Cite as 2012 Ark. 49

SUPREME COURT OF ARKANSAS

IN RE RULES OF CIVIL PROCEDURE; RULES OF THE SUPREME COURT AND COURT OF APPEALS; AND RULES OF APPELLATE PROCEDURE–CIVIL

Opinion Delivered: February 2, 2012

PER CURIAM

The Arkansas Supreme Court Committee on Civil Practice has submitted its annual proposals and recommendations for changes in rules of procedure affecting civil practice. We have reviewed the Committee's work, and we now publish the suggested amendments for comment from the bench and bar. The Reporter's Notes explain the changes, and the proposed changes are set out in "line-in, line-out" fashion (new material is underlined; deleted material is lined through).

We express our gratitude to the Chair of the Committee, Judge Henry Wilkinson, its Reporter, Professor Kenneth S. Gould, and all the Committee members for their faithful and helpful work with respect to the Rules.

Comments on the suggested rules changes should be made in writing before April 2, 2012 to: Leslie W. Steen, Clerk, Supreme Court of Arkansas, Attn.: Civil Procedure Rules, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

A. ARKANSAS RULES OF CIVIL PROCEDURE

Rule 4. Summons.

. . . .

The Supreme Court of Arkansas has adopted the following form of summons for use in all cases in which personal service is to be had pursuant to Rule 4(c), (d) and (e) of the Arkansas Rules of Civil Procedure. The form incorporates a proof of service to be made by a sheriff, deputy sheriff, or other person, as appropriate, in accordance with Rule 4(g). The form may be modified as needed in special circumstances. Additional notices, if required, should be inserted in the appropriate space. This form is not for use in cases of constructive service pursuant to Rule 4(f). The adoption of this form is in compliance with Rule 4(b) and does not modify or amend any part of that rule.

THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS

_____ DIVISION [Civil, Probate, etc.]

_____	)	
Plaintiff	)	
	)	
v.	)	No. _____
	)	
_____	)	
Defendant	)	

SUMMONS

THE STATE OF ARKANSAS TO DEFENDANT:

_____

[Defendant's name and address]..A lawsuit has been filed against you. The relief demanded is stated in the attached. complaint...

Within 30 days after service of this summons on you (not counting the day you received it) — or 60 days if you incarcerated in any jail, penitentiary, or other correctional facility in Arkansas — you must file with the clerk of this court a written answer to the complaint or a motion under Rule 12 of the Arkansas Rules of Civil Procedure

The answer or motion must also be served on the plaintiff or plaintiff's attorney, whose name and address are: _____

If you fail to respond within the applicable time period, judgment by default will be entered against you for the relief demanded in the complaint..

Address of Clerk's Office

_____

_____

CLERK OF COURT

_____

[Signature of Clerk or Deputy Clerk]

[SEAL]

Date: _____

No. _____

PROOF OF SERVICE

☐ I personally delivered the summons and complaint to the individual at _____[place] on _____ [date]; or

☐ I left the summons and complaint in the proximity of the individual by _____after he/she refused to receive it when I offered it to him/her; or

☐ I left the summons and complaint at the individual's dwelling house or usual place of abode at _____ [address] with _____ [name], a person at least 14 years of age who resides there, on _____ [date]; or

☐ I delivered the summons and complaint to _____ [name of individual], an agent authorized by appointment or by law to receive service of summons on behalf of _____ [name of defendant] on _____ [date]; or

☐ I am the plaintiff or an attorney of record for the plaintiff in this lawsuit, and I served the summons and complaint on the defendant by certified mail, return receipt requested, restricted delivery, as shown by the attached signed return receipt.

☐ I am the plaintiff in this lawsuit, and I mailed a copy of the summons and complaint by first-class mail to the defendant together with two copies of a notice and acknowledgment and received the attached notice and acknowledgment form within twenty days after the date of mailing.

☐ Other [specify]:

_____

☐ I was unable to execute service because:

_____

_____

My fee is $ ____.

To be completed if service is by a sheriff or deputy sheriff:

Date: _____ SHERIFF OF _____ COUNTY, ARKANSAS

By: _____
[Signature of server]

_____
[Printed name and title]

To be completed if service is by a person other than a sheriff or deputy sheriff:

Date: _____ By: _____
[Signature of server]

Subscribed and sworn to before me this date: _____

_____
Notary Public

My commission expires: _____

Additional information regarding service or attempted service:
_____
_____
_____
_____
_____
_____

Addition to Reporter's Notes, 2012 Amendment: The summons form has been revised to include an "all purpose proof of service" form for service made by a sheriff, deputy sheriff, or other person (generally an appointed private process server) or, if service is by mail or commercial delivery company, the plaintiff, or an attorney for the plaintiff (*see* Rule 4(c)). In accordance with Rule 4(g) governing proof of service, the proof of service section of the summons includes an "affidavit of service" for service made by a person other than a sheriff or deputy sheriff and a "certificate of service or return" for service made by a sheriff or deputy sheriff. The language of the summons form is also updated consistent with changes in December of 2009 to the comparable federal summons form. The changes to the federal form were part of a nearly three-year-long process to clarify and simplify the language of the Federal Rules of Civil Procedure.

B. Arkansas Rules of the Supreme Court and Court of Appeals

Rule 2-1. Motions, Petitions, and Responses, general rules.

(a) *Writing required*. All motions, petitions, and responses filed in the appellate court must be in writing and comply with the requirements of Rule 4-1(a) in regard to the style of briefs.

(b) *Number of copies*. In cases pending before the Supreme Court, eight (8) clearly legible copies must be filed on 8 ½" x 11" paper. In cases pending before the Court of Appeals, fourteen (14) clearly legible copies must be filed on 8 ½" x 11" paper.

(c) *Service*. Evidence of service of ~~motions~~ a motion, petition, or response upon opposing counsel must be furnished at time of filing.

(d) *Response*. A response may be filed within 10 calendar days of the filing of a motion or petition. Evidence of service is required.

(e) *Memorandum of authorities*. With any motion, petition, application for temporary relief, or other action of the Court that is sought before the regular submission of the case, the moving party shall file and serve upon opposing counsel or an unrepresented party a short citation of statutes, rules of court, and other authorities upon which the movant or petitioner relies. Any party responding to any such motion, petition, or application shall likewise file a memorandum of authorities.

(f) *Compliance with Administrative Order 19 required*. Every motion, petition, response, similar paper, memorandum of authorities, and any document attached to any of those papers, must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal.

(g) *Motions for reconsideration*. Any motion to reconsider the appellate court's order deciding any motion or petition must be filed no later than eighteen calendar days after the date of the order.

(h) *Page length*. Except as otherwise provided in these rules, a motion, petition, or response, including the memorandum of authorities and supporting brief, if any, but excluding any exhibits, shall not exceed ten 8 ½" x 11" double-spaced, typewritten pages and shall comply with the provisions of Rule 4-1(a), except that if the motion, petition, or response and supporting documents are not more than three pages, they need not be bound as set forth in Rule 4-1(a). Motions for an expansion of the page limit must set forth the reason or reasons for the request and must state that a good faith effort to comply with this rule has been made. The motion must specify the number of additional pages requested.

Addition to Reporter's Notes, 2012 Amendment: Prior to the 2012 amendment, this rule applied only to "motions." Because filings in the appellate court may also take the form of "petitions" and "responses," the amendment expands the rule to cover petitions and responses.

The 2012 amendments also add subsection (h). The introductory clause to subsection (h) makes it clear that the 10-page limit of this rule is preempted by a Supreme Court rule setting a different page limit with respect to a particular motion, petition, or response. For example, Supreme Court Rule 2-4 limits petitions for review to three pages, and subsection (h) does not change that limit.

Rule 4-4. Filing and service of briefs in civil cases.

. . . .

(d) *Evidence of service*. Briefs tendered to the Clerk will not be filed unless evidence of service upon opposing counsel ~~and the circuit court~~ has been furnished to the Clerk. Such evidence may be in the form of a letter signed by counsel, naming the attorney or attorneys ~~and the circuit court~~ to whom copies of the brief have been mailed or delivered.

Addition to Reporter's Notes, 2012 Amendment: The requirement under Rule 4-4(d) that briefs filed in the Supreme Court and Court of Appeals be served on the circuit court that rendered the decision from which the appeal was taken has been eliminated. The requirement proved to be a burden on counsel for the parties without providing an adequate corresponding benefit to the judicial process.

Rule 5-1. Oral arguments.

(a) *Written request required.* Any party may request oral argument by filing, contemporaneously with that party's brief, a letter, separate from the brief, stating the request with a copy to all parties. The request for oral argument may be filed contemporaneously with either the party's initial brief or reply brief. Oral argument will be allowed upon request unless it is determined that

(1) the appeal is frivolous;

(2) the dispositive issue or set of issues has been decided authoritatively; or

(3) the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the decision-making process.

Within 10 days of the denial of an initial request for oral argument, a party seeking oral argument may move that the court allow oral argument despite the denial. The motion to allow oral argument shall explain why oral argument should be granted.

The court may at its discretion and on its own motion select any case for oral argument when it appears to the court that the matters presented for consideration are such that oral arguments are appropriate for a full presentation of the issues.

Addition to Reporter's Notes, 2012 Amendment: The addition to Rule 5-1(a) creates a formal procedure for requesting oral argument by motion after the court denies the initial request made by letter as provided under the rule. The procedure established by the revision requires that the motion be made within 10 days of the denial of the letter request and that the motion explain why oral argument should be granted.

C. Arkansas Rules of Appellate Procedure–Civil

Rule 2. Appealable matters; priority.

(a) An appeal may be taken from a circuit court to the Arkansas Supreme Court from:

. . . .

(b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment. An appeal from an order disposing of a postjudgment motion under Rule 4(b)(1) brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from.

. . . .

Rule 3. Appeal — How taken.

(a) *Mode of obtaining review.* The mode of bringing a judgment or order to the Supreme Court or Court of Appeals for review shall be by appeal. An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment. An appeal from an order disposing of a postjudgment motion under Rule 4(b)(1) brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from.

. . . .

Addition to Reporter's Notes, 2012 Amendment: Arkansas Rules of Appellate Procedure–Civil 2(b) and 3(a) contained an ambiguity (same language in both rules) that could have been misconstrued as creating, under limited circumstances, a 180-day period in which to file the notice of appeal of a judgment (or intermediate order). Both rules stated that "[a]n appeal from an order disposing of a postjudgment motion under Rule 4 brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from."

The reference in Rules 2(b) and 3(a) to orders disposing of postjudgment

motions under Rule 4 (without designation of a specific subsection under Rule 4) was intended to apply only to orders disposing of the postjudgment motions included in Rule 4(b)(1) (motions for judgment notwithstanding the verdict, motions to amend the court's findings of fact or to make additional findings, or any other motions to vacate, alter, or amend the judgment). However, the general reference to Rule 4 in Rules 2(b) and 3(a) could have been read as allowing appellate review of the original judgment (or intermediate order) "brought up for review" by an order disposing of *any* postjudgment motion allowed under Rule 4. Since motions for extension of time to file a belated appeal are also included under Rule 4 (Rule 4(b)(3)), orders denying belated appeal motions could have been considered to bring up for review the original judgment (or intermediate order). Because belated appeal motions under Rule 4(b)(3) may be filed up to 180 days following the judgment, the effect would have been to create a 180-day period in which to appeal the original judgment (or intermediate order).

The amendment clarifies the original intent of Rules 2(b) and 3(a) by specifically limiting the postjudgment motions that bring up for review original judgments or intermediate orders to the postjudgment motions included in Rule 4(b)(1).

Rule 2. Appealable matters; priority.

. . . .

(f)(1) The Supreme Court may, in its discretion, permit an appeal from an order pursuant to Rule of Civil Procedure 37 compelling production of discovery when the defense to production is any privilege recognized by Arkansas law or the opinion-work-product protection if a petition for permission to appeal is filed with the Court within 14 days after the order is entered. The decision of the Court to grant permission to appeal will be guided by:

(a) the need to prevent irreparable injury;
(b) the likelihood that the petitioner's claim of privilege or protection will be sustained;
(c) the likelihood that an immediate appeal will delay a scheduled trial date;
(d) the diligence of the parties in seeking an order compelling discovery under Rule 37 in the circuit court;
(e) any statement of reasons (written or oral) by the circuit court supporting or opposing immediate review; and
(f) any conflict with precedent or other controlling authority as to which there is substantial ground for difference of opinion.

(2) The petition must address the factors listed in subdivision (f)(1) and shall be limited to 10 pages exclusive of supporting materials. Petitioner shall attach in an addendum sufficient supporting documentation for the court to understand the dispute and the issues that would be presented in the permissive appeal. No response shall be filed unless requested by the Supreme Court. Any response shall also be limited to 10 pages exclusive of any supplementary addendum. No reply shall be allowed.

(3) Neither the petition nor the grant of permission for an appeal shall delay any scheduled trial or lower-court proceeding unless the circuit court or the Supreme Court orders. If the Supreme Court grants the petition, the petitioner must file a notice of appeal with the circuit clerk within ten calendar days of the Supreme Court's order and file the record on appeal within 30 days from the entry of the order allowing the appeal.

Addition to Reporter's Notes, 2012 Amendment: The amendment gives the Arkansas Supreme Court discretion to grant permission to take an interlocutory appeal of an order compelling production of materials or information for which a privilege or opinion-work-product is claimed. In part the rule is modeled on the successful federal court discretionary interlocutory appeal procedures found in Title 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 23(f).

The availability of interlocutory appellate review of privilege and work product matters was previously restricted by statements in several Arkansas cases that interlocutory review will not be allowed "even when the alleged discovery violation pertains to material the petitioning party claims are privileged." *Cooper Tire & Rubber Co. v. Phillips County Circuit Court*, 2011 Ark. 183, at 6, 381 S.W.3d 67, *Monticello Healthcare Center, LLC v. Goodman*, 2010 Ark. 339, at 18, 373 S.W.3d 256, *Baptist Health v. Circuit Court of Pulaski County*, 373 Ark. 455, 284 S.W.3d 499 (2008). The concern expressed by the court was that allowing interlocutory review could lead to its having to make piecemeal decisions whenever an application for discovery is unsuccessfully resisted at the trial court level. However, a privilege issue that arises within the context of a discovery request also implicates substantive rights that extend well beyond the scope of discovery concerns. *See generally* Sarah Blassingame Leflar, "Reviving the Privilege Doctrine: The Appealability of Orders Compelling the Production of Privileged Information," 62 ARK. L. Rev. 283, 288 (2009). *See also* Jonathan P. Rich, Note, "The Attorney-Client Privilege in Congressional Investigations," 88 COLUM. L. REV. 145, 165 (1988). In addition, the Arkansas Supreme Court has recognized an exception to the general doctrine barring interlocutory appellate review of discovery matters where the issue is not merely the resolution of a discovery matter but involves another area of law that could be impacted by the resolution of the discovery matter. *Cooper Tire & Rubber Co. v. Phillips County Circuit Court*, 2011 Ark. 183, at 6 (*Cooper* involved an order to produce confidential trade secret information for which privilege protection is recognized under section 507 of the Arkansas Rules of Evidence).

New subdivision (f)(1) recognizes that the integrity of certain relationships and information will be irretrievably compromised if appellate review of a privilege-contested order allowing discovery must wait until after the circuit court enters a final judgment. Belated vindication cannot re-cloak the disclosed information. The amendment establishes a mechanism by which the court can balance the interest of judicial efficiency and the values inherent in substantive privilege law. The concern with allowing piecemeal interlocutory appeals of discovery matters is addressed by narrowly limiting the appeal process to privilege matters and by giving the court authority to allow an appeal only if in the court's discretion the matter is worthy of further appellate consideration.

Subsection (f)(1) establishes guidelines for the court's decision whether to allow the appeal. The contents of the petition to allow an appeal and associated procedures are prescribed, in part, by subsection (f)(2). The subsection (f)(2) procedures prohibit the filing of a response unless a response is requested by the Supreme Court and also prohibit a reply. Under subsection (f)(3) appeal proceedings are not to delay trial or other lower-court proceedings unless ordered by the circuit court or the Supreme Court. The initial procedures to be followed if the court allows an appeal are also prescribed by subsection (f)(3).

ARAP–Civ. Rule 5. Record — Time for filing.

(a) *When filed*. The record on appeal shall be filed with the clerk of the Arkansas Supreme Court and docketed therein within 90 days from the filing of the first notice of appeal, unless the time is extended by order of the circuit court as hereinafter provided. When, however, an appeal is taken from an interlocutory order under Rule 2(a)(6) or (7), the record must be filed with the clerk of the Supreme Court within thirty (30) days from the entry of such order.

(b) *Extension of time*.

(1) If any party has designated stenographically reported material for inclusion in the record on appeal, the circuit court, by order entered before expiration of the period prescribed by subdivision (a) of this rule or a prior extension order, may extend the time for filing the record only if it makes the following findings:

(A) The appellant has filed a motion explaining the reasons for the requested extension and served the motion on all counsel of record;

(B) The time to file the record on appeal has not yet expired;

(C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing;

(D) The appellant, in compliance with Rule 6(b), has timely ordered the stenographically reported material from the court reporter and made any financial arrangements required for its preparation; and

(E) An extension of time is necessary for the court reporter to include the stenographically reported material in the record on appeal or for the circuit clerk to compile the record.

(2) In no event shall the time be extended more than seven (7) months from the date of the entry of the judgment or order, or from the date on which a timely postjudgment motion is deemed to have been disposed of under Rule 4(b)(1), whichever is later.

(3) If the appellant has obtained the maximum seven-month extension available from the circuit court, or demonstrates (by affidavit or otherwise) an inability to obtain entry of an order of extension, then before expiration of the period prescribed by subdivision (a) of this rule or a prior extension order, the appellant may file with the clerk of the Supreme Court a petition for writ of certiorari pursuant to Rule 3-5 of the Rules of the Supreme Court and Court of Appeals.

(c) *Partial record*. Prior to the time the complete record on appeal is filed with the clerk of the Arkansas Supreme Court as provided in this rule, any party may docket the appeal to make a motion for dismissal or for any other intermediate order by filing a partial record with the clerk. At the request of the moving party, the clerk of the circuit court that entered the judgment, decree, or order from which the appeal is taken shall certify the portion of the record designated by that party as being a true and correct copy. It shall be the responsibility of the moving party to transmit the certified partial record to the clerk of the Arkansas Supreme Court.

Addition to Reporter's Notes, 2012 Amendment: Arkansas Rule of Appellate Procedure–Civil 5(b)(1)(E) is revised to give the circuit court authority to extend the time for filing the record on appeal when necessary for the circuit clerk to compile the record. The rule previously gave that authority to the circuit court only when necessary for the court reporter to include the stenographically reported material in the record on appeal. However, in its *per curiam* opinion of *Bowman et al. v. Centennial Bank*, 2011 Ark. 34, the Arkansas Supreme Court noted that the rule failed to address the situation when the circuit clerk needs additional time to compile the record. To extend the time for filing the record on appeal because the circuit clerk needs additional time, the circuit court must make the same prerequisite findings under Rule 5(b)(1)(A) through (E) required for granting extension of time for filing the record when the court reporter needs additional time to compile the record.

D. Arkansas District Court Rules

Rule 6. Contents of answer; time for filing.

. . . .

(b) Time for Filing Answer or Reply. A defendant shall file an answer with the clerk of the court within thirty (30) days after the service of the complaint upon the defendant. An answer to a cross-claim and a reply to a counterclaim shall be filed with the clerk of the court within ~~20~~ 30 days of the date that the pleading asserting the claim is served. A copy of an answer or reply shall also be served on the opposing party or parties in accordance with Rule 5(b) of the Rules of Civil Procedure.

Addition to Reporter's Notes, 2012 Amendment: The rule is revised to adopt the same 30-day response time for district court cross-claims and counterclaims that applies to responses to complaints, cross-claims, and counterclaims in circuit court and to responses to district court complaints.