APPENDIX

Rules Adopted or Amended by Per Curiam Orders

IN RE: PROPOSED SUPREME COURT RULE 4-7. BRIEFS IN POSTCONVICTION and CIVIL APPEALS WHERE APPELLANT IS INCARCERATED and PROCEEDING PRO SE

Supreme Court of Arkansas
Opinion delivered January 19, 2006

PER CURIAM. Based upon the court's experience, we have determined that the procedure for briefing by incarcerated *pro se* appellants is in need of revision. We have developed a proposed procedure which is set out below, and we now publish for comment from the bench and bar. The comment period shall expire February 20, 2006.

Comments should be in writing and addressed as follows: Clerk, Arkansas Supreme Court, Attention *Pro Se* Briefs, Justice Building, 625 Marshall Street, Little Rock, AR 72201.

ARTICLE IV. BRIEFS

Rule 4-7. Briefs in Postconviction and Civil Appeals Where Appellant is Incarcerated and Proceeding *Pro Se*

(a) **Applicability.** This rule shall govern *pro se* briefs filed by incarcerated persons in appeals of Rule 37 postconviction relief proceedings and civil appeals. Except for the provisions contained in this rule, briefs filed by *pro se* parties shall otherwise comply with the Rules of the Supreme Court and Court of Appeals.

(b) **Style of briefs.**

(1) *Briefs – Size – Paper – Type.* A *pro se* brief may be handwritten, typed or produced with computer or word processing equipment. A handwritten brief shall be clearly legible, shall not exceed thirty lines per page and fifteen words per line with left-hand and right-hand margins of at least one and one-half inches and upper and lower margins of at least two inches. Briefs shall be of uniform size on 8 1-2" x 11" paper and firmly bound on the left hand margin by staples or other binding devices. If staples are used, they should be covered by tape. Typed briefs shall be double-spaced, except for quoted material, which may be single-

spaced and indented. Footnote lines, except quotations, shall be double-spaced. Use of footnotes is not encouraged, and should be used sparingly. Carbon copies are not acceptable, but copies produced by offset printing, positive photocopy, or other dry photo duplicating process which produces a clearly legible black-on-white reproduction may be used. Each page in the brief should be numbered sequentially with Page 1 being the first page of the abstract.

(2) *Length of argument.* Unless leave of the Court is first obtained, the argument portion of a brief shall not exceed 25 double-spaced pages including the conclusion, if any. The appellant's reply brief shall not exceed 15 double-spaced pages and shall not include any supplemental abstract or Addendum unless permitted by the Court upon motion. Motions for an expansion of the page limit must set forth the reason or reasons for the request and must state that a good faith effort to comply with this Rule has been made. The motion must specify the number of additional pages requested.

(3) *Affidavit.* If the *pro se* appellant received assistance in the preparation of the content of a brief, the brief shall also be accompanied by an affidavit that the appellant has prepared it without the paid assistance of any other prison inmate.

(c) Contents of briefs.

(1) *Contents.* The contents of the brief shall be in the following order:

(A) *Abstract.* The abstract is a summary of the testimony of the witnesses and other statements of the judge and attorneys contained in the transcript that are important to the understanding of the issues raised in the argument portion of the brief. Pleadings and documentary evidence should not be abstracted but should be included in the Addendum. It is the duty of the appellant to abstract such parts of the transcript, but only such parts, as are material to the points to be argued in the appellant's brief. The appellant in the abstract must summarize any testimony of witnesses, discussion between the judge and any person needed for an understanding of the issues. If parts of a prior trial or proceeding are important to the understanding of an issue, those parts of the transcript of that trial or proceeding must be included in the abstract. (*E.g.*, an appellant arguing in a Rule 37.1 appeal that his attorney failed to make an objection at trial must abstract the part

of the transcript where that occurred.) The appellee may prepare a supplemental abstract if material on which the appellee relies is not in the appellant's abstract.

(B) *Argument.* The appellant shall state each issue to be argued and then set out the argument in support of that issue. If an argument refers to a particular place in the record, the page number for that place in the record shall be provided. All citations of decisions of any court must state the name of the case and the book and page where the case may be found. Reference in the argument portion of the brief to material found in the abstract and Addendum shall be followed by a reference to the page number on which the material can be found in the brief.

(C) *Addendum.* The appellant's brief shall contain an Addendum, which consists of photocopies of documents from the record. It is the duty of the appellant to include in the Addendum such parts of the record, but only such parts, as are material to the points to be argued in the appellant's brief. The Addendum shall include true and legible photocopies of the original pleading, order from which the appeal is taken, and the notice of appeal. The Addendum shall also include any other relevant pleadings, jury instructions, documents, or exhibits essential to an understanding of the case. If parts of a prior trial or proceeding are important to the understanding of an issue, those parts of the record of that trial or proceeding must be included in the Addendum. (*E.g.*, an appellant arguing in a Rule 37.1 appeal that his attorney allowed an improper jury instruction at trial must include the jury instruction at issue in the Addendum.) The appellee may prepare a supplemental Addendum if material on which the appellee relies is not in the appellant's Addendum. Only documents that are part of the trial court record may be included in the Addendum.

(2) *Cover for briefs.* On the cover of the brief there should appear the docket number and name of the case, the name of the court from which the appeal is taken, the title of the brief (e.g., "Brief for Appellant"), and the name of the appellant.

(3) *Insufficiency of appellant's abstract or Addendum.* Motions to dismiss the appeal for insufficiency of the appellant's abstract or Addendum will not be recognized. Deficiencies in the appellant's abstract or Addendum will ordinarily come to the Court's attention and be handled in one of three ways as follows:

(A) If the appellee considers the appellant's abstract or Addendum to be defective, the appellee's brief should call the

deficiencies to the Court's attention and may, at the appellee's option, contain a supplemental abstract or Addendum.

(B) If the case has not yet been submitted to the Court for decision, an appellant may file a motion to supplement the abstract or Addendum and file a substituted brief. Subject to the Court's discretion, the Court will routinely grant such a motion and give the appellant thirty days within which to file the substituted abstract, Addendum, and brief. If the appellee has already filed its brief, upon the filing of appellant's substituted abstract, Addendum, and brief, the appellee will be afforded an opportunity to revise or supplement its brief.

(C) Whether or not the appellee has called attention to deficiencies in the appellant's abstract or Addendum, the Court may address the question at any time. If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief. Mere modifications of the original brief by the appellant will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement its brief. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the trial court's order may be affirmed for noncompliance with the Rule.

(4) *Non-compliance.* Briefs not in compliance with this Rule shall not be accepted for filing by the Clerk. When a party submits a brief on time that substantially complies with these Rules, the Clerk shall mark the brief "tendered", grant the party a fourteen-day compliance extension, and return the brief to the party for correction. If the party resubmits a compliant brief within fourteen calendar days, then the Clerk shall accept that brief for filing on the date it is received.

(d) Number of briefs and time for filing.

(1) *Briefs in chief.* The appellant shall have 40 days from the date the transcript is lodged to file 17 copies of the brief with the Clerk.

(2) *Appellee's brief.* The appellee shall have 30 days from the filing of the appellant's brief to file 17 copies of the brief with the Clerk and serve a copy on the appellant.

(3) *Reply brief.* The appellant shall have 15 days from the date that the appellee's brief is filed to file 17 copies of the reply brief.

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

IN RE: ARKANSAS RULES and REGULATIONS FOR MINIMUM CONTINUING LEGAL EDUCATION; and Rules Governing Admission to the Bar

Supreme Court of Arkansas
Opinion delivered February 2, 2006

PER CURIAM The *Arkansas Rules for Minimum Continuing Legal Education* (Rules) provide that certain notices to attorneys be sent via "Certified Mail, Restricted Delivery, Return Receipt Requested". The Arkansas Continuing Legal Education Board (Board) advises that the "Restricted Delivery" provision is rarely enforced by the Post Office. Further, the addition of that requirement accounts for almost one-half of the expense of such a mailing. Accordingly, the Board requests the removal of that requirement from the Rules. We agree with the recommendation and adopt Rule 6.(D) and the first paragraph of Rule 6.(G) as they appear on the attachment to this order. The remaining paragraphs of Rule 6.(G) are not affected by this order.

Further, the Board suggests the adoption of a rule specifying that the address an attorney maintains with the Clerk of this Court shall be his or her address of record. We agree with the recommendation and adopt a new Subsection F. to appear at the end of Rule 7 of the *Rules Governing Admission to the Bar* as shown on the attachment to this order.

Arkansas Rules for Minimum Continuing Legal Education
Rules 6.(D) and (G)

6.(D) If within the allotted time as set out in paragraph 6.(C) above, the attorney fails either to provide written evidence of compliance or that the noncompliance has been corrected, the Board, through its Secretary, shall serve a notice of intent to suspend upon the affected attorney. Such notice shall be mailed to the address the attorney maintains with the Clerk of the Arkansas Supreme Court. The notice shall be sent by certified mail, return receipt requested. Such notice shall apprise the attorney that his or her Arkansas law license shall be considered for suspension at the next regularly scheduled meeting of the Board. Such notice shall be sent at least 20 days prior to that meeting. Upon written request of the attorney, a hearing shall be conducted at that meeting.

6.(G) Promptly after a Board vote of suspension, the Secretary shall notify the affected attorney by way of certified mail, return receipt requested. In addition, the Secretary shall promptly file the order of suspension with the Clerk of the Arkansas Supreme Court and notify Arkansas state judges of general jurisdiction and the United States District Court Clerk.

Rules Governing Admission to the Bar
Rule VII Application for License
F.

At the time of licensure, the new admittee shall provide a mailing address to the Clerk of this Court. The address on record with the Clerk shall constitute the address for service by mail. Attorneys shall be responsible for informing the Clerk in writing and within a reasonable time of any change of such address.

IN RE: ARKANSAS RULES of CRIMINAL PROCEDURE, RULE 37.1

Supreme Court of Arkansas
Opinion delivered February 2, 2006

PER CURIAM. The Supreme Court Committee on Criminal Practice has proposed a change in Rule 37.1 of the Rules of Criminal Procedure to clarify the verification requirement. *See* the Reporter's Note explaining the change. The changes are illustrated in the endnote.

We agree with the Committee's recommendation, adopt the amendment as set out below, and republish the rule. This amendment shall be effective March 1, 2006.

Rule 37.1. Scope of Remedy.

(a) A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(i) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or

(ii) that the court imposing the sentence was without jurisdiction to do so; or

(iii) that the sentence was in excess of the maximum sentence authorized by law; or

(iv) that the sentence is otherwise subject to collateral attack;

may file a petition in the court that imposed the sentence, praying that the sentence be vacated or corrected.

(b) The petition shall state in concise, nonrepetitive, factually specific language, the grounds upon which it is based. The petition, whether handwritten or typed, shall be clearly legible, and shall not exceed ten pages of thirty lines per page and fifteen words per line, with left and right margins of at least one and one-half inches and upper and lower margins of at least two inches. The circuit court or appellate court may dismiss any petition that fails to comply with this subsection.

(c) The petition shall be accompanied by the petitioner's affidavit, sworn to before a notary or other officer authorized by law to administer oaths, in substantially the following form:

AFFIDAVIT

The petitioner states under oath that (he) (she) has read the foregoing petition for postconviction relief and that the facts stated in the petition are true, correct, and complete to the best of petitioner's knowledge and belief.

_____

Petitioner's signature

Subscribed and sworn to before me the undersigned officer this __ day of _____, 20__.

_____

Notary or other officer

(d) The circuit clerk shall not accept for filing any petition that fails to comply with subsection (c) of this rule. The circuit court or any appellate court shall dismiss any petition that fails to comply with subsection (c) of this rule.

Reporter's Note

Rule 37.1 formerly stated that a petition for postconviction relief had to be "verified." The 2006 amendments added subsections (c) and (d) to reduce the likelihood that the verification requirement would be overlooked by the petitioner or the courts.

ENDNOTE

[Illustration of changes to Rule 37.1]

Rule 37.1. Scope of Remedy.

(a) A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

~~(a)~~ (i) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or

~~(b)~~ (ii) that the court imposing the sentence was without jurisdiction to do so; or

~~(c)~~ (iii) that the sentence was in excess of the maximum sentence authorized by law; or

~~(d)~~ (iv) that the sentence is otherwise subject to collateral attack;

may file a ~~verified~~ petition in the court ~~which~~ that imposed the sentence, praying that the sentence be vacated or corrected.

~~(e) The petition will state in concise, nonrepetitive, factually specific language, the grounds upon which it is based and shall not exceed ten pages in length. The petition, whether handwritten or typewritten, will be clearly legible, will not exceed thirty lines per page and fifteen words per line, with lefthand and righthand margins of at least one and one-half inches and upper and lower margins of at least two inches. Petitions which are not in compliance with this rule will not be filed without leave of the court.~~

(b) The petition shall state in concise, nonrepetitive, factually specific language, the grounds upon which it is based. The petition, whether handwritten or typed, shall be clearly legible, and shall not exceed ten pages of thirty lines per page and fifteen words per line, with left and right margins of at least one and one-half inches and upper and lower margins of at least two inches. The circuit court or appellate court may dismiss any petition that fails to comply with this subsection.

(c) The petition shall be accompanied by the petitioner's affidavit, sworn to before a notary or other officer authorized by law to administer oaths, in substantially the following form:

AFFIDAVIT

The petitioner states under oath that (he) (she) has read the foregoing petition for postconviction relief and that the facts stated in the petition are true, correct, and complete to the best of petitioner's knowledge and belief.

Petitioner's signature

Subscribed and sworn to before me the undersigned officer this __ day of _____, 20__.

Notary or other officer

(d) The circuit clerk shall not accept for filing any petition that fails to comply with subsection (c) of this rule. The circuit court or any appellate court shall dismiss any petition that fails to comply with subsection (c) of this rule.

IN RE: PROPOSED RULES FOR APPEALS IN DEPENDENCY-NEGLECT CASES

Supreme Court of Arkansas
Opinion delivered February 2, 2006

PER CURIAM. In 1994, Arkansas received a grant to conduct an assessment of how our courts were handling dependency-neglect cases. The Supreme Court created the Ad Hoc Committee on Foster Care and Adoption (Committee) to oversee the project which became known as the Court Improvement Project (CIP). One of CIP's findings was that appeals in dependency-neglect cases were taking too long, and Ark. R. App. P. - Civil 2 (c) was amended to help remedy this problem. *See In Re Rules of App. Proc. - Civil,* 336 Ark. Appx. 649, 986 S.W.2d 407 (1999).

In the fall of 2003, the Committee began a reassessment of Arkansas courts and evaluated the progress the state has made since the original assessment. In 2005, the reassessment was completed, and its report was presented to the Supreme Court. This reassessment found that appeal time is still too long resulting in unacceptable delays in placing abused and neglected children in safe and permanent homes. The major causes for the delay are the time it takes the court reporter to transcribe the record and the number of extensions granted to attorneys largely to review voluminous records. To tackle these problems, the Committee formed a subcommittee consisting of representatives from the Department of Health and Human Services, ad litem attorneys, judges, and others. Practices in other states were reviewed. The subcommittee prepared a draft rule which was reviewed by court reporters, court

clerks, and other affected parties. The Committee finalized the rule and has recommended it to the Supreme Court.

We have reviewed the Committee's work. The proposal calls for limiting the record, curtailing extensions, and establishing time lines in order to expedite the appellate process. The Committee's recommendation memorandum and the minority report give additional background on the pertinent issues and how the proposal addresses them. We express our gratitude to the members of the Committee and everyone who assisted them in their work.

We have made several modifications to the Committee's draft and now publish for comment the proposed rule regarding appellate procedures and the proposed rule regarding trial counsel's duties on appeals. To aid in the consideration of these proposed rules, we also append excerpts from the Committee's recommendation memorandum and the minority report. Comments on the suggested rules should be made in writing prior to March 1, 2006, and they should be addressed to: Clerk, Supreme Court of Arkansas, Attn: Rules for Appeals in Dependency-Neglect Proceedings, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

PROPOSED RULES RECOMMENDED BY THE SUPREME COURT AD HOC COMMITTEE ON FOSTER CARE AND ADOPTION

I. RULE FOR APPEALS IN DEPENDENCY-NEGLECT CASES

(a) Appealable Orders.

(1) The following orders may be appealed from dependency-neglect proceedings:

(a) adjudication order;

(b) disposition, review, and permanency planning order if the court directs entry of a final judgment as to one or more of the issues or parties based on upon the express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P. Rule 54(b);

(c) termination of parental rights; and

(d) right to appointed counsel.

(2) The circuit court shall enter and distribute all dependency-neglect orders no later than 30 calendar days after a hearing.

(b) Notice and Time for Appeal.

(1) If the court announces its ruling from the bench and an appellant files a notice of appeal prior to the entry of the order, it shall be deemed to be filed the day after the order is entered.

(2) Notice of appeal shall be filed within 14 calendar days from the entry of the circuit court order from which the appeal is being taken.

(a) If the appellant alleges indigency for purposes of the appeal, the appellant must request an indigency hearing within seven (7) calendar days of the entry of the order from which the appeal is taken.

(b) The circuit court shall conduct the indigency hearing within five (5) business days of the request for the indigency appeal hearing.

(c) If the appellant is indigent the notice shall state that the court has made a determination of indigency for payment of the record and appointment of counsel for the appeal. If not indigent, appellant shall state that arrangements for payment of the record have been made.

(d) The notice of appeal and designation of record shall be signed by the appellant, if an adult, and appellant's counsel. The notice shall set forth the party or parties initiating the appeal, the address of the parties or parties, and specify the order from which the appeal is taken.

(e) If a timely notice of appeal is filed, any other party may file a notice of cross-appeal and designation of record within five (5) calendar days from the date the notice of appeal was filed.

(f) The time in which to file a notice of appeal or a notice of cross-appeal and the corresponding designation of record will not be extended.

(c) Record on Appeal.

(1) The record for appeal shall be limited to the transcript of the hearing from which the order of the appeal arose, any petitions or pleadings relevant to that hearing, and all exhibits entered into evidence at that hearing by the attorneys or parties, including, but not limited to, affidavits, petitions, case plans, court reports, records, prior court orders, and relevant excerpts from previous hearing transcripts.

(2) The appellant and the cross-appellant, if any, shall (A) complete a Notice of Appeal (Cross-Appeal) and Designation of Record (Form 1); (B) file Form 1 with the Circuit Clerk; and (C) serve Form 1 on the court reporter and all parties.

(3) The designation-of-record portion of Form 1 shall identify the hearing from which the order being appealed arose, and shall designate the date(s) of the hearing. Service of the Notice of Appeal and Designation of Record (Form 1) shall constitute a request for transcription of the hearing from which the order of the appeal arose.

(4) Within five (5) business days after service of the Notice of Appeal and Designation of Record (Form 1), the court reporter shall file a statement by mail or fax with the Circuit Clerk indicating whether arrangements for payment have been made and that the record will be completed timely. If the court reporter cannot complete the requested record within 60 calendar days timely, the court reporter shall make arrangements for the record to be completed and certified within 60 calendar days.

(d) Transmission of Record.

The record on appeal shall be filed with the Clerk of the Supreme Court within 70 calendar days of the filing of the Notice of Appeal. Within 60 calendar days after the filing of the Notice of Appeal and Designation of Record (Form 1), the court reporter shall provide the record to the Circuit Clerk who shall have no longer than five (5) business days to prepare the record, including any transcripts and exhibits, to be transmitted for submission to Clerk of the Supreme Court. After the record has been duly certified by the Circuit Clerk, it shall be the responsibility of the appellant to transmit the record to the Clerk of the Supreme Court for filing.

(e) Petition on Appeal.

(1) Within 20 calendar days after transmission of the record to the Clerk of the Supreme Court, the appellant shall file an original and 16 copies of a Petition on Appeal or Cross Appeal (Form 4).

(2) The petition shall not exceed twenty pages, excluding the abstract and addendum, and shall include:

(a) A statement of the nature of the case and the relief sought;

(b) A copy of the circuit court order appealed and date the order was entered

(c) A concise statement of the material facts as they relate to the issues presented in the petition on appeal that is sufficient to enable the appellate court to understand the nature of the case, the general fact situation, and the action taken by the circuit court. (References to page and line numbers in the record are not required);

(d) An abstract or abridgment of the transcript that consists of an impartial condensation of only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the court for decision. In the abstracting of testimony, the first person (i.e., "I") rather than the third person (i.e., "He, She") shall be used.

(e) A concise statement of the legal issues presented for appeal, including a statement of how the issues arose; and a discussion of the legal authority on which the party is relying with citation to supporting statutes, case law, or other legal authority for the issues raised. All citations of decisions of any court must state the style of the case and the book and page in which the case is found.

(f) Following the signature and certificate of service, the appellant's petition shall contain an addendum which shall include true and legible photocopies of the order, judgment, decree, ruling, or letter opinion from which the appeal is taken, a copy of the notice of appeal, and any other relevant pleadings, documents, or exhibits essential to an understanding of the case, which may include, but are not limited to, affidavits, petitions, case plan, court reports, court orders, or other exhibits entered

into the record during the hearing from which the appeal arose. The addendum shall include an index of its contents and shall also designate where any item appearing in the Addendum can be found in the record.

(f) Response to Petition on Appeal or Cross Appeal.

(1) Within 20 calendar days after service of the appellant's petition on appeal, any appellee may file an original and 16 copies of a response to the petition on appeal or cross-appeal (Form 5). The response shall be prepared by trial counsel or by substitute counsel so long as substitute counsel has filed an entry of appearance.

(2) The response shall not exceed twenty pages, excluding the abstract and addendum and shall include:

(a) A concise statement of the material facts as they relate to the issues presented by the appellant, as well as the issues, if any, being raised by the appellee on cross-appeal, that is sufficient to enable the appellate court to understand the nature of the case, the general fact situation, and the action taken by the circuit court. (Reference to page and line numbers in the record are not required.);

(b) A concise response to the legal issues presented on appeal and cross-appeal, if any, including a statement of how the issue arose; a discussion of the legal authority on which the party is relying with citation to supporting statutes, case law, or other legal authority for the issues raised. All citations of decisions of any court must state the style of the case and the book and page in which the case is found.

(c) If the appellee considers the appellant's abstract or addendum to be defective or incomplete, the appellee may provide a supplemental abstract or addendum. The appellee's addendum shall only include an item which the appellant's addendum fails to include.

(4) The appellant will have ten (10) business days to reply to the response or cross appeal.

(5) The appellee will have ten (10) business days to reply to appellant's response to the cross appeal.

(g) Extensions.

Extensions for completion of the record and submission of the petition shall only be granted upon a showing of manifest injustice and only for a period of no more than seven (7) calendar days. If the request is based on the court reporter's inability to complete the transcript, it must be supported by an affidavit of the reporter specifying why the transcript has not been completed.

(h) Style of Petition.

The style of the Petition on Appeal, Response, and Cross-Appeal shall follow the style of briefs as described by Rule 4-1 of the Rules of the Supreme Court except where a style is specifically described by these rules.

(i) Ruling.

(1) Dependency-neglect proceedings shall be prioritized on the calendar of the appellate court. Once a case is ready for submission, Clerk of the Supreme Court shall submit the case for decision.

(2) Any party must file a petition for rehearing with the appellate court or review with the Supreme Court within 5 business days of the appellate decision. No supplemental briefs or extensions shall be allowed. The Clerk of the Supreme Court shall submit the petition for decision.

II. RULE REGARDING TRIAL COUNSEL'S DUTIES IN DEPENDENCY-NEGLECT APPEALS

Rule __ Trial counsel's duties with regard to dependency-neglect appeals.

(a) Trial counsel, whether retained or court-appointed, shall continue to represent his/her client in a dependency-neglect case throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court or appellate court to withdraw in the interest of justice or for other sufficient cause. A trial court shall determine if the defendant is indigent for purposes of appeal. If the defendant has appointed counsel and is no longer indigent, the trial court shall relieve appointed counsel. After the

notice of appeal has been filed with the Circuit Clerk, the appellate court shall have exclusive jurisdiction to relieve counsel and appoint new counsel.

(b) If court-appointed counsel is permitted to withdraw pursuant to subsection (a), new counsel shall be appointed promptly by the court exercising jurisdiction over the matter of counsel's withdrawal and appointed counsel shall be qualified pursuant to Arkansas Supreme Court Administrative Order No. 15.

III. EXCERPTS FROM COMMITTEE'S RECOMMENDATION MEMORANDUM

. . . .

Issue: Appeals in dependency-neglect cases are taking too long in Arkansas appellate courts.

Despite efforts to expedite dependency-neglect appeals that resulted in Ark. R. App. P. – Civil 2 in 1997, appeals in these cases continue to delaying permanency for children. The Court Improvement Program (CIP) Reassessment Team reviewed data on 25 published decisions in a two year period. Five cases were appeals of dependency neglect adjudication orders and 20 were appeals of termination of parental rights (TPR) orders.

- The average number of days from the TPR order to the appeals decision was 443 days, ranging from 285 days to 685 days.
- The average number of days from the date of the TPR order to the date the appeal was lodged with the appellate court was 149 days, ranging from 79 days to 241 days.
- The average number of days from the date the appeal was lodged to decision was 286 days, ranging 159 to 527 days.

In the most recent case, *Menzies v. Arkansas Dept. of Human Servs*, CA 03-1237 (December 14, 2005), the appeal process took 774 days and time from entry of the TPR order to the appellate decision was 982 days. The Court of Appeals granted appellant eight brief extensions that resulted in a no-merit brief.

The two biggest factors in the delay are the time it takes the court reporter to transcribe the record and the granting of attorney exten-

sions. The delay in the record is because the petitioner in a TPR hearing will routinely ask the court to incorporate all the previous hearings into the record at the TPR hearing, regardless of the relevance. Attorney extensions are often the result of the time needed to review the voluminous record.

Supreme Court Ad Hoc Committee On Foster Care and Adoption Process and Recommendation

Following the CIP Reassessment and the Chief Justice's attendance at the Leadership Institute Summit on the Protection of Children, the Supreme Court Ad Hoc Committee on Foster Care and Adoption formed a rules sub-committee consisting of representation from DHHS counsel, Attorneys Ad Litem, parent counsel, Judicial Council, and the Chief Staff Attorney for the Court of Appeals. The AOC researched and provided the committee with rules from other model states for reference. The rules subcommittee drafted and circulated a DRAFT Rule and met with court reporters, clerks, court of appeals judges, circuit judges, and attorneys from various fields to seek additional comments and suggestions. The consensus of the group was that timelines should be established at all stages to move the case along, extensions needed to be eliminated, and everyone would be asked to make improvements in the way they currently conduct their practice in these cases to expedite appeals for abused and neglected children.

The biggest issue during the drafting of the rule concerned the record, including the time frames to transcribe the record and what should be included. Bottom line, court reporters that attended the meeting and were interviewed stated that they could not transcribe all dependency-neglect hearings in an expedited time frame under the current system, but it could be done if the record was limited as proposed by this rule change. The rule proposed on limiting records is also consistent with what other states have already done to expedite their appellate processes. . . .

Attorneys were concerned that relevant testimony from previous hearings might be necessary to include at a termination hearing. An example provided by an AAL, was a doctor from an adjudication hearing that is no longer in the state and cannot be called to testify at the TPR hearing if needed or not wanting to recall a child to testify. To address both of these concerns, compromise language was drafted

to limit the record to the transcript of the hearing from which the order on appeal arose but to allow attorneys or parties to enter into evidence relevant excerpts from previous hearing transcripts if needed to prove their case.

The Supreme Court Ad Hoc Committee on Foster Care and Adoption adopted the attached rule at its quarterly meeting on December 9, 2005. A minority of the committee members were concerned with the issue of the record being limited to the transcript of the hearing from which the order on appeal arose. As a result, the Ad Hoc Committee agreed that those members, including one member not present for the vote, could submit a minority report with the recommended rule to the Supreme Court for its consideration. In addition, the Ad Hoc Committee recommends that the Supreme Court provide a comment period on any rule under consideration for adoption concerning dependency-neglect appeals to seek additional input from the bench and bar.

Why This Rule Recommendation?

This proposed rule shortens the time frame for appeals, fosters best trial practice, maximizes state resources, and provides a more reasonable and efficient approach to the appellate process. We realize that this new rule requires a systemic change in how TPR hearings are presented to the trial court and we believe this is a change that is long overdue.

This rule will shorten the appellate process to approximately six months.

As you know, dependency-neglect proceeding differ from most cases in that they involve several stages of the case requiring specific hearing types and can often last a year or longer. Attorneys must present relevant evidence for each type of hearing and courts need to make detailed and relevant findings at each type of hearing. The real issue concerning the record arises at the TPR hearing because of the current practice that attorneys use of incorporating the entire prior case record at TPR hearings. The termination of parental rights hearing is a continuation of a dependency-neglect case and what has occurred in the dependency-neglect case is relevant to this important hearing; however the TPR hearings require a new petition and a higher burden of proof than other dependency-neglect proceedings.

Best practice demands that the parties submit specific evidence that relates to what is alleged in the TPR petition and that circuit courts make specific findings as to a child's best interest and the grounds alleged in the TPR petition. This will assist the appellate court in its review of the case and ensure all parties due process.

The current practice of allowing the petitioner to simply incorporate the entire record at a TPR hearing, most of which is irrelevant to the issue on appeal, is a waste of the court reporter's time and state financial resources. The reporter and the clerk must then copy and certify volumes of documentary evidence which does not focus on the relevant issue on appeal. The attorneys must then sort through masses of evidence and testimony which causes them to request extensions and takes much more time to prepare the appeal. It also costs more to pay the attorneys for this added time in preparation. The appellate court then must sort through the voluminous record and the entire case to resolve the issues on appeal.

Minority committee members expressing concern over the limited record argued that there is much evidence and testimony that occurs in prior hearings that will have to be recreated or that will have to be reintroduced by transcript at the TPR hearings. Based upon the current rule, the proposed rule, and also *Lewis v. Arkansas Dept. of Human Servs., CA 05-252*, (November 17, 2005), the court has determined that "our review of the record for adverse ruling is limited to the termination hearing, because a party is entitled to appeal final orders from the adjudication, review and permanency planning hearing." At the TPR hearing, witnesses do not need to be recalled to testify if that testimony has already been given. The history of the case can be presented by caseworkers without having to repeat all prior testimony. The only witnesses needed are those who have new testimony to present.

Some judges already require parties to present all evidence relevant to the TPR petition. The attorneys in those courts easily conduct the hearings by presenting a chronological case history, court orders from prior hearings, necessary documentary evidence, and any new evidence to address the petition. Courts using this system report that it is no more time consuming and yet allows for a clear and concise evaluation of the case. Transcripts of the entire case are not required.

. . . .

IV. MINORITY REPORT

December 22, 2005

Draft Rule on Appeals in Dependency-Neglect Proceedings

Four members of the Supreme Court Ad Hoc Committee respectfully submit this Minority Report on the proposed rule on appeals in dependency-neglect proceedings. We support the goal of obtaining permanency quicker for children as it relates to appeals of trial court decisions to terminate parental rights. Our primary concern with the proposed rule is the limitation on the record on appeal, specifically (c)(1) which would limit the record on appeal to the transcript of the hearing and exhibits from the termination of parental rights hearing.

We propose alternative language for (c)(1), specifically:

"The parties shall designate the portions of the record for appeal from the circuit court file, to include relevant exhibits, orders, and transcripts."

We understand the rationale behind the proposed rule is that a smaller record would mean a court reporter could more quickly prepare the record and the appellate court could more quickly read the record resulting in a speedier decision for children whose lives are in limbo pending a decision from the appellate court. Unfortunately, we do not believe this proposed rule will accomplish the goal of a smaller record and will, in fact, have an unintended detrimental impact on the entire current child welfare system.

In fact, the burden on the court reporter will increase. In every single termination of parental rights hearing, the petitioner will burden the court reporter with requests to transcribe witness testimony so transcripts can be introduced at the termination of parental rights hearing. Presently, court reporters do not transcribe witness testimony from previous hearings because the trial court takes judicial notice of the previous hearings during the termination of parental rights hearing. The petitioner will be forced to obtain transcripts of witness testimony from previous hearings to introduce into evidence despite the fact the trial court and all of the parties to the case have already heard the testimony thus creating a huge burden on the already overburdened court reporters. We are concerned that court reporters will focus primarily on preparing records for appeal purposes and the requests for transcripts from previous court hearings will be a lower

priority resulting in delays in obtaining the transcripts and a delay in holding termination of parental rights hearings at the trial court level.

We opine that if the only record going before the appellate court will be that from the termination of parental rights hearing, the number of witnesses who testify at the parental rights hearing will significantly increase along with the number of exhibits introduced at the hearing. In addition, the new rule envisions the introduction of transcripts of testimony from witnesses from previous court hearings. The introduction of these transcripts will also significantly impact the volume of the record from the termination of parental rights hearing. We believe the net result will be that the volume of the record on appeal will be exactly the same as it was before the adoption of this rule.

Although adoption of the rule will not result in a smaller record, the rule change will have a significant unintended detrimental impact to the child welfare system.

The burden on the trial court will increase. Courts will have to allocate more time than is currently set aside for termination of parental rights hearings. Courts will have to designate more dates for termination of parental rights hearings. A conservative estimate is that the time for termination of parental rights hearings will double. Right now, the court may allocate two hours for a hearing, but if the record on appeal is limited only to the termination of parental rights hearing and the trial court must disregard previous testimony and evidence submitted, then the time needed for the hearing would double to four hours. Failure to add additional time or days at the trial court level will result in delays in permanency for children because hearings to terminate parental rights will not be timely docketed on the court's calendar. The additional time added to the termination of parental rights hearings will be for the sole purpose of calling witnesses who will simply repeat prior testimony and to have exhibits submitted that have already been introduced at previous hearings. This is a waste of judicial resources. The trial court already heard the testimony and viewed the exhibits, yet for the sake of a clean record on appeal, the trial court must listen to repetitive testimony and review exhibits previously introduced.

The potential burden on children who have been abused is incredible and should be unacceptable. It is difficult for a young child to testify in court about abuse, especially testifying about sexual abuse. Now, counsel will be in the untenable position of deciding whether to call

a victimized child to testify once again about the abuse they suffered, again, simply for the sake of a clean record on appeal.

The burden on the stakeholders in the child welfare community will also increase. Professionals in the community who have testified at previous hearings will be recalled to give duplicate testimony at the termination of parental rights hearings. Caseworkers will have to spend more time at court hearings repeating testimony already given. Parents counsel will bill for more hours for increased time spent at termination of parental rights hearings. Although the volume of cases will remain the same for the attorney ad litems, the attorney ad litems will experience an increase in the amount of time spent on each case because of the requirement that the termination of parental rights hearing stand alone with absolute disregard for previous hearings in the case.

In addition to the burden on the court reporter, obtaining transcripts of witness testimony to introduce into evidence at the termination of parental rights hearings will have a tremendous financial impact on the Department of Health and Human Services (DHHS). To ensure DHHS will be able meet the higher burden of proof at termination of parental rights hearings, DHHS will have no choice but to obtain transcripts of witness testimony resulting in DHHS bearing the cost of paying for said transcripts. This financial burden will result translate into less funds available for services for children and families.

Obtaining transcripts of witness testimony can be manipulated by counsel resulting in an inaccurate representation of the case. Although one witness may testify with one perspective on a case, several other witnesses can testify and directly contradict that witness' testimony, but if counsel only requests the testimony of the witness in his favor, then the appellate court record will be inaccurate and misrepresent the actual state of the case. The trial court will have a complete understanding of the case, having heard all of the testimony from the previous hearings and having viewed all of the exhibits. Under the proposed rule, the appellate court will be limited to selected excerpts designated by counsel giving the ultimate fact finder a lesser amount of information than the trial court.

Counsel who is appointed or retained later in a case will be at a distinct disadvantage in preparing for a termination of parental rights case under the proposed rule. Counsel will not know the testimony from

previous hearings and will not know which testimony is needed to be transcribed for introduction at the termination of parental rights hearing.

It is unrealistic for a court to disregard testimony and exhibits from previous hearings. Trial courts understand the significance of terminating the rights of a parent and do not lightly enter such orders. Trial courts give considerable thought to the history of the case and frequently courts chronologically outline the pertinent facts of the case in written orders of termination. Now the trial court must ignore the past year's worth of hearings as if they never existed and limit the decision on whether or not to terminate parental rights to only what happens at the termination of parental rights hearing. Trial courts invest considerable hours reviewing cases and monitoring the progress of the parents in rehabilitating their circumstances. The appellate court should have before it the entire record of the case when debating whether or not parents' rights should be forever severed as to their children. Incomplete trial court records should be unacceptable. The ultimate finder of fact should have a complete record of all hearings in cases where the outcome will be that parents forever lose rights to their children.

Justice Glover, in the recent decision of Da Rocha v. Arkansas Dep't of Human Servs, put it best:

> The process through which a parent or parents travel when a child is removed from their home consists of a series of hearings — probable cause, adjudication, review, no reunification, disposition, and termination. All of these hearings build on one another, and the findings of previous hearings are elements of subsequent hearings. "The proceedings and orders pertaining to the termination of parental rights [are] in fact a continuation of the original dependency-neglect case." Wade v. Arkansas Dep't of Human Servs., 337, Ark. 353, 361, 990 S.W.2d 509, 514 (1999).

Da Rocha v. Arkansas Dep't of Human Servs, CA04-915, December 7, 2005, p. 6 of 8.

We assert that the delay in obtaining timely decisions on cases involving termination of parental rights is not because of the size of the record on appeal, but because of the numerous, seemingly unrestricted requests for extensions of current time frames outlined the appellate rules. We assert that if all extensions were prohibited,

that quicker decisions will result. With no extensions, the appellate court should have everything needed to make a decision in 7 months (a total of 210 days: 30 days for a notice of appeal, 90 days for a record, 45 days for the abstract and brief, 30 for response brief and 15 days for an optional reply brief). We support the shortening of time frames outlined in the proposed rule change so long as the shortened time frames do not result in shoddy briefs and incomplete abstracts.

We propose that the appellate court reject the rule change pertaining to limiting the record on appeal and instead adopt our proposed language that does not limit the record on appeal. We also ask the appellate court to adopt a rule eliminating all extensions and adopting tighter time frames, if needed. We propose the appellate court wait one year before taking any steps to limit the record on appeal to see whether or not elimination of extensions will result in quicker decisions on appealed cases.

Respectfully submitted,

Merry Alice Hesselbein, Attorney Ad Litem
Kay Forrest, Supervising Attorney, Office of Chief Counsel, DHHS
Pat Page, Assistant Director, Children & Family Services, DHHS
Lisa McGee, Deputy Counsel, Office of Chief Counsel, DHHS

IN RE: ARKANSAS RULES of CIVIL PROCEDURE; ADMINISTRATIVE ORDER NUMBER 18; and RULES of APPELLATE PROCEDURE — CIVIL

Supreme Court of Arkansas
Opinion delivered March 2, 2006.

PER CURIAM. The Arkansas Supreme Court Committee on Civil Practice has submitted its annual proposals and recommendations for changes in rules of procedure affecting civil practice. We have reviewed the Committee's work, and we now publish

the suggested amendments for comment from the bench and bar. The Reporter's Notes explain the changes, and the proposed changes are set out in "line-in, line-out" fashion (new material is italicized; deleted material is lined through).

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

Comments on the suggested rules changes should be made in writing prior to March 31, 2006, and they should be addressed to: Leslie W. Steen, Clerk, Supreme Court of Arkansas, Attn.: Civil Procedure Rules, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

A. ARKANSAS RULES OF CIVIL PROCEDURE

RULE 4. SUMMONS

(d) Personal Service Inside the State. A copy of the summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made upon any person designated by statute to receive service or as follows:

. . .

(4) Where the defendant is incarcerated in any jail, penitentiary, or other correctional facility in this state, service must be upon the ~~keeper or superintendent~~ *administrator* of the institution, who shall deliver a copy of the summons and complaint to the defendant. A copy of the summons and complaint shall also be sent to the defendant by first class mail and marked as "legal mail" and, unless the court otherwise directs, to the defendant's spouse, if any.

. . .

(i) Time Limit for Service. If service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative. If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court upon a showing of good cause. *The order granting any such extension, however, must be entered within 30 days after the*

motion to extend is filed, or by the end of the 120-day period, whichever date is later. If service is made by mail pursuant to this rule, service shall be deemed to have been made for the purpose of this provision as of the date on which the process was accepted or refused. This paragraph shall not apply to service in a foreign country pursuant to Rule 4(e) or to complaints filed against unknown tortfeasors.

Addition to Reporter's Note, 2006 Amendment: *Rule 4(d)(4) has been amended to delete the untoward reference to the "keeper" of a jail, penitentiary, or other correctional facility. The term "administrator" has been substituted for "superintendent."*

Rule 4(i), which governs the time limit for service, has been amended to set a reasonable deadline for getting an order entered on a motion to extend time for service. In Edwards v. Sazabo Foods, 317 Ark. 369, 877 S.W.2d 932 (1994), the supreme court rejected an effort to require that both the motion for extension of time to serve and the order granting that motion must be filed within the 120-day period. This amendment leaves Edwards intact. To encourage prompt service, and discourage filing a motion to extend but not securing an order promptly, the amendment sets a deadline for the entry of that order: thirty days after the motion is filed, or the end of the 120-day period, whichever date is later. The alternative deadlines eliminate the possibility that an early motion for extension will inadvertently reduce the time allowed for extending the time for service.

RULE 23. CLASS ACTIONS

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, ~~and~~ (4) the representative parties will fairly and adequately protect the interests of the class, *and (5) class counsel are adequate.*

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods

for the fair and efficient adjudication of the controversy. ~~As soon as practicable~~ *At an early practicable time* after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section ~~may be conditional and it~~ may be altered or amended ~~before the decision on the merits~~ *at any time before the court enters final judgment. An order certifying a class action must define the class and the class claims, issues, or defenses.*

(c) Notice. *(1)* In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. ~~The notice shall: (1) describe the action and the members' rights in it; (2) advise each member that the court will exclude the member from the class if the member so requests by a specified date; (3) advise each member that the judgment, whether favorable or not, will include all members who do not request exclusion; and (4) state that any member who does not request exclusion may, if the member desires, participate in the litigation, either in person or through counsel.~~

(2) The notice must concisely and clearly state in plain, easily understood language:

- *the nature of the action,*
- *the definition of the class certified,*
- *the class claims, issues, or defenses,*
- *that a class member may enter an appearance and participate in person or through counsel if the member so desires,*
- *that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and*
- *the binding effect of a class judgment on class members.*

(3) In any class action in which no monetary relief is sought, the court may require any notice it deems appropriate in the circumstances.

(4) The cost of ~~such~~ *any* notice shall be borne by the representative parties; provided, however, that the court may shift all or part of ~~such~~ *the* cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; ~~and~~ (5) *dividing the class into subclasses, treating each subclass as a class, and construing and applying the provisions of this rule accordingly; and (6)* dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended from time to time as may be desirable.

(e) Dismissal or Compromise. ~~A class action shall not be dismissed or compromised without the approval of the court. In cases where the court has entered an order that an action shall be maintained as a class action, notice of such proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~ *(1) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class. The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. The court may approve any such resolution that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.*

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) The court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval. An objection may be withdrawn only with the court's approval.

Addition to Reporter's Note, 2006 Amendment: *All parts of the Rule have been revised. Many of these changes echo recent amendments to Federal Rule of Civil Procedure 23, while others incorporate the holding of recent Arkansas decisions and current Arkansas practice. With a few exceptions, the changes are technical and do not change Arkansas law.*

Another prerequisite — the adequacy of class counsel — has been added to subdivision (a). This addition conforms the Rule to Arkansas law. E.g., Mega Life & Health Insurance Co. v. Jacola, 330 Ark. 261, 275, 975 S.W.2d 898, 904 (1997). Relevant factors for the circuit court's evaluation of class counsel include: counsel's work identifying and investigating potential claims, counsel's experience in handling class actions, complex litigation, and claims of the type asserted; counsel's knowledge of the applicable law; and the resources counsel will commit to representing the class. See generally, Federal Rule of Civil Procedure 23(g). Unless a showing is made to the contrary, however, Arkansas law presumes that the class representative's counsel "will vigorously and competently pursue the litigation." USA Check Cashers of Little Rock, Inc. v. Island, 349 Ark. 71, 80, 76 S.W.3d 243, 247.

Subdivision (b) on the timing of the circuit court's certification decision has been amended. The former rule required a certification decision as soon as practicable after the lawsuit commenced. That requirement, however, neither captured the prevailing practice nor recognized the good reasons for delaying the certification decision, such as the need for limited discovery on the Rule 23(a) prerequisites. The revised Rule requires a decision on certification at an early practicable time, which is the current standard in the federal Rule. That standard gives the circuit court and the parties some flexibility, while leaving intact the settled Arkansas law that the court may not inquire into the merits at the certification stage. E.g., Speights v. Stewart Title Guaranty Co., Inc., 358 Ark. 59, 186 S.W.3d 715 (2004) (Supplemental Opinion Denying Rehearing).

The amendment deletes the phrase "may be conditional" from the part of subdivision (b) authorizing the circuit court to alter or amend a certification order. The deleted phrase is superfluous; the Arkansas cases on point have emphasized the circuit court's power to reconsider, affirm, alter, modify, or withdraw certification. E.g., Fraley v. Williams Ford Tractor and Equip. Co., 339 Ark. 322, 347, 5 S.W.3d 423, 438-39 (1999).

All of these actions spring from the power to alter or amend a certification order. This change brings the Arkansas Rule back into conformity with the federal Rule.

The amendment also replaces the phrase "before the decision on the merits" in subdivision (b) with the phrase "at any time before the court enters final judgment." This change follows an amendment to the federal Rule; it better reflects the duration of the circuit court's authority to modify its certification decision; and it should give the circuit court greater flexibility to deal with developments late in the litigation but before final judgment.

A new sentence has been added to the end of subdivision (b). As the cases make plain, the certification order must define the class in sufficiently definite terms so that the court and the parties may identify the class members. E.g., Ferguson v. Kroger, 343 Ark. 627, 631-32, 37 S.W.3d 590, 593 (2001). Identifying the claims, issues, and defenses will likewise help in identifying class members and expedite the resolution of the litigation. The amendment tracks existing Arkansas law and the federal Rule. This amendment does not alter the precedent holding that the circuit court is not required to perform a rigorous analysis of the case at the certification stage. E.g., THE/FRE, Inc. v. Martin, 349 Ark. 507, 514, 78 S.W.3d 723, 727 (2002). But the circuit court must "undertake enough of an analysis to enable [the appellate court] to conduct a meaningful review." See Lenders Title Co. v. Chandler, 353 Ark. 339, 349, 107 S.W.3d 157, 162 (2003).

Subdivision (c) on notice has been rewritten and divided into subparts. The changes specify the contents of the notice in clearer terms, make a plain-statement requirement for the notice explicit, and bring the Arkansas Rule in line with the comparable federal Rule. A provision explicitly authorizing the circuit court to require notice in class actions where no monetary relief is sought has also been added. All these revisions are technical and do not change Arkansas law.

A new sentence (5) has been added to subdivision (d) to recognize the circuit court's authority to create subclasses. The Arkansas cases have assumed this authority, and implicitly approved it, for almost twenty years. E.g., Int'l Union of Ethical, Radio and Machine Workers v. Hudson, 295 Ark. 107, 117, 747 S.W.2d 81, 86-87 (1988); State Farm Fire & Casualty Co. v. Ledbetter, 355 Ark. 28, 35-36, 129 S.W.3d 815, 820-21 (2003). The federal Rule authorizes subclasses, which are often useful. This change conforms the Rule to current Arkansas practice. Former sentence (5) has been renumbered as (6).

Subdivision (e) about dismissal and compromise has been rewritten. With some exceptions, the revised Rule restates Arkansas law in the clearer terms of Federal Rule of Civil Procedure 23(e) and incorporates current

Arkansas practice. For example, proposed settlements are evaluated now for fairness, reasonableness, and adequacy. Ballard v. Martin, 349 Ark. 564, 79 S.W.3d 838 (2002). Subdivision (1) also requires the circuit court to hold a fairness hearing before approving any proposed settlement. This is a new requirement, though fairness hearings are routine in most class actions. Subdivision (2) requires the parties seeking approval of any settlement to file a statement identifying side agreements. This new requirement will promote fairness in settlements and mirrors the federal Rule. Subdivision (3) gives the circuit court discretion to open a second opt-out window if the circumstances justify it. The federal Rule contains this option, and it merely recognizes the circuit court's power to fashion all appropriate relief as part of approving any proposed settlement. Finally, subdivision (4) requires court approval before an objection may be withdrawn. Objections often can, and should be, resolved by the parties. This new requirement, also drawn from the federal Rule, will help the circuit court insure the fairness of those resolutions in light of the overall proposed settlement of the litigation.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(e) Supplementation of Responses. ~~A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:~~

~~(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity and location of each person expected to be called as a witness at trial, and in the case of expert witnesses, the subject matter on which he is expected to testify, and the substance of his testimony.~~

~~(2)~~ *(1)* A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. *This duty includes, but is not limited to, supplying supplemental information about the identity and location of persons having knowledge of discoverable matters, the identity and location of each person expected to be called as a witness at trial, and the subject matter and substance of any expert witness's testimony.*

~~(3)~~ *(2)* ~~A~~ *An additional* duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Addition to Reporter's Notes, 2006 Amendment: *Subdivision (e) has been amended. The amendment strengthens a party's duty to supplement discovery responses with additional or corrected information received after the party's original response. Introductory language stating a general no-duty-to-supplement rule with exceptions has been eliminated. Former subdivisions (e)(1) and (e)(2) have been combined: there is one duty to amend, and amended responses containing supplemental information are one kind of amendment. Former subdivision (e)(3) has been renumbered as new (e)(2) and clarified. The circuit court or the parties may expand the Rule 26(e) duty to supplement. New subdivision (e) in Arkansas Rule of Civil Procedure 37 contains a companion change: if a party fails to supplement discovery responses seasonably, and prejudice results, then the prejudiced party may move for any appropriate sanction from the circuit court.*

RULE 37. FAILURE TO MAKE DISCOVERY; SANCTIONS

(e) Failure to Supplement Responses. *If a party fails to supplement responses seasonably as required by Rule 26(e), and another party suffers prejudice, then upon motion of the prejudiced party made before or at trial, the court may make any order which justice requires to protect the moving party, including but not limited to imposing any sanction allowed by subdivision (b)(2)(A)-(C) of this rule.*

~~(e)~~ ***(f)*** **Expenses Against State.** Except to the extent permitted by statute, expenses and fees may not be awarded against the state of Arkansas under this rule.

Addition to Reporter's Notes, 2006 Amendment: *The Rule has been amended by adding a new subdivision (e) and renumbering former subdivision (e) as (f). New subdivision (e) draws on the principles embodied in the 2000 amendment to Federal Rule of Civil Procedure 37, but establishes a different rule. Under this new Arkansas Rule, when a party fails to supplement discovery responses seasonably with new information, and prejudice results, then the prejudiced party may move the circuit court for relief. New subdivision (e) gives the circuit court wide discretion, including imposing any sanction allowed by Arkansas Rule of Civil Procedure 37, in handling any failure to*

supplement. This new provision works in tandem with the companion change in Arkansas Rule of Civil Procedure 26(e) to strengthen every party's duty to supplement discovery responses promptly.

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, ~~at any time~~ after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. *Absent leave of court for good cause shown, the party must file any such motion no later than 45 days before any scheduled trial date.*

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may~~, at any time,~~ move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. *Absent leave of court for good cause shown, the party must file any such motion no later than 45 days before any scheduled trial date.*

(c) Motion and Proceedings Thereon.

(1) The motion shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, depositions, answers to interrogatories and admissions on file, and affidavits. The adverse party shall serve a response and supporting materials, if any, within 21 days after the motion is served. The moving party may serve a reply and supporting materials within 14 days after the response is served. *For good cause shown,* the court may by order *reduce or* enlarge the foregoing time periods. No party shall submit supplemental supporting materials after the time for serving a reply, unless the court orders otherwise. The court, on its own motion or at the request of a party, may hold a hearing on the motion not less than ~~14~~ 7 days after the time for serving a reply. *For good cause shown, the court may by order reduce the foregoing time period.*

Addition to Reporter's Notes, 2006 Amendment: *Several parts of Rule 56 governing the timing of motions for summary judgment, the related*

briefing, and the hearing have been amended. These changes continue the effort to refine the Rule by making summary-judgment practice more fair, predictable, and efficient.

The amendments to subdivisions (a) and (b) eliminate a party's right to seek summary judgment at any time. Instead, absent good cause, a party must move at least 45 days before any scheduled trial date. This deadline allows for full briefing and a hearing on the motion before trial, which should promote more efficient use of judicial resources. In addition, it prevents a party from using a late motion for summary judgment as a stealth motion for continuance.

Subdivision (c)(1) has been amended to allow the circuit court to reduce the time periods for responses and replies. Under the former Rule, the court could only enlarge the time periods. Both reductions and enlargements must now be justified by a showing of good cause. Finally, the presumptive period between the due date for any reply and any hearing has been shortened from 14 to 7 days. This change accommodates the pre-trial deadline for filing the motion, while giving the non-moving party adequate time to prepare for the hearing in light of any reply. Revised subdivision (c)(1) also allows the circuit court to shorten the seven-day period for good cause, for example, scheduling difficulties.

B. ADMINISTRATIVE ORDER NUMBER 18

3. Civil Jurisdiction. The district court shall have original jurisdiction within its territorial jurisdiction over the following civil matters:

(a) Exclusive of the circuit court in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars ($100), excluding interest, *costs, and attorney's fees*;

(b) Concurrent with the circuit court in matters of contract where the amount in controversy does not exceed the sum of five thousand dollars ($5,000), excluding interest, *costs, and attorney's fees*;

(c) Concurrent with the circuit court in actions for the recovery of personal property where the value of the property does not exceed the sum of five thousand dollars ($5,000); and

(d) Concurrent with the circuit court in matters of damage to personal property where the amount in controversy does not exceed the sum of five thousand dollars ($5,000), excluding interest *and costs*.

. . .

6. Small Claims Magistrate.

(a) At the request of the majority of the district judges of a district court, with the concurrence of a majority of the circuit court judges of a judicial circuit, the Administrative Judge of the judicial circuit may designate one or more licensed attorney(s) to serve as a Small Claims Magistrate to preside over the Small Claims Division of the district court. A Small Claims Magistrate shall be deemed the "judge" as that term is used in Rule 10 of the District Court Rules. A Small Claims Magistrate shall be subject to the superintending control of the district judges of the district court.

(b) A Small Claims Magistrate shall possess the same qualifications as a district court judge. The appointment shall be in writing and filed with the District Court Clerk.

7. Special Judges.

Special district judges shall be appointed or elected in accordance with Administrative Order Number 1 and A.C.A. § 16-17-210. A special district judge shall have the same qualifications, powers, and authority as a regular district judge.

COURT NOTES, 2006

New section 6 on small claim magistrates and new section 7 on special judges have been added. A special district judge shall be appointed or elected in the same manner as a special circuit judge. Section 3 has been amended to clarify that the jurisdictional amounts in contract cases are exclusive of costs and attorney's fees, as well as interest. In cases involving personal property, the jurisdictional amount is exclusive of interest and costs only because an award of attorney's fees will not be available.

C. ARKANSAS RULES OF APPELLATE PROCEDURE – CIVIL

RULE 4. APPEAL — WHEN TAKEN

(b) Extension of Time for Filing Notice of Appeal.

(3) Upon a showing of failure to receive notice of the judgment, decree or order from which appeal is sought, *a showing of diligence by counsel,* 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 fourteen (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 the Arkansas Rules of Civil Procedure.

Addition to Reporter's Notes, 2006 Amendment: *Subdivision (b)(3) has been amended to reflect the holding in Arkco Corp v. Askew, 360 Ark. 222, 200 S.W.3d 444 (2004). In addition to satisfying the Rule's other conditions, the party seeking to reopen the time to file a notice of appeal must demonstrate diligence by the party's counsel in attempting to find out if the circuit court had entered the judgment, decree, or order from which appeal is sought.*

RULE 5. RECORD — TIME FOR FILING

(b) Extension of Time.

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

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

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

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

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

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

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

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

Addition to Reporter's Notes, 2006 Amendment: *Rule 5(b)(3) has been revised to embody the holding of Coggins v. Coggins, 353 Ark. 431, 108 S.W.3d 588 (2003) (per curiam). Before the supreme court will accept a partial record and entertain a petition for a writ of certiorari to complete the record, the appellant must exhaust all extensions available from the circuit court or show that no extension could be obtained. In the latter situation, the appellant must demonstrate that, notwithstanding a good faith effort to get the record prepared on time and secure all available extensions of the record due date from the circuit court, the appellant was unable to get an extension order entered. The appellant should make this showing with references to the partial record filed with the supreme court and, if necessary, an affidavit describing the circumstances.*

IN RE: RULE PROVIDING FOR CERTIFICATION of COURT REPORTERS

Supreme Court of Arkansas
Opinion delivered March 16, 2006

PER CURIAM. The Board of Certified Court Reporter Examiners has recommended amendments to the Rule. We have considered the Board's proposal and agree with it. We thank the Board for its work.

We hereby amend, effective immediately, and republish Section 10 of the Rule. The changes made are illustrated in the endnote.[1]

RULE PROVIDING FOR CERTIFICATION OF COURT REPORTERS

* * *

Section 10. Continuing education requirement

[In General]

Reporters certified pursuant to this rule must acquire thirty (30) continuing education credits every three years through activities approved by the Board or a committee of the Board. Such three year period shall be known as the "reporting period." Each reporting period shall begin on January 1 and extend through December 31 three years hence. The reporting period for reporters newly certified pursuant to this Rule shall begin January 1 following certification by the Board. If a reporter acquires, during such reporting period, approved continuing education in excess of (30) thirty hours, the excess credit may be carried forward and applied to the education requirement for the succeeding reporting period only. The maximum number of continuing education hours one may carry forward is ten (10).

A continuing education credit is presumed to be 60 minutes in length. However, the Board in its discretion may grant greater or lesser credits per hour of education as each individual program may warrant. Court reporters certified pursuant to this rule who maintain a residence address outside the State of Arkansas are subject to this requirement. However, continuing education activities approved by the appropriate authority in their resident jurisdiction shall be applicable to this requirement.

To establish compliance with this continuing education requirement the Board may accept continuing education hours acquired to meet the continuing education requirements of the National Court Reporters Association or the National Verbatim Reporters Association.

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

RULE PROVIDING FOR CERTIFICATION OF COURT REPORTERS

* * *

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* * *

Appointments to Committees

IN RE: ARKANSAS LAWYER ASSISTANCE PROGRAM COMMITTEE

Supreme Court of Arkansas
Opinion delivered January 19, 2006

PER CURIAM. We appoint Hon. Kathleen Bell, Circuit Judge, of West Helena, James E. Smith, Jr., Esq., of Little Rock, and Ms. Melissa Carroll of Fayetteville to the Arkansas Lawyers Assistance Program Committee for six-year terms which will conclude on February 28, 2012. The Court thanks these committee members for their willingness to accept reappointment to this important committee.

IN RE: SUPREME COURT COMMITTEE ON CONTINUING LEGAL EDUCATION

Supreme Court of Arkansas
Opinion delivered February 2, 2006

PER CURIAM. District Judge Waymond Brown, of Pine Bluff, Fourth Congressional District, is appointed to the Supreme Court Committee on Continuing Legal Education Board for a three-year term to expire on December 5, 2008. Retired Circuit Judge Gerald Pearson, of Jonesboro, is appointed to an "at large" position for a three-year term to expire on December 5, 2008.

Michael Hodson, of Fayetteville, is reappointed to an "at large" position for a three-year term to expire on December 5, 2008.

The Court thanks Judge Brown, Judge Pearson, and Mr. Hodson for accepting these appointments to this important Com-

mittee. We also express our appreciation to Judge Don Glover, and Harold Evans, whose terms have expired, for their service to the Committee.

IN RE: SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE

Supreme Court of Arkansas
Opinion delivered February 23, 2006

PER CURIAM. Hon. Jim Hudson of Texarkana, Circuit Judge, 8th Judicial Circuit-South, and Hon. Robin Green of Bentonville, Prosecuting Attorney, 19th Judicial Circuit-West, are appointed to the Criminal Practice Committee for three-year terms to expire on January 31, 2009. We thank these new members for accepting appointment to this important committee.

Hon. David Clinger of Bentonville, Circuit Judge, 19th Judicial Circuit-West, Thomas B. Devine, III, Esq., of Little Rock, Timothy Dudley, Esq., of Little Rock, and David Raupp, Esq., Assistant Attorney General, are reappointed to the Criminal Practice Committee for three-year terms to expire on January 31, 2009. The Court thanks these members for their willingness to continue to serve.

We designate Hon. Larry Chandler of Magnolia, Circuit Judge, 13th Judicial Circuit, the new chair of the Committee and thank him for accepting these duties.

The Court expresses its gratitude to Hon. David Burnett, Circuit Judge, the out-going chair, and Hon. Bruce Anderson, District Judge, whose terms have expired, for their years of dedicated service.

IN THE MATTER of THE APPOINTMENT of A SPECIAL JUDGE

Supreme Court of Arkansas
Opinion delivered February 23, 2006.

PER CURIAM. Jack Holt, Jr. shall be appointed as a special judge, and he shall be given authority, for the express purpose of swearing in the newly-elected officers of the Arkansas Game & Fish Commission on March 10, 2006.

It is so ordered.

Professional Conduct Matters

IN RE: William David GOLDMAN,
Ark. Bar No. 81074

06-050

Supreme Court of Arkansas
Opinion delivered February 2, 2006

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender, in lieu of further disciplinary proceedings before the Committee for "serious misconduct," of the law license of William David Goldman of Hot Springs, Arkansas, to practice law, based on a license from the State of Arkansas. The name of William David Goldman shall be removed from the registry of attorneys licensed by the State of Arkansas, and he is barred and enjoined from engaging in the practice of law in this state.

It is so ordered.