IN RE: SUPREME COURT AD HOC COMMITTEE on FOSTER CARE and ADOPTION

Supreme Court of Arkansas
Delivered January 22, 2004

PER CURIAM. Thomas David Hoffpauir Jr., LMSW, Pat Baily Page, Attorney at Law, both of Little Rock, Levi Thomas of Pine Bluff, and Birkes Williams, MSW, of Hot Springs, are hereby appointed to the Supreme Court Ad Hoc Committee on Foster Care and Adoption. The Court thanks Mr. Hoffpauir, Ms. Page, Mr. Thomas, and Mr. Williams for accepting appointment to the Committee.

The Court expresses its appreciation to Lisa G. Peters for service on the Committee and to Amy Rossi for her years of faithful service to this Committee since its creation.

IN RE: SUPREME COURT COMMITTEE on CRIMINAL PRACTICE

Supreme Court of Arkansas
Opinion delivered January 29, 2004

PER CURIAM. The Hon. Larry Chandler, Circuit Judge, of Magnolia and W. H. Taylor, Esq., of Fayetteville are hereby reappointed to our Committee on Criminal Practice for three-year terms to expire on January 31, 2007. The Court thanks Judge Chandler and Mr. Taylor for accepting reappointment to this important Committee.

Professional Conduct Matters

IN RE: Dale Winston FINLEY,
Arkansas Bar ID #67017

03-1274

Supreme Court of Arkansas
Delivered November 20, 2003

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the law license of Dale Winston Finley of Russellville, Arkansas, to practice law in the State of Arkansas. Effective December 1, 2003, Mr. Finley's name shall be removed from the registry of licensed attorneys, and he is barred and enjoined from engaging in the practice of law in this state.

It is so ordered.

IN RE: Jason Antonio MARTINEZ,
Arkansas Bar ID # 99132

03-1275

Supreme Court of Arkansas
Delivered November 20, 2003

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the law license of Jason Antonio Martinez of Springdale, Arkansas, to practice law in the State of Arkansas. Mr. Martinez's name shall be removed from the registry of licensed attorneys, and he is barred and enjoined from engaging in the practice of law in this state.

It is so ordered.

IN RE: KENNETH W. HAYNES, Arkansas Bar ID # 95178

03-1345

Supreme Court of Arkansas
Delivered December 11, 2003

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the law license of Kenneth W. Haynes of West Helena, Arkansas, to practice law in the State of Arkansas. Mr. Haynes's name shall be removed from the registry of licensed attorneys, and he is barred and enjoined from engaging in the practice of law in this state.

It is so ordered.

ARNOLD, C.J., not participating.

IN RE: Walter Albert KENDEL Jr.; Arkansas Bar ID # 88122

03-1458

Supreme Court of Arkansas
Delivered January 15, 2004

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the law license of Walter Albert Kendel Jr. of Little Rock to practice law in the State of Arkansas. Mr. Kendel's name shall be removed from the registry of licensed attorneys, and he is barred and enjoined from engaging in the practice of law in this state.

It is so ordered.

Ceremonial Observances

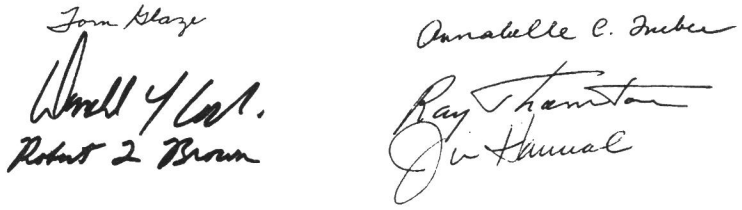
IN the MATTER of the RETIREMENT of CHIEF JUSTICE W.H. "DUB" ARNOLD

Supreme Court of Arkansas
Delivered December 18, 2003

PER CURIAM. Since 1997, Chief Justice W.H. "Dub" Arnold has served the Supreme Court and the citizens of the State of Arkansas with distinction as a dedicated and thoughtful jurist. His ready wit and engaging exuberance have made him a companionable colleague and an effective ambassador for the judiciary to the legal profession, the legislature, and the larger community. During his tenure, Chief Justice Arnold left his mark on the cultural history of the Arkansas Supreme Court. He presided over the construction of the Justice Building's architecturally significant West Wing. In addition, he encouraged the establishment of the Arkansas Supreme Court Historical Society to preserve and perpetuate the legacy of this institution.

Chief Justice Arnold has been a tireless champion of the independence of the judiciary, yet his advocacy has never been strident or overbearing. Instead, he has sought to persuade through common sense and good humor. These qualities, along with his abiding love for the judicial system and his earnest desire to maintain its distinctive role, are central to Chief Justice Arnold's life and work. In the words of his favorite poet, Robert Frost: "Only where love and need are one,/And the work is play for mortal stakes,/Is the deed ever really done/For Heaven and the future's sakes."

The Supreme Court salutes Chief Justice Arnold on his retirement from the bench and wishes him happiness and fulfillment in all his future endeavors.



Alphabetical Headnote Index

Index to Acts, Codes, Constitutional Provisions, Rules, and Statutes Cited

INDEX TO ACTS, CODES, CONSTITUTIONAL PROVISIONS, INSTRUCTIONS, RULES, AND STATUTES CITED

ARKANSAS CODE OF JUDICIAL CONDUCT:

UNITED STATES CODE:

CONSTITUTIONAL PROVISIONS:

ARKANSAS CONSTITUTION:

UNITED STATES CONSTITUTION:

ARKANSAS APPELLATE REPORTS

Volume 84

CASES DETERMINED
IN THE

Court of Appeals of Arkansas

FROM
November 19, 2003 — January 28, 2004
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
DEPUTY
REPORTER OF DECISIONS

VICTORIA M. FREY
EDITORIAL ASSISTANT

PUBLISHED BY THE
STATE OF ARKANSAS
2006

Index to Acts, Codes, Constitutional Provisions, Rules, and Statutes Cited

INDEX TO ACTS, CODES, CONSTITUTIONAL PROVISIONS, INSTRUCTIONS, RULES, AND STATUTES CITED

APPENDIX

Rules Adopted or Amended by Per Curiam Orders

IN RE: ARKANSAS RULES of CIVIL PROCEDURE; RULES of APPELLATE PROCEDURE—CIVIL; RULES of the SUPREME COURT and COURT of APPEALS; and INFERIOR COURT RULES

Supreme Court of Arkansas
Delivered November 20, 2003

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 underlined; deleted material lined through).

We express our gratitude to the Chair of the Committee, Judge Henry Wilkinson, its Reporter, Professor John J. Watkins, and 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 prior to January 15, 2004, and they should be addressed to: Clerk, Supreme Court of Arkansas, Attn: Civil Procedure Rules, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

New material underlined. Deleted material lined through.

A. Rules of Civil Procedure

Rule 4. Summons.

* * *

(d) * * *

(8)(A)(i) Service of a summons and complaint upon a defendant of any class referred to in paragraphs (1) through (5), and (7) of this subdivision (d) ~~of this rule~~ may be made by the plaintiff or an attorney of record for the plaintiff by any form of mail addressed

to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee. The addressee must be a natural person specified by name~~,~~ and the agent of the addressee must be authorized in accordance with U.S. Postal Service regulations. However, service on the registered agent of a corporation or other organization may be made by certified mail with a return receipt requested.

(ii) Service pursuant to this paragraph (A) shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee or a returned envelope, postal document or affidavit by a postal employee reciting or showing refusal of the process by the addressee. If delivery of mailed process is refused, the plaintiff or attorney making such service, promptly upon receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default may be rendered against him unless he appears to defend the suit. Any such default or judgment by default may be set aside pursuant to Rule 55(c) if the addressee demonstrates to the court that the return receipt was signed or delivery was refused by someone other than the addressee or the agent of the addressee.

Addition to Reporter's Notes, 2004 Amendment: Subdivision (d)(8)(A) of the rule has been divided into two paragraphs. In a change that reflects settled case law, paragraph (A)(i) has been rewritten to state expressly that the agent of the addressee "must be authorized in accordance with U.S. Postal Service regulations." *See Green v. Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989). For the applicable postal service regulations, see Domestic Mail Manual S916.

More importantly, paragraph (A)(i) has been amended to establish less onerous requirements when service is made on the registered agent of a corporation or other organization. In that situation, the new last sentence provides that service may be made by certified mail, return receipt requested. Because delivery need not be restricted, there is no requirement that the addressee be a natural person or that the agent of the addressee be authorized in accordance with postal service regulations. *See generally* Domestic Mail Manual S912 (certified mail), S915 (return receipt).

Rule 6. Time.

* * *

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of mistake, inadvertence, surprise, excusable neglect, or other just cause, but it may not extend the time for taking an action under Rules 4(i), 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Addition to Reporter's Notes, 2004 Amendment: Subdivision (b) of the rule has been amended by adding Ark. R. Civ. P. 4(i) to the list of exceptions, thereby codifying the holding in *Smith v. Sidney Moncrief Pontiac*, No. 02-449 (June 19, 2003).

Rule 12. Defenses and objections — When and how presented — By pleading or motion — Motion for judgment on the pleadings.

(a) *When Presented.* (1) A defendant shall file his or her answer within ~~twenty (20)~~ 20 days after the service of summons and complaint upon him or her, except that: (A) a defendant not residing in this state shall file an answer within 30 days after service; (B) a defendant served under Rule 4(f) shall file an answer within 30 days from the date of first publication of the warning order; and (C) a defendant incarcerated in any jail, penitentiary, or other correctional facility in this state shall file an answer within 60 days after service. ~~when service is upon a non-resident of this state or a person incarcerated in any jail, penitentiary, or other correctional facility in this state, in which event he shall have thirty (30) days after service of summons and complaint upon him within which to file his answer. Where service is made under Rule 4(f), the defendant shall have thirty (30) days from the date of the first publication of the warning order within which to file his answer.~~ A party served with a pleading stating a cross-claim or counterclaim against him shall file his answer or reply thereto within

~~twenty (20)~~ 20 days after service upon him. The court may, upon motion of a party, extend the time for filing any responsive pleading.

(2) The filing of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: ~~(1) If~~ (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within ~~ten (10)~~ 10 days after notice of the court's action; ~~(2)~~ (B) if the court grants a motion for a more definite statement, the responsive pleading shall be filed within ~~ten (10)~~ 10 days after service of the more definite statement. Provided, that nothing herein contained shall prevent a defendant summoned in accordance with Rule 4(f) from being allowed, at any time before judgment, to appear and defend the action; and, upon a substantial defense being disclosed, from being allowed a reasonable time to prepare for trial.

(3) When any case is removed to federal court and subsequently remanded, the plaintiff shall file a certified copy of the order of remand with the clerk of the circuit court and shall forthwith give written notice of such filing to all parties in accordance with Rule 5. Any adverse party shall have 20 days from the receipt of such notice within which to file an answer or a motion permitted under this rule.

* * *

Addition to Reporter's Notes, 2004 amendment: Subdivision (a) has been divided into three paragraphs and other stylistic made. The two departures from prior law appear in what are now paragraphs (1) and (3). Under the first paragraph, the time for an incarcerated defendant to file an answer has been increased from 30 days to 60 days. This change recognizes the role of prison employees under Rule 4(d)(4) in delivering the summons and complaint, the possibility that delays in such delivery may occur, and the likelihood that securing legal representation will take longer for incarcerated persons than for other defendants.

Paragraph (3) deals with an issue previously covered in Rule 55(f), *i.e.*, the time period for responding to a complaint after a federal court has remanded a removed case to state court. The new paragraph expands that period from 10 to 20 days and states more clearly the point at which the time begins to run. *See NCS Healthcare*

v. W.P. Malone, Inc., 350 Ark. 520, 88 S.W.3d 852 (2002). Because of new language in Rule 55(f), a defendant who filed an answer or Rule 12 motion in federal court while the case was pending there need not, following remand, take the same action in state court within the 20-day grace period to avoid a default judgment. *See* Addition to Reporter's Notes to Rule 55 (2004 amendment).

Rule 17. Parties plaintiff and defendant.

* * *

~~(c) *Prisoners.* No judgment shall be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or, if there is none, by a person appointed by the court to defend for him.~~

Addition to Reporter's Notes, 2004 Amendment: Subdivision (c), which has no counterpart in Fed. R. Civ. P. 17, has been deleted. Borrowed from a superseded statute that was part of the Civil Code of 1868, the subdivision stated that "[n]o judgment shall be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or, if there is none, by a person appointed by the court to defend for him." Because of the elimination of subdivision (c), prisoners no longer receive special treatment with respect to default judgments. See *Zardin v. Terry*, 275 Ark. 452, 631 S.W.2d 285 (1982). However, the safeguards in Rule 4(d)(4) and Rule 12(a)(1) afford incarcerated persons notice, the opportunity to be heard, and the opportunity to obtain counsel. Rule 12(a)(1), as amended in 2004, provides that incarcerated persons have 60 days after service of process in which to file an answer, compared to the 20-day period for residents of the state. This differential reflects the role of prison employees in delivering the summons and complaint, as well as the likelihood that an incarcerated person will need more time than other defendants to arrange for legal representation.

Rule 35. Physical and mental examination of persons.

* * *

(c) *Medical Records.* (1) A party who relies upon his or her physical, mental, or emotional condition as an element of his or her claim or defense shall, within 30 days after the request of any other party, execute an authorization to allow such other party to obtain copies of his or her medical records. A shorter or longer

time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The term "medical records" means any writing, document, or electronically stored information pertaining to or created as a result of treatment, diagnosis, or examination of a patient.

* * *

Addition to Reporter's Notes, 2004 Amendment: A new sentence has been added to subdivision (c)(1) to provide that the 30-day response time may be lengthened or shorted by the court or by written agreement of the parties. Corresponding provisions appear in Rule 33(b) and Rule 34(b)(2), which apply to interrogatories and production of documents, respectively.

Rule 52. Findings by the court.

(a) *Effect.* If requested by a party at any time prior to entry of judgment, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under these rules.

(b) *Amendment.* (1) Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings of fact previously made or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered. If the court neither

grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

* * *

Addition to Reporter's Notes, 2004 Amendment: Subdivision (a) has been amended to make plain that a request for findings of fact and conclusions of law may be made "at any time prior to entry of judgment." A companion change in subdivision (b)(1) emphasizes that a motion after entry of judgment pursuant to that provision is for a different purpose, *i.e.*, to amend findings "previously made" or to make additional findings. The effect of these changes is to overrule *Apollo Coating RSC, Inc. v. Brookridge Funding Corp.*, 103 S.W.3d 682 (Ark. App. 2003), which held that a motion for findings and conclusions pursuant to Rule 52(a) could be made after entry of judgment.

Rule 55. Default.

* * *

(f) *Remand from Federal Court.* No judgment by default shall be entered against a party in an action removed to federal court and subsequently remanded if that party filed an answer or a motion permitted by Rule 12 in the federal court during removal. ~~Whenever a case has been removed to a United States court and thereafter remanded, no judgment by default shall be entered prior to the expiration of ten (10) days after service of notice upon defendants that the order remanding such case has been filed. Within such time the defendants may move or plead as they might have done had the case not been removed.~~

Addition to Reporter's Notes, 2004 Amendment: Subdivision (f) has been rewritten to modify and clarify the practice when a case is removed to federal court and then remanded. A corresponding change has been made in Rule 12(a). These amendments are based on a Texas rule, *see* Tex. R. Civ. P. 237a, and a similar approach has been taken in other states as well.

Under the original version of subdivision (f), a defendant had a 10-day grace period during which file an answer or Rule 12 motion after a removed case was remanded to state court. Even if the defendant had so responded to the complaint while the case was

pending in federal court after its removal, he or she was required to file another answer or motion in circuit court to avoid a default judgment. *See NCS Healthcare v. W.P. Malone, Inc.*, 350 Ark. 520, 88 S.W.3d 852 (2002).

Amended Rule 12(b)(3) expands the grace period to 20 days, during which time a defendant who filed neither an answer nor a Rule 12 motion in the federal court must take such action in the state court. By contrast, if the defendant responded to the complaint in federal court while the case was pending there, Rule 55(f) prohibits entry of judgment by default upon remand. Consequently, the defendant need not respond again in circuit court, within the 20-day period, to avoid such a judgment. *See Laguna Village, Inc. v. Laborers International Union*, 672 P.2d 882 (Cal. 1983); *Banks v. Allstate Indemnity Co.*, 757 N.E.2d 776 (Ohio App. 2001).

Because Arkansas procedural rules differ in some respects from those in the federal courts, however, Rule 55(f) does not require the circuit court to adopt the documents filed in federal court for all purposes. *See Laguna Village, supra.* For example, the plaintiff may move for an order from the circuit court directing the defendant to revise his or her answer to conform to the Arkansas pleading rules. In addition, the "bulk filing" of the federal pleadings and motions in the circuit court will not suffice. Rather, a party relying on a pleading or motion filed in federal court is charged with the responsibility of making the circuit court aware of the filings and must, if challenged, be able to show that the document was served on the other party. *NCS Healthcare, supra; Banks, supra.*

B. Rules of Appellate Procedure—Civil

Rule 4. Appeal — When taken.

* * *

(b) *Extension of time for filing notice of appeal.*

(1) * * *

(3) Upon a showing of failure to receive notice of the judgment, decree, or order from which appeal is sought and a determination that no party would be prejudiced, the circuit court ~~may~~ shall, upon motion filed within 180 days of entry of the judgment, decree, or order, extend the time for filing the notice of appeal for a period of ~~fourteen (14)~~ 14 days from the day of entry

of the extension order. Notice of any such motion shall be given to all other parties in accordance with Rule 5 of the Arkansas Rules of Civil Procedure. Expiration of the 180-day period specified in this paragraph does not limit the circuit court's power to act pursuant to Rule 60 of Arkansas Rules of Civil Procedure.

Addition to Reporter's Notes, 2004 Amendment: The first sentence of subdivision (b)(3) has been amended by replacing the word "may" with "shall," thereby requiring the circuit court to extend the time under the circumstances described in this provision. This change has the effect of overruling *Arnold v. Camden News Pub. Co.*, 110 S.W.3d 268 (Ark. 2003).

A new third sentence has been added to subdivision (b)(3) to make plain that although an extension of time is no longer possible because more than 180 days have passed, the circuit court retains its authority to take action under Ark. R. Civ. P. 60. This provision has the effect of overruling *Barnett v. Monumental Gen. Ins. Co.*, 97 S.W.3d 901 (Ark. App. 2003).

Rule 9. Extension of time when clerk's office is closed. ~~Time extension when last day for action falls on Saturday, Sunday or holiday.~~

Whenever the last day for taking any action under these rules or under the Rules of the Supreme Court and Court of Appeals falls on a Saturday, Sunday, ~~or~~ legal holiday, or other day when the clerk's office is closed, the time for such action shall be extended to the next business day.

Addition to Reporter's Notes, 2004 Amendment: The rule has been amended to address the situation in which the clerk's office is closed for reasons other than weekends and legal holidays. This change mirrors an amendment to Ark. R. Civ. P. 6(a) in 2003 that incorporates the Supreme Court's holding in *Honeycutt v. Fanning*, 349 Ark. 324, 78 S.W.3d 96 (2002).

C. Supreme Court Rules

Rule 2-3. Petitions for rehearing.

(a) *Filing and service.* A petition for rehearing, a brief in support of the petition, and evidence of service of the petition,

brief, and a certificate of merit stating that the petition is not filed for the purpose of delay, shall be filed within 18 calendar days from the date of decision.

(b) *Response.* The respondent may file a brief on the following Monday (in the Supreme Court) or Wednesday (in the Court of Appeals) or within seven ~~(7)~~ calendar days from the filing of the petition for rehearing, whichever last occurs, or may, on or before that time, obtain an extension of one ~~(1)~~ week upon written motion to the Court.

* * *

Rule 2-4. Petitions for review.

(a) *Contents of petition.* A petition to the Supreme Court for review of a decision of the Court of Appeals must be in writing and must be filed within 18 calendar days from the date of the decision, regardless of whether a petition for rehearing is filed with the Court of Appeals. The petition may be typewritten and shall not exceed three 8 1/2" x 11", double-spaced pages in length. The petition must briefly and distinctly state the basis upon which the case should be reviewed and may include citations of authority or references to statutes or constitutional provisions. The petition can only be filed by a party to the appeal and is otherwise subject to Rule 1-2(e).

* * *

(f) *Supplemental and reply briefs.* Any party may request permission to submit a supplemental brief by motion, filed with the Clerk and served upon all other parties, within two weeks after the granting of review. The moving party's brief shall be due ~~twenty~~ 20 calendar days from the granting of the motion. Other parties may file responsive supplemental briefs within ~~ten~~ 10 calendar days of the date the moving party's supplemental brief is filed. A reply brief may be filed within five calendar days after the filing of a responsive supplemental brief. No supplemental brief, responsive supplemental brief, or reply brief submitted pursuant to this Rule shall exceed ~~ten~~ 10 pages in length. These briefs shall otherwise conform to the requirements of Rule 4-1.

Rule 4-3. Briefs in criminal cases.

* * *

(k) *Continuances and extensions of time.*

(1) The Clerk or a deputy clerk may extend the due date of any brief by seven ~~(7)~~ calendar days upon oral request. If such an extension is granted, no further extension shall be entertained except by the Court upon a written motion showing good cause.

* * *

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

* * *

(f) *Continuances and extensions of time.*

(1) The Clerk or a deputy clerk may extend the due date of any brief by seven ~~(7)~~ calendar days upon oral request. If such an extension is granted, no further extension shall be entertained except by the Court upon a written motion showing good cause.

* * *

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 15 calendar days of the mailing of the letter notifying the Clerk and the other party or parties of the request for oral argument, counsel and the parties may submit to the Clerk, in writing, dates when they will be unavailable for argument. In addition to the reasons listed above, if it appears that attempts to schedule oral argument may result in undue delay, the Court may decide any case without oral argument.

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.

* * *

D. Inferior Court Rules

Rule 9. Appeals to circuit court.

(a) *Time for Taking Appeal.* All appeals in civil cases from inferior courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within ~~thirty (30)~~ 30 days from the date of the entry of judgment. The 30-day period is not extended by a motion for judgment notwithstanding the verdict, a motion for new trial, a motion to amend the court's findings of fact or to make additional findings, or any other motion to vacate, alter or amend the judgment.

(b) *How Taken.* An appeal from an inferior court to the circuit court shall be taken by filing a record of the proceedings had in the inferior court. Neither a notice of appeal nor an order granting an appeal shall be required. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and upon payment of any fees authorized by law therefor. The appellant shall have the responsibility of filing such record in the office of the circuit clerk.

(c) *Unavailability of Record.* When the clerk of the inferior court, or the court in the absence of a clerk, neglects or refuses to prepare and certify a record for filing in the circuit court, the person desiring an appeal may perfect his appeal on or before the 30th day from the date of the entry of the judgment in the inferior court by filing an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the inferior court (or the inferior court) to prepare and certify the records thereof for purposes of appeal and that the clerk (or the court) has neglected to prepare and certify such record for purposes of appeal. A copy of such affidavit shall be promptly served upon the clerk of the inferior court ~~[or the court]~~ (or the court) and the adverse party.

Addition to Reporter's Notes, 2004 Amendment: The new second sentence of subdivision (a) incorporates the holding of the Court of Appeals in *Barnett v. Howard*, 79 Ark. App. 293, 94 S.W.3d 342 (2002). The new second sentence of subdivision (b) provides

that neither a notice of appeal nor order granting an appeal is required to perfect an appeal to circuit court. The Supreme Court has made plain that all that is necessary is the timely filing of the inferior court record or an affidavit that the record is unavailable. *E.g., McBride v. State*, 297 Ark. 410, 762 S.W.2d 785 (1989); *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994). However, an express statement in Rule 9 was deemed desirable in light of reports that some clerks have demanded a notice of appeal or court order.

IN RE: RULES GOVERNING ADMISSION to the BAR

Supreme Court of Arkansas
Delivered November 20, 2003

PER CURIAM. Rule XIII of the *Rules Governing Admission to the Bar* sets forth the procedures to be followed where an applicant seeks initial admission to the Bar, reinstatement to the Bar, or readmission to the Bar after surrender of license or disbarment. Presently, it is a lengthy rule to which numerous changes have been made over the years. By reason of those changes, the rule has become difficult to understand or apply.

The Arkansas State Board of Law Examiners has asked this Court to amend Rule XIII to incorporate a reorganization of the rule, including stylistic and grammatical changes, and the removal of unnecessary language. We agree that such an amendment would be helpful for both the Board and the applicants.

We adopt and republish Rule XIII of the *Rules Governing Admission to the Bar* as it appears on the attachment to this order.

RULE XIII. STANDARDS AND PROCEDURES FOR ADMISSION; READMISSION; AND REINSTATEMENT

The practice of law is a privilege. Admission to practice is based upon the grade made on the examination, moral qualifications, and mental and emotional stability.

GENERALLY

Every applicant for admission, readmission, or reinstatement, shall complete and file with the Executive Secretary (Secretary) of the Board of Law Examiners (Board) an application, verified under oath, on a form approved by the Board. The Board may conduct whatever investigation it deems appropriate as to any applicant.

Upon receipt of a petition seeking readmission to the bar after disbarment or surrender of license, the Board shall cause a public notice of pendency of the petition to be placed in a newspaper of general circulation in the State and one newspaper of local circulation. The site for publication of the local notice shall be left within the discretion of the Secretary based upon the circumstances surrounding the applicant's surrender or disbarment. These notices shall be published at least 30 days prior to the hearing or decision by the Chair of the Board (Chair) pursuant to this rule. The notice shall be in such form as designated by the Board.

Further, where an application is for readmission subsequent to disbarment or surrender of license, such application shall be subject to the limitations set forth in Section 24 — Readmission to the Bar — of the *Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law,* or its successor rule.

The determination of eligibility of every applicant shall be made in accordance with this rule and the burden of establishing eligibility shall be on the applicant. The standard of proof is preponderance of the evidence.

Any proceedings at which the testimony of witnesses is being taken under oath shall be open to the public.

A. INITIAL REVIEW

Applications for admission, readmission after disbarment or surrender, or reinstatement after suspension pursuant to Rule VII(D) of these rules, shall be reviewed by the Secretary of the Board. Any application which raises questions of eligibility based upon the standards set out in this rule shall be referred to the Chair. The Chair, applying the standards set out in this rule, shall determine whether: the applicant is eligible for admission, readmission, or reinstatement; to recommend the deferral of the admission decision; or, the Chair is unable to determine eligibility for admission, readmission, or reinstatement.

B. STANDARDS

In addition to meeting all other requirements of the Rules Governing Admission to the Bar, every applicant for admission to practice by examination and every applicant for readmission or reinstatement of license to practice must be of good moral character and mentally and emotionally stable.

C. DECISION OF CHAIR - ADMISSION, READMISSION, OR REINSTATEMENT GRANTED

In the event the Chair determines that an applicant for admission is eligible, the Chair shall notify the Secretary, who shall certify to the Clerk of the Supreme Court (Clerk) that the applicant is eligible for admission.

In the event the Chair determines that an applicant for reinstatement is eligible, the Chair shall certify to the Clerk that the applicant is eligible for reinstatement. The Chair may condition such reinstatement upon the applicant taking the examinations as set forth in Rule IX of these rules or its successor rule.

In the event the Chair determines that an applicant for readmission after disbarment or surrender of license is eligible, the Chair shall so notify the applicant. The applicant will then be required to file a motion with the Arkansas Supreme Court as set forth in paragraph 2 of Section G of this rule. The Chair may condition such readmission upon the applicant taking the examinations as set forth in Rule IX of these rules or its successor rule.

D. DEFERRAL OF ADMISSION DECISION

The Chair shall annually appoint a Deferral of Admission Committee (Committee) composed of three (3) members. The committee members shall serve terms of one year subject to reappointment by the Chair. The Chair shall not be eligible to serve on the committee. The Chair shall designate the Chair of the committee.

In the event the Chair concludes that an applicant might be eligible for admission absent circumstances set out hereafter, then the Chair may defer the eligibility decision and provide the applicant with the alternative of participation in a deferral of admission program (program). The circumstances which might warrant such a deferral are: an

applicant currently has a condition or impairment resulting from alcohol or other chemical or substance abuse which currently adversely affects the applicant's ability to practice law in a competent and professional manner.

In such cases, the applicant shall be notified of the Chair's determination by certified, return receipt, restricted delivery mail. The applicant shall have thirty (30) days from receipt of notice in which to advise the Secretary that he or she is agreeable to participating in the program on such terms, and for such period of time, as may be set by the Committee. Failure of the applicant to timely agree to the program shall cause the application to be referred to the Board and processed as set forth in section E of this rule.

In the event an applicant elects the deferral of admission program, the committee shall secure such evidence as may be necessary to establish the terms and duration of the program. Such materials may include: documentary evidence supplied by the applicant; evidence secured by the Secretary; evidence acquired by an informal conference with members of the committee; or such other evidence as the committee may consider necessary to their decision. Prior to establishing the terms and duration of any deferral of admission program, the committee may reject the applicant as a candidate for the program. In such case, the applicant shall then be referred to the Board and processed as set forth in section E of this rule.

In the event the committee accepts the applicant as a participant in the program, then the applicant will sign an agreement with the committee which sets forth the terms and duration of the program. All expenses relating to the program shall be borne by the applicant, and this shall be part of the agreement. In the event the applicant does not sign the agreement within thirty (30) days of notification thereof, the deferral of admission for that applicant shall deem to have been waived. The applicant shall then be referred to the Board for disposition in accord with section E of this rule.

The deferral agreement may continue for a period not to exceed two (2) years.

At the conclusion of the deferral period, or anytime prior thereto, the committee shall determine whether the applicant has complied with all terms and conditions of the deferral agreement, and the committee shall so notify the Board. The Board shall then, by majority vote,

concurrence or dissent in writing shall be made a part of the record and a copy furnished to the applicant. In instances where the Board votes to grant admission of a new applicant, no findings of fact and conclusions are required.

F. BOARD DECISION — EVIDENTIARY HEARING — ADMISSION, READMISSION OR REINSTATEMENT DENIED — APPEAL

Within thirty (30) days of receipt of written findings of the Board denying eligibility, the applicant may appeal said findings to the Supreme Court of Arkansas for review de novo upon the record. Such appeal shall be prosecuted by filing a written notice of appeal with the Clerk with a copy to the Secretary. The notice of appeal shall specify the party taking the appeal; shall designate the order of the Board from which appeal is sought; and, shall designate the contents of the record on appeal. The notice shall also contain a statement that the transcript, or specific portions thereof, have been requested from the Secretary. The Secretary shall certify the record as being a true and correct copy of the record as designated by the parties and it shall be the responsibility of the appellant to transmit such record to the Clerk. The record on appeal shall be filed with the Clerk within ninety (90) days from filing of the notice of appeal, unless the time is extended by order of the Board. In no event shall the time be extended more than seven (7) months from the date of entry of the order of the Board. Such appeals shall be processed in accord with pertinent portions of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas.

G. BOARD DECISION — EVIDENTIARY HEARING — ADMISSION, READMISSION OR REINSTATEMENT RECOMMENDED

The Board may recommend that an applicant be certified for admission. In such cases, the Secretary shall certify to the Clerk that the applicant is eligible for admission.

The Board may recommend readmission of an applicant subsequent to disbarment or surrender of license, or reinstatement after suspension of license pursuant to Rule VII (D) where a hearing panel has been appointed. In the Board's discretion, the applicant may be required to take the examinations set forth in Rule IX of these rules, or its successor rule. Subsequent to such recommendation the appli-

cant shall file with the Court a motion pursuant to Rule 2-1 of the Rules of the Supreme Court and Court of Appeals, or its successor rule. Such a motion must be filed within thirty (30) days of receipt of notice that the Board has recommended readmission or reinstatement. The applicant shall file a single copy of the original transcript of the hearing, if one has been conducted, to include the findings of fact and conclusions, or, the original copy of the authorization for readmission which has been issued by the Chair of the Board. The motion filed in conjunction with the transcript or recommendation from the Chair shall briefly summarize the circumstances leading to the disbarment, surrender, or suspension. The matter shall then be referred to the Arkansas Supreme Court for disposition, at its discretion, in accordance with regular motion practice pursuant to Rule 2-1 or its successor rule.

H. GENERAL

All other *Rules Governing Admission to the Bar* are hereby amended to conform with the provisions of this rule.

IN RE: ARKANSAS BAR ASSOCIATION — PETITION TO REVISE THE ARKANSAS RULES of PROFESSIONAL CONDUCT

03-1049

Supreme Court of Arkansas
Opinion delivered December 11, 2003

PER CURIAM. The Arkansas Bar Association has petitioned the Court to revise the Arkansas Rules of Professional Conduct by replacing them with proposed rules patterned on the latest version of the American Bar Association Model Rules of Professional Conduct. The Arkansas Bar Association through its

make a determination as to whether the applicant is eligible for admission. In the event of a favorable Board vote, the Secretary shall then certify to the Clerk that the applicant is eligible for admission.

In the event the Committee determines that the applicant has failed to comply with the terms and requirements of the deferral agreement he or she shall be referred to the full Board for disposition in accord with the provisions of section E of this rule.

E. REFERRAL TO BOARD — HEARING — PROCEDURES

In the event the Chair is unable to determine eligibility of the referred applicant, or in instances where other provisions of this rule mandate referral of the applicant to the Board for determination of eligibility, then the applicant shall be notified of such determination. The applicant shall be advised that he or she has a right to a hearing on the question and the right to be represented by counsel at the expense of the applicant. Such notice shall be sent by certified, return receipt, restricted delivery mail. The applicant shall have thirty (30) days from receipt of the notice to request a hearing. Such request shall be in writing and addressed to the Secretary.

Upon request of the applicant, the Chair shall appoint a hearing panel (panel) from the Board comprised of not less than three members who shall proceed to a hearing as hereafter provided. The Chair shall not be eligible to serve thereon. Absent exigent circumstances, the hearing shall be conducted within 60 days after the Secretary is notified that the applicant requests a hearing. The Chair shall designate a member to serve as Chair of the panel. For good cause shown, the Chair of the panel may grant extensions of time.

This panel shall be appointed for the sole purpose of making a full and accurate record of all facts and circumstances affecting the application.

The Secretary shall act as evidence officer for the hearing with the responsibility of procuring and presenting evidence that may be pertinent, either for or against the applicant. However, for good cause shown, the Chair of the Board is authorized to appoint a substitute evidence officer.

At the start of the hearing, the evidence officer shall establish that all procedural requirements have been met as required by this rule and introduce documentary evidence. The applicant shall then present

evidence in support of the application without regard to rules of evidence but subject to cross-examination. At the close of the applicant's presentation, the evidence officer shall then present any additional evidence which is pertinent, subject to cross-examination, and the applicant shall then be permitted to introduce any additional evidence which may be pertinent in rebuttal, subject to cross-examination. The record may be held open for a set period to acquire additional evidence.

All costs and expenses attributable to the preparation and distribution of the transcript shall be borne by the applicant. The applicant shall be required to post a bond as set by the Secretary to insure payment of such costs and expenses. The panel shall have authority to issue summons for any person or subpoenas for any witness, directed to any Sheriff or State Police Officer within the State, requiring the presence of any party or the attendance of any witness before it, to include production of pertinent documents or records. Such process shall be issued under the seal of the Supreme Court of the State of Arkansas and be signed by the Chair of the panel, or the Secretary. Summonses or subpoenas shall be served in any manner provided by the Arkansas Rules of Civil Procedure for service of process. Likewise, the affected applicant shall be entitled to compel, by summons or subpoena issued in the same manner, the attendance and testimony of witnesses, and the production of pertinent documents or records. The Circuit Court of Pulaski County shall have the power to enforce process. Disobedience of any summons or subpoena or refusal to testify shall be regarded as constructive contempt of the Arkansas Supreme Court.

Failure of the applicant to timely request a hearing or tender the bond required by the Secretary shall cause the application to be administratively terminated. After such termination, the applicant must file a new application for admission, readmission, or reinstatement, accompanied by the appropriate fees.

At the conclusion of the hearing, a copy of the transcript of the proceedings shall be submitted without comment to each member of the Board and the applicant. The Board, within thirty (30) days of receipt of the transcript, after considering the entire record de novo, shall by majority vote, determine the eligibility of the applicant. Thereafter, within sixty (60) days of said vote, the Board shall cause to be filed with the Secretary the findings of fact and conclusions of the Board, a copy of which shall be delivered to the applicant. Any

Professional Ethics Committee and the House of Delegates has reviewed the American Bar Association's Model Rules and made some changes culminating with the draft rules attached to its petition filed with this Court. We thank the Arkansas Bar Association for its work.

Today, the Court publishes the Bar's proposed rules for comment. The comment period shall end on February 11, 2004. Comments should be sent to the Clerk of the Supreme Court, Attention: Rules of Professional Conduct, Justice Building, 625 Marshall, Little Rock, AR 72201.

Because of their length, the proposed rules are not attached to this *per curiam* order. They can be examined by going to the Arkansas Bar Association's web site: http://www.arkbar.com. ("Proposed Ethics Rules"). This web site contains a "red-lined" version showing how the proposed rules differ from the current rules, summaries, and links to the work of the American Bar Association. If this electronic version is not practicable, a disk containing the proposal or a hard copy can be obtained by contacting the Arkansas Bar Association, 400 West Markham, Little Rock, AR 72201 (800-609-5668).

IN RE: ARKANSAS BAR ASSOCIATION — PETITION for CREATION of the ARKANSAS ACCESS to JUSTICE COMMISSION

03-979

Supreme Court of Arkansas
Delivered December 18, 2003

PER CURIAM. The Arkansas Bar Association has petitioned the Court to create the Arkansas Access to Justice Commission. The Bar through the work of its House of Delegates and

Access to Justice Working Group ("Working Group") has submitted a detailed recommendation for a commission to coordinate efforts to improve access to the civil justice system for poor and near-poor individuals who cannot afford attorneys for representation in civil legal matters.

The Working Group reviewed access to justice efforts from accross the nation in developing its recommendation to create an Arkansas Access to Justice Commission. The recommendation points out that "while there are no comprehensive studies of the unmet civil legal needs of poor and near poor Arkansans, case data from Arkansas' two legal services providers suggest the unmet need is substantial":

> • Just 21% of the 12,588 cases Arkansas' two legal services providers completed in 2002 received full representation while 71% were given advice and counsel. While advice met the needs of some, a significant number would have benefitted from full representation. An additional 3,022 cases were pending at the end of the year.
>
> • In addition to completed cases, Arkansas' legal services providers had to reject 4,858 cases in 2002 due to conflicts and other factors. This number does not include individuals who call and no case is opened.
>
> • Demand for civil legal services for the poor is increasing. Arkansas' legal services providers completed seven percent more cases in 2002 than 2001. Requests for assistance are expected to accelerate in 2003 due to the declining economy, at a time when staff reductions at Arkansas' legal services providers will make it difficult to maintain the current level of services.
>
> • Despite the growing need, the number of cases handled on a pro bono basis was more or less flat from 2001 to 2002.
>
> • Due to a decline in Arkansas' share of the national poverty population, federal funds will decline in 2003 at the same time that Interest on Lawyers Trust Accounts (IOLTA) funds are decreasing. Arkansas' legal services providers have seen their revenue slashed nearly 20%, making it necessary to eliminate six support staff and nine attorney positions in 2003.

Recommendation dated March 31, 2003 at pages 2-3.

The Court has reviewed the proposal and concludes that a commission charged with the responsibility of assessing access to the civil justice system and furthering access to all Arkansans is called for. We thank the Arkansas Bar Association and the Working Group for its work on this project.

We incorporate the mission, goals, and structure for the Commission as contained in the the Working Group's Recommendation and set them out below. Members will be appointed at a later date. The remainder of the Recommendation is appended to the end of this order.

ARKANSAS ACCESS TO JUSTICE COMMISSION

MISSION STATEMENT

The Mission of the Arkansas Access to Justice Commission is to provide equal access to justice in civil cases to all Arkansans.

GOALS

A. Develop an objective and accurate understanding of the problems Arkansans face in using our legal system to obtain justice in civil cases.

B. Devise a strategic plan for statewide delivery of civil legal services to all Arkansans.

C. Review and report on the efficient allocation and application of the available resources.

D. Educate the people of Arkansas about the importance of equal access to justice and of the problems many Arkansans face in gaining effective access to our civil justice system.

E. Encourage a strong and consistent commitment to providing equal access to justice among the leaders of our state.

F. Suggest innovations that will increase effective access to the civil justice system for all Arkansans.

G. Provide technical and other support to the efforts of the legislature, courts, and other government agencies to improve access to justice for the people of Arkansas.

H. Develop stable, long-term funding and other resources to support access to civil justice.

STRUCTURE

A. The Commission shall consist of fifteen voting members, appointed as provided herein. The initial voting members shall draw their initial terms by lot, so that five members shall serve a one-year term, five shall serve a two-year term, and five shall serve a three-year term. All subsequent appointments of voting members shall be for a term of three years. A voting member may be appointed to serve no more than three successive three-year terms.

B. Should any vacancy in the term of a voting member occur, the appropriate appointing authority shall appoint a successor voting member who shall serve the remainder of the term. Any member whose term shall expire shall continue to serve until his or her successor is appointed.

C. Membership.

1.The Arkansas Supreme Court shall appoint five members of the Commission as follows:

(a) one justice of the Arkansas Supreme Court,

(b) two circuit judges, one from a circuit with a total population of more than 100,000 and one from a circuit with a total population of less than 100,000,

(c) one full-time district court judge, and

(d) one representative from the faculty of the University of Arkansas or University of Arkansas at Little Rock Schools of Law.

2. The Arkansas Bar Association shall appoint five members of the Commission as follows:

(a) the President of the Arkansas Bar Association or his or her designee,

(b) one attorney who is either employed as an in-house corporate counsel or whose practice is primarily focused on the representation of corporate clients,

(c) one non-attorney employed in a full time capacity as an advocate for the needs of low income Arkansans, and

(d) two attorneys active in the private practice of law who have demonstrated an interest in the provision of pro bono legal services.

3. The Governor shall be entitled to appoint three members of the Commission as follows:

(a) one non-attorney employed in a full time capacity by a non-profit agency which is dedicated to providing for the needs of low income Arkansans,

(b) one attorney employed in a full time capacity by the Center for Arkansas Legal Services or Legal Aid of Arkansas, and

(c) one non-attorney representative of the Arkansas State Chamber of Commerce.

4. The Speaker of the Arkansas House of Representatives and the President Pro Tempore of the Arkansas Senate shall each be entitled to appoint one member of their respective chambers to serve as members of the Commission.

D. Each of the appointing authorities shall coordinate the appointments to insure that, at all times, the Commission shall reflect the diverse ethnic, gender and geographic communities of the state.

E. In addition to the voting members set out herein, the Director of the Center for Arkansas Legal Services, the Director of Legal Aid of Arkansas, the Director of the Arkansas IOLTA Foundation and representatives of legal clinics at the state's two law schools appointed by their respective deans shall serve as ex-officio members of the Commission.

F. The Commission shall, by majority vote, elect a Chairperson from among the voting members who shall serve a term of one year and who may be re-elected to successive terms. Such other officers of the Commission may be selected, pursuant to rules established by the Commission.

G. The Commission may create such committees and appoint such committee members as are necessary to facilitate the work of the Commission.

APPENDIX

Recommendation
To Create an Arkansas Access to Justice Commission

Submitted to the

Arkansas Bar Association

By

Access to Justice Working Group

March 2003

"Equal justice under law is not only a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status."

Justice Lewis Powell, Jr.

U.S. Supreme Court

Equal justice hinges on *all* Arkansans being empowered to make their case in a court of law, not only in criminal cases but also in civil matters. Most often, people retain an attorney to make their case for them. Across the nation, however, a growing number of litigants now choose to represent themselves in civil matters. While the reasons vary, most represent themselves because they cannot afford an attorney. When people with limited income and education face a corporation or government agency without representation because they cannot afford an attorney, *equal justice under the law* can quickly become an unfulfilled promise.

Some 16% of Arkansans live below the federal poverty level, compared to 12.4% nationally. In nine Delta counties, more than 25% of the population lives in poverty. One-quarter of Arkansas adults lack a high school diploma, compared to 20% nationwide. Not only is justice not served when self-represented litigants are unprepared, but

these individuals also affect the functioning of the courts. Not surprisingly, the increase in self-represented litigants is occurring at the same time that funding for legal services for the poor is declining.

The National Council of State Courts, the American Judicature Society, the American Bar Association, the National Legal Aid and Defender Association and other national organizations have addressed the causes and consequences of barriers that impede access as well as strategies to improve access to justice in the civil legal system. In response, many states have created a broadly representative commission or similar entity to coordinate efforts to improve access to the civil justice system for poor and near-poor individuals who cannot afford attorneys. These commissions achieve their goals in part by bringing together leaders from the judiciary, private bar, advocacy community, academia, legal services and other interests who share a commitment to improving access to the civil legal system as a means to fulfilling the promise of equal justice under law. Their approaches range from reinvigorating pro bono programs to generating new resources for legal services to developing pro se materials to simplifying court procedures and forms.

National Studies and State Studies Provide Insight

In its landmark Comprehensive Legal Needs Study published in 1994, the American Bar Association found that 38% of poor households and 43% of near poor households in the South had one or more legal problems in the survey year. The most frequently reported legal problems were housing and real property, personal finance and consumer issues, family and domestic needs, and employment. Of these, 37% of poor households and 41% of near poor households sought help either from the civil justice system or a non-legal third party while 24% and 23% respectively reported handling their problem on their own. Even though the study was conducted nearly a decade ago, many states have conducted state-level legal needs studies more recently, most generating similar results.

A 1999 article published by the American Bar Association, Standing Committee on the Delivery of Legal Services, summarized recent research on the frequency of pro se litigation. A 1991 report from the National Center for State Courts examined the incidence of representation in divorce cases in urban jurisdictions. Just 28% of divorces proceeded with both parties represented by a lawyer. Frequently cited studies examining the trend of pro se litigation in domestic relations in

Maricopa County, Arizona found that pro se cases in which one party proceeded without a lawyer grew from 24% in 1980 to 47% in 1985 and 88% in 1990. A 1996 Maryland study found 57% of pro se litigants surveyed reported they could not afford a lawyer.

Indicators Suggest Arkansas' Unmet Need is Substantial

While there are no comprehensive studies of the unmet civil legal needs of poor and near poor Arkansans, case data from Arkansas' two legal services providers suggest the unmet need is substantial.

• Just 21% of the 12,588 cases Arkansas' two legal services providers completed in 2002 received full representation while 71% were given advice and counsel. While advice met the needs of some, a significant number would have benefited from full representation. An additional 3,022 cases were pending at the end of the year.

• In addition to completed cases, Arkansas' legal services providers had to reject 4,858 cases in 2002 due to conflicts and other factors. This number does not include individuals who call and no case is opened.

• Demand for civil legal services for the poor is increasing. Arkansas' legal services providers completed seven percent more cases in 2002 than 2001. Requests for assistance are expected to accelerate in 2003 due to the declining economy, at a time when staff reductions at Arkansas' legal services providers will make it difficult to maintain the current level of services.

• Despite the growing need, the number of cases handled on a pro bono basis was more or less flat from 2001 to 2002.

• Due to a decline in Arkansas' share of the national poverty population, federal funds will decline in 2003 at the same time that Interest on Lawyers Trust Accounts (IOLTA) funds are decreasing. Arkansas' legal services providers have seen their revenue slashed nearly 20%, making it necessary to eliminate six support staff and nine attorney positions in 2003.

The Process

The Arkansas Access to Justice Conference brought 118 attorneys, judges and advocates representing Arkansas' justice community together on March 23, 2001 to identify challenges to access and develop a consensus about the most effective institutional vehicle to coordinate statewide efforts to improve access to justice. The conference concluded with a call to action to create a permanent Arkansas Access

to Justice Commission. In response, the Arkansas Bar Association convened the Access to Justice Working Group, which held its first meeting in October 2002 (membership list attached). The Working Group's purpose is to determine if a need exists for a permanent Arkansas Access to Justice Commission and, if so, to develop a recommendation for the governance bodies of the Arkansas Bar Association.

To this end, the Arkansas Access to Justice Working Group has met as a body four times since October 2002. In addition, subcommittees have met in between meetings to develop work products for review. Through its deliberations, the Working Group has concluded:

• Fulfilling the promise of equal justice under law requires an ongoing process of continually improving access to the legal system.

• Leaders of the private bar, the judiciary, advocacy organizations, legal services and other Arkansans share a commitment to improving access to justice. Without a coordinated effort, however, progress will remain elusive.

• Improving access to justice hinges on documenting the unmet need in Arkansas, understanding the different dimensions of that need, and devising a long term plan of action, while demonstrating best practices through pilot projects and other means.

• Effective and frequent communication among different interests is fundamental to progress.

• A permanent Arkansas Access to Justice Commission is the most effective forum to bring leaders committed to improving access to justice together and to promote coordinated effort.

To this end, the Access to Justice Working Group recommends that the Arkansas Bar Association submit a formal request to the Arkansas Supreme Court to create a permanent Arkansas Access to Justice Commission with the mission, goals and structure described below.

....

[... Mission, Goals, Structure...have been excerpted and may be found in body of order.]

....

Recommendation

The Access to Justice Working Group recommends that the Arkansas Bar Association submit a formal request to the Arkansas Supreme Court to create a permanent Arkansas Access to Justice Commission with the mission, goals and structure described above.

Access to Justice Working Group

Nate Coulter
Attorney

James D. Gingerich
Administrative Office of the Courts

Charles W. Goldner, Jr., Chair
UALR School of Law

The Honorable James R. Hannah
Arkansas Supreme Court

Louis "Bucky" Jones
Attorney

Chalk S. Mitchell
Attorney

Michael W. Mullane
University of Arkansas School of Law

Susie Pointer
IOLTA Foundation

The Honorable Willard Proctor
Circuit Judge

The Honorable Jim D. Spears
Circuit Judge

Carolyn B. Witherspoon
Attorney

Scott Holladay
Carelink

Amy Rossi
Arkansas Advocates for Children & Families

Frank Sewall
Arkansas Blue Cross and Blue Shield

Ex Officio

Don Hollingsworth
Arkansas Bar Association

Jean Turner Carter
Center for Arkansas Legal Services

Mona Teague
Legal Aid of Arkansas

Sandra Miller
Arkansas Legal Services Partnership

IN RE: ADMINISTRATIVE ORDER NUMBER 14

Supreme Court of Arkansas
Delivered January 22, 2004

PER CURIAM. On January 30, 2003, we announced a major revision of Administrative Order Number 14, at which time we also instituted the position of administrative judge. *See In re Administrative Order Number 14*, 351 Ark. Appx., 94 S.W. 3d 903 (2003). On that occasion, we again acknowledged that implementation of Amendment 80 to the Arkansas Constitution and Administrative Order Number 14 is an evolving process which would be refined with the benefit of experience. In the last year, we have had the benefit of further experience in working with the newly installed administrative judges, as well as other circuit judges.

In response, today we announce three amendments to Administrative Order Number 14. We are clarifying the time for the election of administrative judges [Section 2(a)] and the duties of administrative judges [Section 2(c)(2)]. Lastly, after considering the request of the Arkansas Judicial Council, we agree with the suggestion to add domestic relations cases to criminal and juvenile cases, as cases which may be exclusively assigned to particular judges. [Section 3(a)(2)]. The changes are illustrated in the endnotes at the conclusion of this order.

Again, we thank the members of the judiciary for their interest and assistance as we continue in the Amendment 80 implementation process.

Finally, the Court adopts Administrative Order Number 14, as amended, effective immediately, and republishes it as set out below.

ADMINISTRATIVE ORDER NUMBER 14 — ADMINISTRATION OF CIRCUIT COURTS

1. *Divisions.*

a. The circuit judges of a judicial circuit shall establish the following subject-matter divisions in each county of the judicial circuit: criminal, civil, juvenile, probate, and domestic relations. The designation of divisions is for the purpose of judicial administration and caseload

management and is not for the purpose of subject-matter jurisdiction. The creation of divisions shall in no way limit the powers and duties of the judges to hear all matters within the jurisdiction of the circuit court.

b. For purposes of this order, "probate" means cases relating to decedent estate administration, trust administration, adoption, guardianship, conservatorship, commitment, and adult protective custody. "Domestic Relations" means cases relating to divorce, annulment, maintenance, custody, visitation, support, paternity, and domestic abuse. Provided, however, the definitions of "probate" and "domestic relations" are not intended to restrict the juvenile division of circuit court from hearing adoption, guardianship, support, custody, paternity, or commitment issues which may arise in juvenile proceedings.

2. *Administrative Judges.* In each judicial circuit in which there are two or more circuit judges, there shall be an administrative judge.

a. *Means of Selection.* On or before the first day of February of each year following the year in which the general election is held, the circuit judges of a judicial circuit shall select one of their number by secret ballot to serve as the administrative judge for the judicial circuit. In circuits with fewer than ten judges the selection must be unanimous among the judges in the judicial circuit. In circuits with 10 or more judges the selection shall require the approval of at least 75% of the judges. The name of the administrative judge shall be submitted in writing to the Supreme Court. If the judges are unable to agree on a selection, they shall notify the Chief Justice of the Supreme Court in writing and furnish information detailing their efforts to select an administrative judge and the results of their balloting. The Supreme Court shall then select the administrative judge. An administrative judge shall be selected on the basis of his or her administrative skills.

b. *Term of Office.* The administrative judge shall serve a term of two years and may serve successive terms. The administrative judge shall be subject to removal for cause by the Supreme Court. If a vacancy occurs in the office of the administrative judge prior to the end of a term, then within twenty days of such vacancy, the circuit judges in office at the time of such vacancy shall select an administrative judge to serve the unexpired term, and failing to do so, the Supreme Court shall select a replacement.

c. *Duties.* In addition to his or her regular judicial duties, an administrative judge shall exercise general administrative supervision over the circuit court and judges within his or her judicial circuit under the administrative plan submitted pursuant to Section 3 of this Administrative Order. The administrative judge will be the liaison for that judicial circuit with the Chief Justice of the Supreme Court in matters relating to administration. In addition, the duties of the administrative judge shall include the following:

(1) *Administrative Plan.* The administrative judge shall insure that the administrative plan and its implementation are consistent with the requirements of the orders of the Supreme Court.

(2) *Case Assignment.* Cases shall be assigned under the supervision of the administrative judge in accordance with the circuit's administrative plan. The administrative judge shall assure that the business of the court is apportioned among the circuit judges as equally as possible, and cases may be reassigned by the administrative judge as necessity requires. A circuit judge to whom a case is assigned shall accept that case unless he or she is disqualified or the interests of justice require that the case not be heard by that judge.

(3) *Information Compilation.* The administrative judge shall have responsibility for the computation, development, and coordination of case statistics and other management data respecting the judicial circuit.

(4) *Improvements in the Functioning of the Court.* The administrative judge shall periodically evaluate the effectiveness of the court in administering justice and recommend changes to the Supreme Court.

3. *Administrative Plan.* The circuit judges of each judicial circuit by majority vote shall adopt a plan for circuit court administration. The administrative judge of each judicial circuit shall submit the administrative plan to the Supreme Court. The purpose of the administrative plan is to facilitate the best use of the available judicial and support resources within each circuit so that cases will be resolved in an efficient and prompt manner. The plan shall include the following:

a. *Case Assignment and Allocation.*

(1) The plan shall describe the process for the assignment of cases and shall control the assignment and allocation of cases in the judicial circuit. In the absence of good cause to the contrary, the plan of assignment of cases shall assume (i) random selection of unrelated

cases; (ii) a substantially equal apportionment of cases among the circuit judges of a judicial circuit; and (iii) all matters connected with a pending or supplemental proceeding will be heard by the judge to whom the matter was originally assigned. For purposes of subsection 3(a)(1)(i), "random selection" means that cases assigned to a particular subject-matter division shall be randomly distributed among the judges assigned to hear those types of cases. For purposes of subsection 3(a)(1)(ii), "a substantially equal apportionment of cases" does not require that the judges among whom the cases of a division are assigned must hear the same percentage of such cases so long as the judges' overall caseloads are substantially equal.

(2) Cases in the criminal division, the juvenile division, or the domestic relations division may be exclusively assigned to particular judges, but such assignment shall not preclude them from hearing cases from any subject-matter division of circuit court. Except for the exclusive assignment of criminal, juvenile, and domestic relations division cases, cases in other subject-matter divisions should not be exclusively assigned to particular judges absent extraordinary reasons which must be set out in the circuit's administrative plan.

(3) The Administrative Office of the Courts shall as soon as practical develop and make available to each judicial circuit a computerized program to assure (i) random assignment of cases where appropriate and (ii) a substantially equal apportionment of cases among the judges.

b. *Caseload Estimate.* The plan shall provide a process which will apportion the business of the circuit court among each of the judges within the judicial circuit on as equal a basis as possible. The plan shall include an estimate of the projected caseload of each of the judges based upon previous case filings. If, at any time, it is determined that a workload imbalance exists which is affecting the judicial circuit or a judge adversely, the plan shall be amended subject to the provisions of Section 4 of this Administrative Order.

4. *Supreme Court.*

a. The administrative plan for the judicial circuit shall be submitted by the administrative judge to the Supreme Court by July 1 of each year following the year in which the general election of circuit judges is held. The effective date of the plan will be the following January 1. Until a subsequent plan is submitted to and published by the Supreme Court, any plan currently in effect shall remain in full force. Judges

who are appointed or elected to fill a vacancy shall assume the caseload assigned to the judge they are replacing until such time a new administrative plan is required or the original plan is amended. Upon approval, the Supreme Court shall publish the administrative plan and a copy shall be filed with the clerk of the circuit court in each county within the judicial circuit and the Clerk of the Supreme Court. The process for the amendment of a plan shall be the same as that of the plan's initial adoption.

b. In the event the administrative judge is unable to submit a plan consistent with the provisions of this Administrative Order, the Supreme Court shall formulate a plan for the equitable distribution of cases and caseloads within the judicial circuit. The Supreme Court shall set out the plan in an order which shall be filed with the clerk of each court in the judicial circuit and the Clerk of the Supreme Court. The clerk shall thereafter assign cases in accordance with the plan.

c. In the event an approved plan is not being followed, a judge may bring the matter to the attention of the Chief Justice of the Arkansas Supreme Court by setting out in writing the nature of the problem. Upon receipt of a complaint, the Supreme Court may cause an investigation to be undertaken by appropriate personnel and will take other action as may be necessary to insure the efficient operation of the courts and the expeditious dispatch of litigation in the judicial circuit.

ENDNOTES

Section 2.

> a. *Means of Selection.* On or before the first day of February of each year following the year in which the general election ~~of circuit judges~~ is held, the circuit judges of a judicial circuit shall select one of their number by secret ballot to serve as the administrative judge for the judicial circuit. . . .
>
> ***
>
> c. *Duties.* In addition to his or her regular judicial duties, an administrative judge shall exercise general administrative supervision over the circuit court and judges within his or her judicial circuit under the administrative plan submitted pursuant to Section 3 of this Administrative Order. The admin-

istrative judge will be the liaison for that judicial circuit with the Chief Justice of the Supreme Court in matters relating to administration. In addition, the duties of the administrative judge shall include the following:

(1) Administrative Plan. The administrative judge shall insure that the administrative plan and its implementation are consistent with the requirements of the orders of the Supreme Court.

(2) Case Assignment. Cases shall be assigned under the supervision of the administrative judge in accordance with the circuit's administrative plan. The administrative judge shall assure that the business of the court is apportioned among the circuit judges as equally as possible, and cases may be reassigned by the administrative judge as necessity requires. A circuit judge to whom a case is assigned shall accept that case unless he or she is disqualified or the interests of justice require that the case not be heard by that judge.

~~(3) Judicial Assignments. The administrative judge may, when specified in the circuit's administrative plan, provide for the assignment or reassignment of judges to any subject matter division of the circuit court to hear matters within that division.~~

~~(4)~~(3) Information Compilation. The administrative judge shall have responsibility for the computation, development, and coordination of case statistics and other management data respecting the judicial circuit.

~~(5)~~(4) Improvements in the Functioning of the Court. The administrative judge shall periodically evaluate the effectiveness of the court in administering justice and recommend changes to the Supreme Court.

Section 3

***

(a)(2) Cases in the criminal division, ~~or~~ the juvenile division, or the domestic relations division may be exclusively assigned

to particular judges, but such assignment shall not preclude them from hearing cases from any subject-matter division of circuit court. Except for the exclusive assignment of criminal, ~~and~~ juvenile, and domestic relations division cases, cases in other subject-matter divisions should not be exclusively assigned to particular judges absent extraordinary reasons which must be set out in the circuit's administrative plan.

IN RE: ARKANSAS RULES of CIVIL PROCEDURE; RULES of APPELLATE PROCEDURE—CIVIL; RULES of the SUPREME COURT and COURT of APPEALS; and INFERIOR COURT RULES

Supreme Court of Arkansas
Delivered January 22, 2004

PER CURIAM. On November 20, 2003, we published for comment the Arkansas Supreme Court Committee on Civil Practice's proposals for changes in the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure — Civil, Rules of the Supreme Court and Court of Appeals, and Inferior Court Rules. We thank everyone who reviewed the proposals and submitted comments.

We adopt the following amendments to be effective immediately and republish the rules and Reporter's Notes as set out below.

We encourage all judges and lawyers to review this *per curiam* order to familiarize themselves with the changes to the rules. We again express our gratitude to the members of our Civil Practice Committee for the Committee's diligence in performing the important task of keeping our civil rules current, efficient, and fair.

A. Rules of Civil Procedure

Rule 4. Summons.

* * *

(d) * * *

(8)(A)(i) Service of a summons and complaint upon a defendant of any class referred to in paragraphs (1) through (5), and (7) of this subdivision (d) may be made by the plaintiff or an attorney of record for the plaintiff by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee. The addressee must be a natural person specified by name, and the agent of the addressee must be authorized in accordance with U.S. Postal Service regulations. However, service on the registered agent of a corporation or other organization may be made by certified mail with a return receipt requested.

(ii) Service pursuant to this paragraph (A) shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee or a returned envelope, postal document or affidavit by a postal employee reciting or showing refusal of the process by the addressee. If delivery of mailed process is refused, the plaintiff or attorney making such service, promptly upon receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default may be rendered against him unless he appears to defend the suit. Any such default or judgment by default may be set aside pursuant to Rule 55(c) if the addressee demonstrates to the court that the return receipt was signed or delivery was refused by someone other than the addressee or the agent of the addressee.

Addition to Reporter's Notes, 2004 Amendment: Subdivision (d)(8)(A) of the rule has been divided into two paragraphs. In a change that reflects settled case law, paragraph (A)(i) has been rewritten to state expressly that the agent of the addressee "must be authorized in accordance with U.S. Postal Service regulations." *See Green v. Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989). For the applicable postal service regulations, see Domestic Mail Manual S916.

More importantly, paragraph (A)(i) has been amended to establish less onerous requirements when service is made on the registered agent of a corporation or other organization. In that situation, the new last sentence provides that service may be made by certified mail, return receipt requested. Because delivery need not be restricted, there is no requirement that the addressee be a natural person or that the agent of the addressee be authorized in accordance with postal service regulations. *See generally* Domestic Mail Manual S912 (certified mail), S915 (return receipt).

Rule 6. Time.

* * *

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of mistake, inadvertence, surprise, excusable neglect, or other just cause, but it may not extend the time for taking an action under Rules 4(i), 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Addition to Reporter's Notes, 2004 Amendment: Subdivision (b) of the rule has been amended by adding Ark. R. Civ. P. 4(i) to the list of exceptions, thereby codifying the holding in *Smith v. Sidney Moncrief Pontiac*, No. 02-449 (June 19, 2003).

Rule 12. Defenses and objections — When and how presented — By pleading or motion — Motion for judgment on the pleadings.

(a) *When Presented.* (1) A defendant shall file his or her answer within 20 days after the service of summons and complaint upon him or her, except that: (A) a defendant not residing in this state shall file an answer within 30 days after service; (B) a defendant

served under Rule 4(f) shall file an answer within 30 days from the date of first publication of the warning order; and (C) a defendant incarcerated in any jail, penitentiary, or other correctional facility in this state shall file an answer within 60 days after service. A party served with a pleading stating a cross-claim or counterclaim against him shall file his answer or reply thereto within 20 days after service upon him. The court may, upon motion of a party, extend the time for filing any responsive pleading.

(2) The filing of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within 10 days after notice of the court's action; (B) if the court grants a motion for a more definite statement, the responsive pleading shall be filed within 10 days after service of the more definite statement. Provided, that nothing herein contained shall prevent a defendant summoned in accordance with Rule 4(f) from being allowed, at any time before judgment, to appear and defend the action; and, upon a substantial defense being disclosed, from being allowed a reasonable time to prepare for trial.

(3) When any case is removed to federal court and subsequently remanded, the plaintiff shall file a certified copy of the order of remand with the clerk of the circuit court and shall forthwith give written notice of such filing to all parties in accordance with Rule 5. Any adverse party shall have 20 days from the receipt of such notice within which to file an answer or a motion permitted under this rule.

* * *

Addition to Reporter's Notes, 2004 amendment: Subdivision (a) has been divided into three paragraphs and other stylistic made. The two departures from prior law appear in what are now paragraphs (1) and (3). Under the first paragraph, the time for an incarcerated defendant to file an answer has been increased from 30 days to 60 days. This change recognizes the role of prison employees under Rule 4(d)(4) in delivering the summons and complaint, the possibility that delays in such delivery may occur, and the likelihood that securing legal representation will take longer for incarcerated persons than for other defendants.

Paragraph (3) deals with an issue previously covered in Rule 55(f), *i.e.*, the time period for responding to a complaint after a federal court has remanded a removed case to state court. The new paragraph expands that period from 10 to 20 days and states more clearly the point at which the time begins to run. *See NCS Healthcare v. W.P. Malone, Inc.*, 350 Ark. 520, 88 S.W.3d 852 (2002). Because of new language in Rule 55(f), a defendant who filed an answer or Rule 12 motion in federal court while the case was pending there need not, following remand, take the same action in state court within the 20-day grace period to avoid a default judgment. *See* Addition to Reporter's Notes to Rule 55 (2004 amendment).

Rule 17. Parties plaintiff and defendant.

* * *

Addition to Reporter's Notes, 2004 Amendment: Subdivision (c), which has no counterpart in Fed. R. Civ. P. 17, has been deleted. Borrowed from a superseded statute that was part of the Civil Code of 1868, the subdivision stated that "[n]o judgment shall be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or, if there is none, by a person appointed by the court to defend for him." Because of the elimination of subdivision (c), prisoners no longer receive special treatment with respect to default judgments. See *Zardin v. Terry*, 275 Ark. 452, 631 S.W.2d 285 (1982). However, the safeguards in Rule 4(d)(4) and Rule 12(a)(1) afford incarcerated persons notice, the opportunity to be heard, and the opportunity to obtain counsel. Rule 12(a)(1), as amended in 2004, provides that incarcerated persons have 60 days after service of process in which to file an answer, compared to the 20-day period for residents of the state. This differential reflects the role of prison employees in delivering the summons and complaint, as well as the likelihood that an incarcerated person will need more time than other defendants to arrange for legal representation.

Rule 35. Physical and mental examination of persons.

* * *

(c) *Medical Records.* (1) A party who relies upon his or her physical, mental, or emotional condition as an element of his or her claim or defense shall, within 30 days after the request of any other party, execute an authorization to allow such other party to obtain copies of his or her medical records. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The term "medical records" means any writing, document, or electronically stored information pertaining to or created as a result of treatment, diagnosis, or examination of a patient.

* * *

Addition to Reporter's Notes, 2004 Amendment: A new sentence has been added to subdivision (c)(1) to provide that the 30-day response time may be lengthened or shortened by the court or by written agreement of the parties. Corresponding provisions appear in Rule 33(b) and Rule 34(b)(2), which apply to interrogatories and production of documents, respectively.

Rule 52. Findings by the court.

(a) *Effect.* If requested by a party at any time prior to entry of judgment, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions, the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under these rules.

(b) *Amendment.* (1) Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings of fact previously made or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered. If the court neither grants nor denies the motion within 30 days of the date on which it is filed or treated as filed, it shall be deemed denied as of the 30th day.

* * *

Addition to Reporter's Notes, 2004 Amendment: Subdivision (a) has been amended to make plain that a request for findings of fact and conclusions of law may be made "at any time prior to entry of judgment." A companion change in subdivision (b)(1) emphasizes that a motion after entry of judgment pursuant to that provision is for a different purpose, *i.e.*, to amend findings "previously made" or to make additional findings. The effect of these changes is to overrule *Apollo Coating RSC, Inc. v. Brookridge Funding Corp.*, 103 S.W.3d 682 (Ark. App. 2003), which held that a motion for findings and conclusions pursuant to Rule 52(a) could be made after entry of judgment.

Rule 55. Default.

* * *

(f) *Remand from Federal Court.* No judgment by default shall be entered against a party in an action removed to federal court and subsequently remanded if that party filed an answer or a motion permitted by Rule 12 in the federal court during removal.

Addition to Reporter's Notes, 2004 Amendment: Subdivision (f) has been rewritten to modify and clarify the practice when a case is removed to federal court and then remanded. A corresponding change has been made in Rule 12(a). These amendments are based on a Texas rule, *see* Tex. R. Civ. P. 237a, and a similar approach has been taken in other states as well.

Under the original version of subdivision (f), a defendant had a 10-day grace period during which to file an answer or Rule 12 motion after a removed case was remanded to state court. Even if the defendant had so responded to the complaint while the case was pending in federal court after its removal, he or she was required to file another answer or motion in circuit court to avoid a default judgment. *See NCS Healthcare v. W.P. Malone, Inc.*, 350 Ark. 520, 88 S.W.3d 852 (2002).

Amended Rule 12(b)(3) expands the grace period to 20 days, during which time a defendant who filed neither an answer nor a Rule 12 motion in the federal court must take such action in the state court. By contrast, if the defendant responded to the complaint in federal court while the case was pending there, Rule 55(f) prohibits entry of judgment by default upon remand. Consequently, the defendant need not respond again in circuit court, within the 20-day period, to avoid such a judgment. *See Laguna Village, Inc. v. Laborers International Union*, 672 P.2d 882 (Cal. 1983); *Banks v. Allstate Indemnity Co.*, 757 N.E.2d 776 (Ohio App. 2001).

Because Arkansas procedural rules differ in some respects from those in the federal courts, however, Rule 55(f) does not require the circuit court to adopt the documents filed in federal court for all purposes. *See Laguna Village, supra.* For example, the plaintiff may move for an order from the circuit court directing the defendant to revise his or her answer to conform to the Arkansas pleading rules. In addition, the "bulk filing" of the federal pleadings and motions in the circuit court will not suffice. Rather, a party relying on a pleading or motion filed in federal court is charged with the responsibility of making the circuit court aware of the filings and must, if challenged, be able to show that the document was served on the other party. *NCS Healthcare, supra; Banks, supra.*

B. Rules of Appellate Procedure-Civil

Rule 4. Appeal — When taken.

* * *

(b) *Extension of time for filing notice of appeal.*

(1) * * *

(3) Upon a showing of failure to receive notice of the judgment, decree, or order from which appeal is sought and a determination that no party would be prejudiced, the circuit court shall, upon motion filed within 180 days of entry of the judgment, decree, or order, extend the time for filing the notice of appeal for a period of 14 days from the day of entry of the extension order. Notice of any such motion shall be given to all other parties in accordance with Rule 5 of the Arkansas Rules of Civil Procedure. Expiration of the 180-day period specified in this paragraph does not limit the circuit court's power to act pursuant to Rule 60 of Arkansas Rules of Civil Procedure.

Addition to Reporter's Notes, 2004 Amendment: The first sentence of subdivision (b)(3) has been amended by replacing the word "may" with "shall," thereby requiring the circuit court to extend the time under the circumstances described in this provision. This change has the effect of overruling *Arnold v. Camden News Pub. Co.*, 110 S.W.3d 268 (Ark. 2003).

A new third sentence has been added to subdivision (b)(3) to make plain that although an extension of time is no longer possible because more than 180 days have passed, the circuit court retains its authority to take action under Ark. R. Civ. P. 60. This provision has the effect of overruling *Barnett v. Monumental Gen. Ins. Co.*, 97 S.W.3d 901 (Ark. App. 2003).

Rule 9. Extension of time when clerk's office is closed.

Whenever the last day for taking any action under these rules or under the Rules of the Supreme Court and Court of Appeals falls on a Saturday, Sunday, legal holiday, or other day when the clerk's office is closed, the time for such action shall be extended to the next business day.

Addition to Reporter's Notes, 2004 Amendment: The rule has been amended to address the situation in which the clerk's office is closed for reasons other than weekends and legal holidays. This change mirrors an amendment to Ark. R. Civ. P. 6(a) in 2003 that incorporates the Supreme Court's holding in *Honeycutt v. Fanning*, 349 Ark. 324, 78 S.W.3d 96 (2002).

C. Supreme Court Rules

Rule 2-3. Petitions for rehearing.

(a) *Filing and service.* A petition for rehearing, a brief in support of the petition, and evidence of service of the petition, brief, and a certificate of merit stating that the petition is not filed for the purpose of delay, shall be filed within 18 calendar days from the date of decision.

(b) *Response.* The respondent may file a brief on the following Monday (in the Supreme Court) or Wednesday (in the Court of Appeals) or within seven calendar days from the filing of the petition for rehearing, whichever last occurs, or may, on or before that time, obtain an extension of one week upon written motion to the Court.

* * *

Rule 2-4. Petitions for review.

(a) *Contents of petition.* A petition to the Supreme Court for review of a decision of the Court of Appeals must be in writing and must be filed within 18 calendar days from the date of the decision, regardless of whether a petition for rehearing is filed with the Court of Appeals. The petition may be typewritten and shall not exceed three 8 1/2" x 11", double-spaced pages in length. The petition must briefly and distinctly state the basis upon which the case should be reviewed and may include citations of authority or references to statutes or constitutional provisions. The petition can only be filed by a party to the appeal and is otherwise subject to Rule 1-2(e).

* * *

(f) *Supplemental and reply briefs.* Any party may request permission to submit a supplemental brief by motion, filed with the Clerk and served upon all other parties, within two weeks after the granting of review. The moving party's brief shall be due 20 calendar days from the granting of the motion. Other parties may file responsive supplemental briefs within 10 calendar days of the date the moving party's supplemental brief is filed. A reply brief may be filed within five calendar days after the filing of a responsive supplemental brief. No supplemental brief, responsive supplemental brief, or reply brief submitted pursuant to this Rule shall exceed 10 pages in length. These briefs shall otherwise conform to the requirements of Rule 4-1.

Rule 4-3. Briefs in criminal cases.

* * *

(k) *Continuances and extensions of time.*

(1) The Clerk or a deputy clerk may extend the due date of any brief by seven calendar days upon oral request. If such an extension is granted, no further extension shall be entertained except by the Court upon a written motion showing good cause.

* * *

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

* * *

(f) *Continuances and extensions of time.*

(1) The Clerk or a deputy clerk may extend the due date of any brief by seven calendar days upon oral request. If such an extension is granted, no further extension shall be entertained except by the Court upon a written motion showing good cause.

* * *

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 15 calendar days of the mailing of the letter notifying the Clerk and the other party or parties of the request for oral argument, counsel and the parties may submit to the Clerk, in writing, dates when they will be unavailable for argument. In addition to the reasons listed above, if it appears that attempts to schedule oral argument may result in undue delay, the Court may decide any case without oral argument.

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.

* * *

D. Inferior Court Rules

Rule 9. Appeals to circuit court.

(a) *Time for Taking Appeal.* All appeals in civil cases from inferior courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within 30 days from the date of the entry of judgment. The 30-day period is not extended by a motion for judgment notwithstanding the verdict, a motion for new trial, a motion to amend the court's findings of fact or to make additional findings, or any other motion to vacate, alter or amend the judgment.

(b) *How Taken.* An appeal from an inferior court to the circuit court shall be taken by filing a record of the proceedings had in the inferior court. Neither a notice of appeal nor an order granting an appeal shall be required. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and upon payment of any fees authorized by law therefor. The appellant shall have the responsibility of filing such record in the office of the circuit clerk.

(c) *Unavailability of Record.* When the clerk of the inferior court, or the court in the absence of a clerk, neglects or refuses to prepare and certify a record for filing in the circuit court, the person desiring an appeal may perfect his appeal on or before the 30th day from the date of the entry of the judgment in the inferior court by filing an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the inferior court (or the inferior court) to prepare and certify the records thereof for purposes of appeal and that the clerk (or the court) has neglected to prepare and certify such record for purposes of appeal. A copy of such affidavit shall be promptly served upon the clerk of the inferior court (or the court) and the adverse party.

Addition to Reporter's Notes, 2004 Amendment: The new second sentence of subdivision (a) incorporates the holding of the Court of Appeals in *Barnett v. Howard*, 79 Ark. App. 293, 94 S.W.3d 342 (2002). The new second sentence of subdivision (b) provides that neither a notice of appeal nor order granting an appeal is required to perfect an appeal to circuit court. The Supreme Court has made plain that all that is necessary is the timely filing of the inferior court record or an affidavit that the record is unavailable. *E.g., McBride v. State*, 297 Ark. 410, 762 S.W.2d 785 (1989); *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994). However, an express statement in Rule 9 was deemed desirable in light of reports that some clerks have demanded a notice of appeal or court order.

IN RE: REGULATIONS of the BOARD of CERTIFIED COURT REPORTER EXAMINERS

Supreme Court of Arkansas
Delivered January 29, 2004

PER CURIAM. The Board of Certified Court Reporter Examiners has recommended amendments to Section 14 of the Regulations. We have considered the Board's proposals and agree with them. We thank the Board for its work.

We hereby amend and republish Sections 14(c) and 14(d) of the Regulations. These amendments apply to those persons whose certification test applications are received after the date of this per curiam. These amendments will not apply to test applicants who failed portions of the test given on September 27, 2003, and who are taking only the previously failed portions of the test on the April 2004 testing date. The changes made are illustrated in the endnote.[1]

REGULATIONS OF THE BOARD OF CERTIFIED COURT REPORTER EXAMINERS

Section 14. The tests shall be as follows:

* * *

---

[1] *(Added language has been underlined; deleted language has been stricken)*

REGULATIONS OF THE BOARD OF CERTIFIED COURT REPORTER EXAMINERS

Section 14. The tests shall be as follows:

* * *

(c) Applicants shall be required to transcribe each dictation tests with ~~a cumulative average of~~ 95% accuracy.

(d) If an applicant shall pass one or more parts of the test but fail one or more ~~the other~~ parts, the applicant will not be required to take the part or parts passed at the next successive examination given, but only the ~~that~~ part or parts failed. If the applicant does not pass the previously failed part or parts at the next successive examination, the applicant shall be required to retake the entire examination. ~~All parts of the dictation test must be passed at the same time.~~

(c) Applicants shall be required to transcribe each dictation test with 95% accuracy.

(d) If an applicant shall pass one or more parts of the test but fail one or more parts, the applicant will not be required to take the part or parts passed at the next successive examination given, but only the part or parts failed. If the applicant does not pass the previously failed part or parts at the next successive examination, the applicant shall be required to retake the entire examination.

IN RE: RULES of the ARKANSAS LAWYER ASSISTANCE PROGRAM (ALAP)

Supreme Court of Arkansas
Delivered January 29, 2004

PER CURIAM. On December 7, 2000, this Court approved the establishment of the Arkansas Lawyer Assistance Program (ALAP). The rules and regulations for ALAP which were adopted at that time included a provision for a revolving loan fund to be made available to impaired lawyers and judges. It has been brought to our attention that Rule 9 of those rules limits loan funds to those generated pursuant to Rule 1.C.(2) which includes "gifts or bequests from any source and earnings on investments of the ALAP fund." The ALAP Committee is optimistic such funds will become available as time passes. However, for the present such monies are insufficient to assist impaired lawyers. The Committee asks that we amend Rule 9 to allow any funds designated for ALAP under Rule 1.C. be made available for the revolving loan fund, with the annual amount of that fund to be set by order of this Court in the normal budgetary process. We agree with the Committee's request and amend Rule 9 as it appears on the attachment to this per curiam order.

RULES OF THE ARKANSAS LAWYERS ASSISTANCE PROGRAM (ALAP)

Rule 9. REVOLVING LOAN FUND

From the funds received under Rule 1, ALAP may establish a revolving loan fund. Such fund shall be made available to impaired lawyers and judges under rules and regulations established by the Committee, as a low interest loan for the purposes of defraying the cost of treatment.

Appointments to Committees

IN RE: ARKANSAS CONTINUING LEGAL EDUCATION BOARD

Supreme Court of Arkansas
Delivered November 20, 2003

PER CURIAM. Mark Hayes, Esq. of North Little Rock, Sixth Court of Appeals District, and Madison "Pat" Aydelott, III, Esq. of Searcy, Second Court of Appeals District, are hereby reappointed to the Board of Continuing Legal Education for three-year terms to expire on December 5, 2006. The court thanks Mr. Hayes and Mr. Aydelott for accepting reappointments to this Board.

IN RE: COMMITTEE on AUTOMATION

Supreme Court of Arkansas
Delivered November 20, 2003

PER CURIAM. Mr. James McCormack of Little Rock is hereby reappointed to the Committee on Automation for a three-year term to expire October 2006.

The Court extends its appreciation to Mr. McCormack for accepting this reappointment to this committee.

IN RE: ARKANSAS CONTINUING LEGAL EDUCATION BOARD

Supreme Court of Arkansas
Delivered December 4, 2003

PER CURIAM. Jim Rose, III, Esq. of Fayetteville, is hereby reappointed as an at-large representative to the Continuing Legal Education Board for a three-year term to expire on December 5, 2006. The Court thanks Mr. Rose for accepting reappointment to this Board.

IN RE: SUPREME COURT COMMITTEE on MODEL JURY INSTRUCTIONS—CIVIL

Supreme Court of Arkansas
Delivered December 4, 2003

PER CURIAM. We designate Professor Donald P. Judges of the University of Arkansas Law School at Fayetteville as the Reporter for the Committee on Model Jury Instructions—Civil. At the request of the Committee, Professor Judges has been assisting the Committee for a number of years in an advisory role. We take this opportunity to designate him as the Committee's Reporter to recognize his work and to formalize the nature of his service. We thank Professor Judges for his willingness to serve the Committee in this capacity.

IN RE: SUPREME COURT COMMITTEE on PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Delivered December 11, 2003

PER CURIAM. The Honorable Kathleen Bell of Helena, Arkansas, is appointed to the Supreme Court Committee on Professional Conduct, as an attorney representative from the First Congressional District, for a term of six years, commencing January 1, 2004, and expiring December 31, 2009. Judge Bell's appointment is made as a result of the term limitation of Richard A. Reid, of Blytheville, whose two (2) complete terms expire December 31, 2003.

The Court expresses its gratitude to Judge Bell for accepting appointment to this important Court Committee.

ARNOLD, C.J., not participating.

IN RE: SUPREME COURT COMMITTEE on PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Delivered December 11, 2003

PER CURIAM. J. Michael Cogbill, Esquire of Fort Smith, and Sylvia Orton of Little Rock are reappointed to the Supreme Court Committee on Professional Conduct, as an attorney representative from the Third Congressional District and an at-large non-lawyer representative, respectively, each for a term of six years, commencing January 1, 2004, and expiring December 31, 2009.

The Court expresses its gratitude to Mr. Cogbill and Mrs. Orton for accepting reappointment to this important Court Committee.

ARNOLD, C.J., not participating.

IN RE: SUPREME COURT COMMITTEE on CHILD SUPPORT

Supreme Court of Arkansas
Delivered December 12, 2003

PER CURIAM. The Honorable Gary Arnold, Circuit Judge, of Benton, and H.T. Moore, Esq., of Paragould are hereby reappointed to the Supreme Court Committee on Child Support. These are four-year terms, which will expire on November 30, 2007. Michael Lamoureux of Russellville is hereby appointed to the Committee on Child Support for a four-year term to expire on November 30, 2007.

The Court thanks Judge Arnold and Mr. Moore for accepting reappointment and Mr. Lamoureux for accepting appointment to this most important Committee.

The Court expresses its appreciation to the Hon. Jodie Mahony of El Dorado, whose term has expired, for his dedicated service to this Committee.