appeal using the original record rather than multiple copies.[38] Omitting reproduction also saves time for the clerk's

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32. "The Clerk of the Supreme Court shall forthwith return the record, unless the entire record had been transmitted, to the clerk of the circuit court for preparation . . . ." W. Va. R. App. P. 7(c)(3) (2001).

33. W. Va. R. App. P. 9(a) (2001).

34. W. Va. R. App. P. 9 (2001).

35. Perry E-mail, *supra* n. 13.

36. *Id.* Rule 9(f) permits the attorney to file a "motion for leave to move to reverse or affirm," which means that the attorney is filing a motion to reverse the procedure and instead use the circuit court's original record. W. Va. R. App. P. 9(f) (2001).

37. *West Virginia Supreme Court of Appeals Proposed Amendments to Rules* (available at <http://www.state.wv.us/wvsca/Rules/app_amend.htm> (accessed Jan. 19, 2002; copy on file with Journal of Appellate Practice and Process)). The proposed new Rule 9 states:

> The parties are encouraged as an inexpensive and expedient alternative to reproduction of the record, to request that the appeal be heard upon the original record without its reproduction. Either the appellant or the appellee may file a motion to proceed on the original record. After the motion to proceed on the original record is granted, the appeal shall be heard on the original record, as designated by the parties, and the Clerk of the Supreme Court shall establish a briefing schedule.

38. *Id.* at 9(f). Reproducing the record can take weeks because the clerk must estimate the cost and bill the attorney, who has thirty days to pay. The cost can run into thousands of dollars. Perry Telephone Interview, *supra* n. 26.

office, which would normally estimate the cost of reproduction, notify the appellant, and collect payment before the reproduction could commence. This process can take weeks, and when it is omitted, the clerk can immediately move on to the briefing schedule, the next step of the appeal.

The briefing schedule raises the third way to expedite the appeal. If the appellant's attorney filed a thorough petition brief, the attorney now merely needs to reformat the petition brief and address any additional points that the respondent may have raised at the petition stage.[39] With today's technology, all of this can be done within a matter of hours, allowing the attorney to submit the appeal brief weeks earlier than the thirty days given by the rules. This early filing expedites the appellee's briefing schedule, because the appellee's thirty days to file a response brief is triggered by service of the appellant's brief.[40]

Another mechanism used by West Virginia attorneys to expedite a decision is to file a "Motion to Expedite" either the oral argument or the decision, or both. By rule, oral argument is scheduled for the term that falls seventy-five days after the appeal record has been filed with the court.[41] Thus, an expedited oral argument could take weeks off the normal timeline, and an expedited decision after oral argument would further reduce the appeal timeframe.

These tactics might be thwarted, however, if the attorney used Rule 4A to file the petition without a transcript in the record. The court expects a complete record to hear the appeal, and Rule 8 requires the parties to the appeal to furnish a record that will support the facts and evidence relevant to the issues raised by the appeal.[42] Rule 8 does provide an exception that

39. The author learned this tactic working as an associate in a defense firm in West Virginia. If the petition brief is focused, thorough, well written, and persuasive, the petitioner's chances of having the petition accepted are better. Furthermore, the brief will need very little redrafting prior to oral argument, perhaps needing only an update on the law or additional text to address points raised by the respondent at the petition stage. Furthermore, at the appeal stage, the appellant is permitted to file a reply to the appellee's brief. Thus, the appeal brief should be refiled quickly to expedite the briefing schedule if the appellant desires quick resolution of the case.

40. W. Va. R. App. P. 10(b) (2001).

41. W. Va. R. App. P. 11(a) (2001).

42. *See Thornton v. CAMC*, 305 S.E.2d 316 (W. Va. 1983) (refusing to decide the issue because the plaintiff's attorney, who used Rule 4A and then filed no transcript when the appeal was accepted, did not sufficiently present a record for making the decision).

permits the parties to the appeal to avoid requesting a transcript: The parties may prepare and sign an agreed statement of the case that includes the critical facts of the underlying case.[43] However, as one might expect, attorneys do not use this tool to avoid filing a transcript, perhaps because the cost in time and energy of negotiating an agreement on how to draft the statement would far exceed the financial cost of simply requesting the official transcript. In the end, using Rule 4A may ultimately hamper an attorney's later attempts to hasten a decision.

III. SUMMARY AND RECOMMENDATION

The West Virginia Supreme Court of Appeals recognizes the need for an expedited process. Most attorneys in West Virginia do not use the expedited petition process, however, instead preferring to expedite the appeal, when necessary, after having the petition accepted. More attorneys should nonetheless consider also using the expedited petition process for several reasons.

First, it makes sense to use a petition process that is easier and more economical for the client who has a slim chance of having the appeal granted. Second, a transcript for the appeal is not always necessary. Where the issue on appeal is procedural rather than evidentiary, the testimony in the underlying case may not be necessary. Third, the rules not only permit the attorney to file a petition without a transcript, but also permit the attorney to proceed without a transcript after the appeal has been granted. The attorney may substitute a statement of the case that has been negotiated with the other parties.[44] Fourth, even if no negotiated statement is included, the court will probably accept the appellant's and appellee's statements of the case as acceptable evidence of events when the statements are not in conflict and reflect that no issues are raised by the facts.[45]

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43. W. Va. R. App. P. 8(c) (2001).

44. *Id.*

45. The court addressed this issue in a cautionary manner in *Bowman v. Barnes*, 282 S.E.2d 613, 622 n. 15 (W. Va. 1981):

> All parties to the appeal have proceeded to present the key facts surrounding the accident by narrative statements in their briefs [in lieu of a transcript]. Where

The fifth and final reason pertains to cases where the transcript *will* be necessary to resolve evidentiary issues. Here, the attorney should use the usual mechanisms for expediting the appeal after the petition is granted, e.g., designate the entire record and proceed on the original record without reproduction. However, the attorney who now needs the transcript should ask the court to grant a "Motion to Supplement the Original Record" with the transcript. This tactic probably has not been considered or tested, but it might allow attorneys to again use Rule 4A with good results.

The current clerk's office has a reputation of competency and courtesy in processing appeals. It works closely with the attorneys, which may in part reflect the fact that West Virginia is a small state with a close-knit legal profession. Even more so, it reflects an understanding by the court and its staff of the difficulties associated with practicing law in today's fast-paced world. Although neither the rules nor current unwritten procedure reflect that a "Motion to Supplement the Original Record" would be permitted, the author believes that the Rule 4A procedure for omitting the transcript during petition has merit because it saves time and money at the point where the risk of investing both is the greatest. In cases where the transcript is needed for the decisional stage of an appeal, the court could allow the appeal to proceed expeditiously by granting a motion to proceed on the original record *and to supplement the record with the transcript.*

Use of this procedure would allow the clerk to avoid sending the record to the circuit court, would avoid reproduction of the record, and would let the transcript be filed directly with the clerk, where it would be added to the original record in a timely manner. In fact, the court's order granting the motion could establish a timeframe for filing the transcript, which would act as a mandate to the reporter to comply. Upon the transcript's filing, the clerk could establish the briefing schedule and set the time for oral argument. In the end, both the petition and the appeal stages of appellate review would be expedited

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their respective statements do not appear to be in dispute, we have addressed the points of error raised. *In so doing, counsel should not assume that we will in the future sanction this practice.*

Id. (emphasis in original).

with cost-savings in mind, and the court would be assured of having the transcript when it was needed to make the final decision in the case.