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VOLUME 51

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Volume 322

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
October 9, 1995 – December 18, 1995
INCLUSIVE[1]

AND

ARKANSAS APPELLATE REPORTS
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IN THE

Court of Appeals of Arkansas

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PUBLISHED BY THE
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Volume 322

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
October 9, 1995 – December 18, 1995
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

PUBLISHED BY THE
STATE OF ARKANSAS
1995

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DURING THE PERIOD COVERED
BY THIS VOLUME
(October 9, 1995 –
December 18, 1995, inclusive)

JUSTICES

BRADLEY D. JESSON	Chief Justice
ROBERT H. DUDLEY	Justice
DAVID NEWBERN	Justice
TOM GLAZE	Justice
DONALD L. CORBIN	Justice
ROBERT L. BROWN	Justice
ANDREE LAYTON ROAF	Justice

OFFICERS

WINSTON BRYANT	Attorney General
LESLIE W. STEEN	Clerk
JACQUELINE S. WRIGHT	Librarian
WILLIAM B. JONES, JR.	Reporter of Decisions

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STANDARDS FOR PUBLICATION OF OPINIONS

Rule 5-2

Rules of the Arkansas Supreme Court and Court of Appeals

OPINIONS

(a) SUPREME COURT — SIGNED OPINIONS. All signed opinions of the Supreme Court shall be designated for publication.

(b) COURT OF APPEALS — OPINION FORM. Opinions of the Court of Appeals may be in conventional form or in memorandum form. They shall be filed with the Clerk. The opinions need not contain a detailed statement of the facts, but may set forth only such matters as may be necessary to an understandable discussion of the errors urged. In appeals from decisions of the Arkansas Board of Review in unemployment compensation cases, when the Court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.

(c) COURT OF APPEALS — PUBLISHED OPINIONS. Opinions of the Court of Appeals which resolve novel or unusual questions will be released for publication when the opinions are announced and filed with the Clerk. The Court of Appeals may consider the question of whether to publish an opinion at its decision-making conference and at that time, if appropriate, make a tentative decision not to publish. Concurring and dissenting opinions will be published only if the majority opinion is published. All opinions that are not to be published shall be marked "Not Designated for Publication."

(d) COURT OF APPEALS — UNPUBLISHED OPINIONS. Opinions of the Court of Appeals not designated for publication shall not be published in the *Arkansas Reports* and shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such

as res judicata, collateral estoppel, or law of the case). Opinions not designated for publication shall be listed in the *Arkansas Reports* by case number, style, date, and disposition.

(e) COPIES OF ALL OPINIONS. In every case the Clerk will furnish, without charge, one typewritten copy of all of the Court's published or unpublished opinions in the case to counsel for every party on whose behalf a separate brief was filed. The charge for additional copies is fixed by statute.

OPINIONS NOT DESIGNATED FOR PUBLICATION

Banks *v.* State, CR 95-780 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief denied and appeal dismissed October 16, 1995.

Barnes *v.* State, CR 95-1075 (Per Curiam), Pro Se Petition for Writ of Mandamus Tendered, writ of certiorari issued October 23, 1995.

Bennett *v.* Pope, CR 95-1026 (Per Curiam), Pro Se Petition for Writ of Mandamus moot November 20, 1995.

Billett *v.* State, CR 94-107 (Per Curiam), Pro Se Motion for Transcript and Other Material at Public Expense denied October 30, 1995.

Boyd *v.* Keith, CR 95-1221 (Per Curiam), Pro Se Petition for Writ of Mandamus moot December 11, 1995.

Bradley *v.* State, CR 95-895 (Per Curiam), Pro Se Motion for Belated Appeal granted October 23, 1995.

Brown *v.* State, CR 95-833 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied October 9, 1995.

Caldwell *v.* State, CR 95-842 (Per Curiam), affirmed December 11, 1995.

Clark *v.* State, CR 95-564 (Per Curiam), affirmed November 13, 1995.

Coleman *v.* State, CR 95-963 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied December 11, 1995.

Davis, Arthur Dean *v.* State, CR 95-973 (Per Curiam), Pro Se Motion for Rule on the Clerk denied December 4, 1995.

Davis, Roy E. *v.* State, CR 95-901 (Per Curiam), Pro Se Motion for Access to Record denied and appeal dismissed December 18, 1995.

Delph *v.* McGowan, 95-828 (Per Curiam), Pro Se Motion for Rule on the Clerk denied November 6, 1995.

Fox *v.* State, CR 95-91 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief and Motion to Supplement Record granted October 9, 1995.

Fuller *v.* State, CR 95-754 (Per Curiam), Pro Se Motion to File Belated Brief denied and appeal dismissed November 20, 1995.

Green *v.* State, CR 95-689 (Per Curiam), affirmed November 13, 1995.

Grundy *v.* State, CR 92-1326 (Per Curiam), Pro Se Motion for Transcript denied October 16, 1995.

Hadley *v.* State, CR 95-657 (Per Curiam), Pro Se Motions to Relieve Counsel and Appoint New Counsel or, in the Alternative, for Permission to File a Pro Se Supplemental Brief denied December 4, 1995.

Haltiwanger *v.* State, CR 95-837 (Per Curiam), Pro Se Motion to Relieve Counsel and for Continuance denied November 20, 1995.

Harris *v.* Burnett, CR 95-744 (Per Curiam), Pro Se Petition for Writ of Mandamus moot November 13, 1995.

Heard *v.* State, CR 95-840 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied November 6, 1995.

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Jobes *v.* State, CR 95-908 (Per Curiam), Pro Se Motion for Extension of Time to File Brief moot and Pro Se Motion for Appointment of Counsel denied and appeal dismissed December 11, 1995.

Johninson *v.* State, CR 95-173 (Per Curiam), affirmed November 13, 1995.

Johnson *v.* State, CR 95-217 (Per Curiam), affirmed December 4, 1995.

Jones *v.* State, CR 95-639 (Per Curiam), Appellee's Motion to Dismiss Appeal granted; appeal dismissed October 9, 1995.

Keel *v.* State, CR 95-822 (Per Curiam), affirmed; Motion for Appointment of Counsel denied October 30, 1995.

Kelly *v.* State, CR 95-672 (Per Curiam), Appellee's Motion to Dismiss Appeal granted; appeal dismissed October 9, 1995.

Leavy *v.* Davis, CR 95-978 (Per Curiam), Pro Se Petition for Writ of Mandamus moot December 4, 1995.

Madison *v.* State, CR 95-829 (Per Curiam), Pro Se Petition for Extension of Time denied, Motion for Access to Transcript denied, and Motion for Appointment of Counsel denied and appeal dismissed November 13, 1995.

Miller *v.* State, CR 95-129 (Per Curiam), Pro Se Motion for Extension of Time to File Pro Se Brief denied November 6, 1995.

Mitchell *v.* State, CR 95-834 (Per Curiam), Pro Se Motion for Appointment of Counsel denied, Appellee's Motion to Dismiss Appeal granted December 11, 1995.

Mosby *v.* Arkansas Bd. of Parole & Community Rehabilitation, 95-172 (Per Curiam), affirmed October 9, 1995.

Mosley *v.* State, CR 95-872 (Per Curiam), Pro Se Motion to Supplement Appellant's Brief and for Photocopies denied December 4, 1995.

Mosley *v.* State, CR 95-872 (Per Curiam), Pro Se Motion to Relieve Counsel, to Proceed Pro Se on Appeal and for Photocopies denied December 4, 1995.

Nooner *v.* State, CR 94-578 (Per Curiam), Pro Se Motion for Photocopy of Appellant's Brief at Public Expense denied October 16, 1995.

Owens *v.* State, CR 95-510 (Per Curiam), affirmed December 18, 1995.

Riddle *v.* Davis, 95-1062 (Per Curiam), Pro Se Petition for Writ of Mandamus moot October 30, 1995.

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Russey *v.* State, CR 95-867 (Per Curiam), Pro Se Motion for Transcript denied November 13, 1995.

Shavers *v.* Jones, CR 95-820 (Per Curiam), Pro Se Petition for Writ of Mandamus moot October 16, 1995.

Taylor *v.* State, CR 95-632 (Per Curiam), appeal dismissed December 4, 1995.

Thornton *v.* State, CR 94-1404 (Per Curiam), affirmed October 9, 1995.

Walker, Darryl *v.* State, CR 95-477 (Per Curiam), affirmed October 9, 1995.

Walker, Jimmy DeWayne *v.* State, CR 95-474 (Per Curiam), affirmed November 13, 1995.

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White *v.* State, CR 95-940 (Per Curiam), Pro Se Motion for Belated Appeal denied October 23, 1995.

Wilburn *v.* State, CR 94-1110 (Per Curiam), affirmed November 6, 1995.

Wilson *v.* State, CR 95-835 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied October 16, 1995.

APPENDIX
Rules Adopted or Amended by Per Curiam Orders

IN RE: RETENTION SCHEDULE FOR OFFICIAL COURT REPORTER RECORDS

906 S.W.2d 689

Supreme Court of Arkansas
Delivered October 16, 1995

PER CURIAM. The Board of Certified Court Reporter Examiners has petitioned the Court to adopt a retention schedule for the verbatim records produced by an official court reporter, or a certified court reporter serving in the absence of the official court reporter, in any court hearing, trial, or proceeding and for all physical exhibits received or proffered in evidence in those proceedings and of which the official court reporter has possession.

The Board has studied this issue in depth and has submitted a proposed retention schedule to the Court, recommending that the retention schedule be made a part of the Board's regulations and that the Board be charged with the ongoing responsibility for advising the Court when necessary in this area.

Pursuant to act 743 of 1995 amending Ark. Code Ann. Section 16-13-503, the Supreme Court of Arkansas has the responsibility for the regulation of the practice of court reporting in this state including the authority to adopt a records retention schedule for official court reporter records.

Having carefully considered the Board's recommendations, the Court adopts the attached Retention Schedule for Official Court Reporter Records to be published as Section 21 of the Regulations of the Board of Certified Court Reporter Examiners. Further, the Court amends the Rule Providing for Certification of Court Reporters, republishing attached Section 3, Duties of the Board, to include the retention schedule in the list of responsibilities with which the Board is charged. The Retention Schedule for Official Court Reporter Records and the amendment to Section 3 of the Rule are effective upon date of issuance.

SECTION 21

OFFICIAL COURT REPORTER RECORDS RETENTION SCHEDULE

PART 1. Scope.

a. This records retention schedule applies to all official court reporters in the State of Arkansas. "Official court reporter" as used in this retention schedule means a court reporter, certified by the Arkansas Board of Certified Court Reporter Examiners, who is regularly employed by a circuit, chancery, or circuit/chancery judge, or who serves in the absence of the regularly employed court reporter.

b. The term "records" as used in this retention schedule refers to any and all verbatim records produced by an official court reporter and all physical exhibits received or proffered in evidence in any court hearing, trial, or proceeding.

PART 2. Court Ordered Retention of Specific Records.

Upon the motion of any party demonstrating good cause or upon the court's own motion, the trial judge may enter an order directing that the records be retained for an additional period beyond the time established in PART 6. At the end of each additional court-ordered retention period, the judge may enter a new order extending the retention period.

PART 3. Responsibility for Storage; Sanctions.

a. During the period which the records are required to be retained, it shall be the responsibility of the official court reporter to maintain his or her records in an orderly, secure and identifiable manner. It is highly recommended that space be provided in the county courthouse in the county where the official court reporter maintains an office or resides. If that is not feasible, it shall be the responsibility of the official court reporter to provide adequate space for the records.

b. If an official court reporter leaves his or her position for any reason other than his or her death, the reporter shall, within thirty (30) days, deliver or cause to be delivered, those records as defined in PART 1, to the trial court and retained by the court until a subsequent official court reporter is employed

or retained, at which time the records shall be transferred to that reporter. A former official court reporter who maintains Arkansas certification may, with the court's permission, temporarily retrieve his or her former records necessary to prepare an appeal transcript or other documents which a party may request.

c. If an official court reporter dies while still in possession of those records subject to retention as defined in PART 1, the trial court shall take possession of those records within thirty (30) days of the official court reporter's death. The trial court shall retain possession of the records until a subsequent official court reporter is employed or retained. At that time the records shall be transferred to the possession of the subsequent official court reporter who shall safely maintain the records subject to the direction of the trial court.

d. Any person who fails to comply with or who interferes with these transfer provisions may be ordered to appear and show cause why he or she should not be held in contempt of court.

PART 4. Methods of Disposal of Records.

a. Paper records may be disposed of by burning or shredding.

b. Tapes may be erased and reused or may be dismantled to prevent their replaying.

c. Upon their written request, physical exhibits, other than weapons or contraband shall be returned to the party or attorney who proffered same. If no request is made within the time period for retention, the court reporter may dispose of the exhibit.

d. Exhibits such as weapons or contraband shall be disposed of in the following manner: (1) weapons, in whatever form, unless otherwise ordered by the trial court, shall be transferred to the sheriff, or his or her designee, in the county where the case was tried, for disposal pursuant to law; (2) contraband, in whatever form, shall be transferred to the sheriff, or his or her designee, in the county where the case was tried, for disposal pursuant to law.

PART 5. Log of Records. Sanctions.

a. Each official court reporter shall maintain an accurate,

orderly log of his or her records which also notes the date and method of destruction of each record listed. Any work papers maintained by the reporter for the purpose of identifying the record of court proceedings shall suffice, as long as they are legible. When an official court reporter leaves his or her position for whatever reason, the trial court shall take possession of the log no later than the date he or she takes possession of the records as set out in PART 3. When a subsequent official court reporter is employed or retained, the log shall be transferred to the possession of the subsequent official court reporter who shall safely maintain the log subject to the direction of the trial court.

b. Any person who fails to comply with or who interferes with this Section may be ordered to appear and show cause why he or she should not be held in contempt of court.

PART 6. Official Court Reporter Retention Schedule

TYPE OF CASE	PERIOD OF RETENTION
Criminal Cases	
Death Penalty	Permanently
Life in Prison w/o Parole	Permanently
Other Felonies (transcript lodged with appellate court)	90 days after Mandate issues
Other Felonies (no transcript prepared)	5 years from date of verdict or sentencing
Misdemeanors	2 years from date of sentencing
Grand Jury Proceedings	1 year subsequent to adjournment
Civil Circuit	
All Cases (transcript lodged with appellate court)	90 days after Mandate issues
All Cases (no transcript prepared)	2 years from date of final order of trial court

Chancery Cases

All Cases (transcript lodged with appellate court)	90 days after Mandate issues
All Cases (no transcript prepared)	2 years from date of final order of the trial court

Probate

All Cases (transcript lodged with appellate court)	90 days after Mandate issues
All Cases (no transcript prepared)	2 years from date of final order of trial court

Juvenile Division of Chancery Court

All Cases (transcript lodged with appellate court)	90 days after Mandate issues

Cases Where No Transcript is Prepared:

Delinquency	3 years from date of final order of trial court or on date of expungement order, whichever occurs first
Families in Need of Services (FINS)	3 years from date of final order of trial court
Dependent/Neglect	7 years from date of final order of trial court

PART 7. Effective Date.

This Official Court Reporter Records Retention Schedule is effective immediately upon publication. It applies to records of cases already tried and those to be tried.

SECTION 3.

DUTIES OF THE BOARD

The Board is charged with the duty and invested with the power and authority:

A. To determine the eligibility of applicants for certification;

B. To determine the content of examinations to be given to applicants for certification as certified court reporters.

C. To determine the applicant's ability to make a verbatim record of court proceedings by any recognized system designated by the Board.

D. To issue certificates to those found qualified as certificed court reporters.

E. To establish standards and conditions for reciprocity and for temporary waivers of certification requirements of eligible applicants.

F. To set a fee to be paid by each applicant at the time the application is filed and an annual license fee.

G. To develop a records retention schedule for official court reporters of state trial courts.

H. To promulgate, amend and revise regulations relevant to the above duties and to implement this Rule. Such regulations are to be consistent with the provisions of this Rule and shall not be effective until approved by this Court.

IN RE: ARKANSAS RULE OF CIVIL PROCEDURE 78

Supreme Court of Arkansas
Delivered November 13, 1995

PER CURIAM. Rule 78 of the Rules of Civil Procedure is amended by the addition of the following subparagraph (d):

(d) **Mandamus and Prohibition.** Upon the filing of petitions for writs of mandamus or prohibition in election matters, it shall be the mandatory duty of the judge or chancellor having jurisdiction to fix and announce a day of court to be held no sooner than two (2) and no longer than seven (7) days thereafter to hear and determine the cause.

The Notes accompanying Rule 78 are amended by adding the following:

Court's Notes, 1995 Amendment: Subsection (d) is added to modify the effect of Act 582, § 1, of 1991 which amended Ark. Code Ann. § 16-115-104 (Supp. 1993). Act 582 increased the time to hear writs of prohibition and mandamus to 45 days. The Court has concluded that the abbreviated procedure formerly prescribed in Ark. Code Ann. § 16-115-104 is necessary in election matters because of their urgency.

In the Matter of Recommendations of the
Arkansas Supreme Court Committee on Civil Practice:
Inferior Court Rules 1, 3, 4, 5, 6, 8 and 9;
Ark. R. Civ. P. 1, 4, 5, 11, 12, 24, 26, 28, 30, 31, 32, 33, 37,
54 and 58; Ark. R. App. P. Civ. 3 and 11.

Supreme Court of Arkansas
Delivered November 13, 1995

PER CURIAM. The Arkansas Supreme Court Committee on Civil Practice has submitted its annual proposals and recommendations for changes in the Arkansas Inferior Court Rules, the Arkansas Rules of Civil Procedure and the Arkansas Rules of Appellate Procedure—Civil.

We have reviewed the Committee's work and with minor changes we now publish the suggested amendments to the Rules and the Reporter's Notes for comment from the bench and bar.

We again express our gratitude to the Chair of the Committee, Judge John Ward, its Reporter, Professor John J. Watkins, and the Committee membership for their faithful and helpful work with respect to the Rules.

Comments and suggestions on these suggested rules changes may be made in writing prior to September 1, 1996. They should be addressed to:

Clerk, Arkansas Supreme Court
Attn: Civil Procedure Rules
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

Comments and suggestions on the Arkansas Rules of Civil Procedure, generally, should be addressed to:

Professor John J. Watkins
Leflar Law Center
University of Arkansas
Fayetteville, Arkansas 72701

Arkansas Rules of Civil Procedure

The following rules are amended by adding the underlined language and/or deleting the lined-through language. Additions to the Reporter's Notes follow each rule.

Rule 1. SCOPE OF RULES

These rules shall govern the procedure in the circuit, chancery, and probate courts in all suits or actions of a civil nature with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy and inexpensive determination of every action.

The Reporter's Notes accompanying Rule 1 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: This revision, which adds the words "and administered" to the second sentence, is based on the 1993 amendment to the corresponding federal rule. Its purpose is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. Attorneys, as officers of the court, share this responsibility.

Rule 4. SUMMONS

(a) Issuance: Upon the filing of the complaint, the clerk shall forthwith issue a summons and cause it to be delivered for service to a sheriff or to a person specifically appointed or authorized by law to serve it. Upon request of the plaintiff, separate or additional summons shall issue against any defendant.

(b) Form: The summons shall be styled in the name of the court and shall be dated and signed by the clerk; be under the seal of the court; contain the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff; and the time within which these rules require the defendant to appear, file a pleading, and defend and shall notify him that in case of his failure to do so, judgment by default may be entered against him for the relief demanded in the complaint.

(c) By Whom Served: Service of summons shall be made by

(1) a sheriff of the county where the service is to be made, or his or her deputy; (2) any person not less than eighteen years of age specially appointed ~~by the court for the purpose of serving a summons; and~~ for the purpose of serving a summons by either the court in which the action is filed or a court in the county in which service is to be made; or (3) in the event of service by mail pursuant to subdivision (d)(8) of this rule, by the plaintiff or an attorney of record for the plaintiff.

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

(1) Upon an individual, other than an infant by delivering a copy of the summons and complaint to him personally, or if he refuses to receive it, by offering a copy thereof to him, or by leaving a copy thereof at his dwelling house or usual place of abode with some person residing therein who is at least 14 years of age, or by delivering a copy thereof to an agent authorized by appointment or by law to receive service of summons.

(2) When the defendant is under the age of 14 years, service must be upon a parent or guardian having the care and control of the infant, or upon any other person having the care and control of the infant and with whom the infant lives. When the infant is at least 14 years of age, service shall be upon him.

(3) Where the defendant is a person for whom a plenary, limited or temporary guardian has been appointed, the service must be upon the individual and the guardian. If the person for whom the guardian has been appointed is confined in a public or private institution for the treatment of the mentally ill, service shall be upon the superintendent or administrator of such institution and upon the guardian.

(4) Where the defendant is confined in a state or federal penitentiary or correctional facility, service must be upon the keeper or superintendent 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 delivered to the spouse of the defendant, if any, unless the court otherwise directs.

(5) Upon a domestic or foreign corporation or upon a part-

nership, limited liability company, or any unincorporated association subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, partner other than a limited partner, managing or general agent, or any agent authorized by appointment or by law to receive service of summons.

(6) Upon the United States or any officer or agency thereof, by service upon any person and in such manner as is authorized by the Federal Rules of Civil Procedure or by other federal law.

(7) Upon a state or municipal corporation or other governmental organization or agency thereof, subject to suit, by delivering a copy of the summons and complaint to the chief executive officer thereof, or other person designated by appointment or by statute to receive such service, or upon the Attorney General of the state if such service is accompanied by an affidavit of a party or his attorney that such officer or designated person is unknown or cannot be located.

(8)(A) Service of a summons and complaint upon a defendant of any class referred to in paragraphs (1) through (5), and (7) of this subdivision 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. Service pursuant to this paragraph 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.

(B) Alternatively, service of a summons and complaint upon a defendant of any class referred to in paragraphs (1)–(5) and (7) of this subdivision of this rule may be made by the plaintiff by mailing a copy of the summons and the complaint by first-class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to a form adopted by the Supreme Court and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service is received by the sender within twenty days after the date of mailing, service of such summons and complaint shall be made pursuant to subdivision (c)(1)–(3) of this rule in the manner prescribed by subdivisions (d)(1)–(5) and (d)(7). Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within twenty days after mailing, the notice and acknowledgement of receipt of summons. The notice and acknowledgement of receipt of summons and complaint shall be executed under oath or affirmation.

(e) Other Service: Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made:

(1) By personal delivery in the same manner prescribed for service within this state;

(2) In any manner prescribed by the law of the place in which service is made in that place in an action in any of its courts of general jurisdiction;

(3) 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;

(4) As directed by a foreign authority in response to a letter rogatory or pursuant to the provisions of any treaty or convention pertaining to the service of a document in a foreign country;

(5) As directed by the court.

(f) Service Upon Defendant Whose Identity or Whereabouts Is Unknown: (1) Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warn-

ing order issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county wherein the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. This subsection shall not apply to actions against unknown tortfeasors. (2) In all actions in which the plaintiff has been granted leave to proceed as an indigent without prepayment of costs, where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and conspicuously posted for a continuous period of 30 days at the courthouse or courthouses of the county wherein the action is filed and by mailing by the plaintiff or his attorney of a copy of the complaint and warning order to the defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee.

~~(g) Return: The person serving the summons shall make proof of service to the clerk within the time during which the person served must respond to the summons. If service is made by a sheriff or his deputy, proof may be made by executing a certificate of service or return contained in the same document as the summons. If service is made by a person other than a sheriff or his deputy, he shall make affidavit thereof, and if service has been by mail, by attaching to the affidavit a return receipt, envelope, affidavit or other writing required by Rule 4 (d)(8).~~

(g) Proof of Service: The person effecting service shall make proof thereof to the clerk within the time during which the person served must respond to the summons. If service is made by a sheriff or his deputy, proof may be made by executing a certificate of service or return contained in the same document as the summons. If service is made by a person other than a sheriff or his deputy, he shall make affidavit thereof, and if service has been made by mail, shall attach to the affidavit a return receipt, envelope, affidavit or other writing required by Rule 4(d)(8). Proof of service in a foreign country, if effected pursuant to the provisions of a treaty or convention as provided in Rule 4(e)(4), shall be made in accordance with the applicable treaty or convention.

(h) Amendment: At any time in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the summons is issued.

(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. 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.

(j) Service by Warning Order: In any case in which a party seeks a judgment which affects or may affect the rights of persons who are not and who need not be subject personally to the jurisdiction of the court, the clerk shall issue a warning order. The warning order shall state the caption of the pleadings, a description of the property or other res to be affected by the judgment of the court, and it shall warn any interested person to appear within 30 days from the first date of publication of the warning order or be barred from answering or asserting his interest. The warning order shall be published weekly for at least two weeks in a newspaper of general circulation in the county in which the court is held. No default judgment shall be taken pursuant to this procedure unless the party seeking the judgment or his attorney has filed with the court an affidavit stating that thirty days have elapsed since the first publication of the warning order. In any case in which an interested person is known to the party seeking judgment or his attorney, the affidavit shall also state that 30 days have elapsed since a letter enclosing a copy of the warning order and the pleadings was sent to the known interested person at his last known address by a form of mail restricting delivery to the addressee or the agent of the addressee.

(k) Service of Other Writs and Papers. Whenever any rule

or statute requires service upon any person, firm, corporation or other entity of notices, writs, or papers other than a summons and complaint, including without limitation writs of garnishment, such notices, writs or papers may be served in the manner prescribed in this Rule for service of a summons and complaint. Provided, however, any writ, notice or paper requiring direct seizure of property, such as a writ of assistance, writ of execution, or order of delivery shall be made as otherwise provided by law.

The Reporter's Notes accompanying Rule 4 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: Subdivision (c)(2) has been amended to make clear that "the court" for purposes of appointing a person to serve the summons and complaint is either the court in which the action is filed or the court in the county where service is to be made. This question arose, but was not resolved, in *Hubbard* v. *The Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993).

The amendment also changes the caption of subdivision (g) from "return" to "proof of service," makes minor grammatical revisions, and adds a sentence dealing with proof of service in a foreign country, a matter not previously addressed by the rule. The new provision is based on language in Rule 4(l) of the Federal Rules of Civil Procedure, as amended in 1993.

Rule 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service: When Required. Except as otherwise provided in these rules, every pleading and every other paper, including all written communications with the court, filed subsequent to the complaint, except one which may be heard ex parte, shall be served upon each of the parties, unless the court orders otherwise because of numerous parties. No service need be made upon parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided for service of summons in Rule 4. Any pleading asserting new or additional claims for relief against any party who has appeared shall be served in accordance with subdivision (b) of this rule.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How Made. Whenever under this rule or any statute, service is required or permitted to be made upon a party represented by an attorney, the service shall be upon the attorney unless the court orders service upon the party himself or service is to be with respect to an action in which a final judgment has been entered but the court has continuing jurisdiction. Service upon an attorney of record in a case in which there is a final judgment but the court has continuing jurisdiction is not sufficient, but service shall be upon the party to be served. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means handing it to the attorney or to the party; or, by leaving it at his office with his clerk or other person in charge thereof; or, if the office is closed or the person has no office, leaving it at his dwelling house or usual place of abode with some person residing therein who is at least 14 years of age. Service by mail is presumptively complete upon mailing. Where service is permitted upon an attorney under this rule, such service may be effected by electronic transmission, provided that the attorney being served has facilities within his office to receive and reproduce verbatim electronic transmissions, or such service may be made by a commercial delivery service which maintains permanent records of actual delivery.

(c) Filing. (1) All papers after the complaint required to be served upon a party or his attorney shall be filed with the clerk of the court either before service or within a reasonable time thereafter. The clerk shall note the date and time of filing thereon. However, depositions, interrogatories, requests for production or inspection, proposed findings of fact, proposed conclusions of law, trial briefs, proposed jury instructions, and responses thereto may, but need not be filed with the clerk unless ordered by the court. When such discovery documents are relevant to a motion, they or the relevant portions thereof shall be submitted with the motion and attached as an exhibit unless such documents have

already been filed. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form.

(2) The clerk may accept facsimile transmissions of any paper filed under this rule, provided that it is transmitted on to bond-type paper that can be preserved for a period of at least ten years or on to nonbond paper if an original is substituted for the facsimile copy within ten days of transmission. Any signature appearing on a facsimile copy shall be presumed authentic until proven otherwise. A facsimile copy shall be deemed received when it is transmitted and received on the clerk's facsimile machine without regard to the hours of operation of the clerk's office. The date and time printed by the clerk's facsimile machine on the transmitted copy shall be prima facie evidence of the date and time of the filing.

(d) Filing With the Judge. The judge may permit papers or pleadings to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(e) Proof of Service. Every pleading, paper or other document required by this rule to be served upon a party or his attorney, shall contain a statement by the party or attorney filing same that a copy thereof has been served in accordance with this rule, stating therein the date and method of service and, if by mail, the name and address of each person served.

The Reporter's Notes accompanying Rule 5 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: Subdivision (c) has been amended by designating the former text as paragraph (1) and by adding new paragraph (2), which addresses the filing of papers by facsimile. A statute adopted in 1989 provides that clerks may accept fax copies of pleadings but does not cover other papers that must be filed. See Ark. Code Ann. § 16-20-109. Paragraph (2) tracks the language of the statute but applies to any paper filed under this rule.

Rule 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

(a) Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(b) A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (a). It shall be served as provided in Rule 5 but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

The Reporter's Notes accompanying Rule 11 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The rule has been amended by designating the former text as subdivision (a) and by adding new subdivision (b), which is based on Rule 11(c)(1) of the Federal Rules of Civil Procedure, as amended in 1993. Subdivision (b) provides that requests for sanctions must be made as a separate motion, rather than simply be included as an additional prayer for relief in another motion. The motion for sanctions is not to be filed until at least 21 days, or other such period as the court may set, after being served. If the alleged violation is corrected during this period, the motion should not be filed with the court. This provision is intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation.

To emphasize the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the new subdivision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a letter or telephone call, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

Rule 12. DEFENSES AND OBJECTIONS — WHEN AND HOW PRESENTED — BY PLEADING OR MOTION — MOTION FOR JUDGMENT ON THE PLEADINGS

(a) When Presented. A defendant shall file his answer within twenty (20) days after the service of summons and complaint upon him, except when service is upon a non-resident of 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) days after service upon him. The court may, upon motion of a party, extend the time for filing any responsive pleading. The filing of a motion permitted under this rule alters these peri-

ods of time as follows, unless a different time is fixed by order of the court: (1) 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) days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be filed within ten (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.

(b) How Presented. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts upon which relief can be granted, (7) failure to join a party under Rule 19, (8) pendency of another action between the same parties arising out of the same transaction or occurrence. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A defense or objection enumerated in this subdivision is waived unless asserted in a pleading or motion containing a concise statement of the reasons upon which it is based.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1) – (8) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion is directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule, but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense

or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds therein stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or pendency of another action between the same parties arising out of the same transaction or occurrence is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in the original responsive pleading. Objection to venue may be made, however, if the action is dismissed or discontinued as to a defendant upon whose presence venue depends.

(2) A defense of failure to state facts upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7 (a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or direct that the case be transferred to the proper court.

(i) Response to Motions. If a party opposes a motion made under this or any other rule, he shall file his response, including a brief in support, within ten (10) days after service of the motion upon him. If the movant desires to reply he shall do so within five (5) days after service of the response upon him.

(j) Further Pleading. Attorneys will be notified of action taken by the court under this rule, and, if appropriate, the court will designate a certain number of days in which a party is to be given to plead further.

The Reporter's Notes accompanying Rule 12 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: Subdivision (b) has been amended by adding a new sentence to require that a pleading or motion asserting a defense or objection under this provision contain "a concise statement of the reasons" upon

which it is based. Absent such a statement, the defense or objection is waived. This requirement is designed to prevent defendants from asserting "boilerplate" objections under Rule 12(b). That tactic has left the opposing party in the dark about the basis for the objection, thus requiring interrogatories or other discovery to ascertain it.

Rule 24. INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. ~~When the constitutionality of a statute of this state affecting the public interest is drawn into question in any action, the court may require that the Attorney General of this state be notified of such question.~~

(d) Notice to Attorney General. When the constitutionality of a statute of this state affecting the public interest is drawn into

question in any pleading or motion in any action, the party or attorney raising the issue shall notify the Attorney General of the state.

The Reporter's Notes accompanying Rule 24 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: New subdivision (d) requires that the Attorney General be given notice, and thus an opportunity to intervene, when a case involves the constitutionality of a state statute. The notice must be given by the party or attorney raising the issue. Under a provision that has been deleted from subdivision (c) of the rule, notice to the Attorney General was required only if the court so directed. Subdivision (d) is consistent with Ark. Code Ann. § 16-111-106, which requires notice when a declaratory judgment is sought, but is not limited to actions of that type. The new provision is similar to Rule 24(c) of the Federal Rules of Civil Procedure, as amended in 1991. However, the federal rule imposes the burden of notification on the court, while subdivision (d) places it upon the party or attorney who raises the constitutional question.

Rule 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at

the trial of any cause. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation; Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a tran-

scription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which he is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at the trial, only as provided in Rule 35 (b) or upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, stating that the movant has in good faith conferred or attempted to confer with other affected

parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's 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) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A 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.

The Reporter's Notes accompanying Rule 26 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The introductory clause of Rule 26(c) has been revised along the lines of the corresponding federal rule, as amended in 1993. A similar change has been made in Rule 37(a). Subdivision (c) provides that a motion for a protective order must contain a statement that the movant has conferred, either in person or by telephone, with the other affected parties in a good faith effort to resolve the discovery dispute without the need for court intervention. If the movant is unable to get opposing parties even to discuss the matter, the efforts in attempting to arrange such a conference should be indicated. Like the motion itself, the statement required by subdivision (c) is subject to Rule 11.

Rule 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

(a) Within this State and Elsewhere in the United States. Within this state and elsewhere in the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of this State or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) In Foreign States or Countries. In a foreign state or country, depositions may be taken (1) on notice before a person autho-

rized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to ~~a letter rogatory~~ any applicable treaty or convention or pursuant to a letter of request, whether or not captioned a letter rogatory. A commission or a letter ~~rogatory~~ of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter ~~rogatory~~ of request that the taking of the deposition in any other manner is impractical or inconvenient; and both a commission and a letter ~~rogatory~~ of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter ~~rogatory~~ of request may be addressed "To The Appropriate Authority in ~~(here insert the country)~~. [name of the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter ~~rogatory~~ of request need not be excluded ~~merely for the reason~~ merely because ~~that~~ it is not a verbatim transcript, ~~or that~~ because the testimony was not taken under oath or ~~for~~ because of any similar departure from the requirements for depositions taken within the United States under these rules.

(c) For Use in Foreign Countries. A party desiring to take a deposition or have a document or other thing produced for examination in this state, for use in a judicial proceeding in a foreign country, may produce to a judge of the circuit, chancery or probate court in the county where the witness or person in possession of the document or thing to be examined resides or may be found, letter rogatory, appropriately authenticated, authorizing the taking of such deposition or production of such document or thing on notice duly served; whereupon it shall be the duty of the court to issue a subpoena requiring the witness to attend at a specified time and place for examination. In case of failure of the witness to attend or refusal to be sworn or to testify or to produce the document or thing requested, the court may find the witness in contempt.

(d) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

The Reporter's Notes accompanying Rule 28 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: This revision, based on a 1993 change in federal Rule 28(b), is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties that the United States may enter into in the future which provide procedures for taking depositions abroad. The term "letter of request" has been substituted for "letter rogatory" because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of a letter of request.

Rule 30. DEPOSITIONS UPON ORAL EXAMINATION

(a) When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4 (e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of a witness may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination; General Requirements; Special Notice; ~~Non-Stenographic Recording~~ Method of Recording; Production of Documents and Things; Deposition of Organization. (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a

general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff under subdivision (a) if the notice (A) states that the person to be examined is about to go out of this state, or is about to go out of the United States, and will be unavailable for examination unless his deposition is taken before expiration of the 30 day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information and belief, the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

~~If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of due diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.~~

~~(3) The court may for cause shown enlarge or shorten the time for taking the deposition.~~

(3) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

~~(4) The court may, upon motion, order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving and filing the deposition and may include other pro-~~

~~visions to assure that the recorded testimony be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.~~

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request. The court may on motion, with or without notice, allow a shorter or longer time.

(6) A party may in his notice and in the subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized by these rules.

(7) The parties may stipulate in writing or the court may

upon motion order that a deposition be taken by telephone or other remote electronic means. For purposes of these rules, a deposition ~~by telephone~~ by such means is taken at the place where the deponent is to answer questions. ~~propounded to him.~~

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of ~~Rule 43 (b)~~ the Arkansas Rules of Evidence, except Rule 103. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other ~~means ordered in accordance with subdivision (b)(4)~~ method authorized by subdivision (b)(3) of this rule. ~~If requested by one of the parties, the testimony shall be transcribed~~. All objections made at the time of the examination to the qualifications of the officer taking the deposition, ~~or~~ to the manner of taking it, ~~or~~ to the evidence presented, ~~or~~ to the conduct of any party, or to any other aspect of the proceedings ~~and any other objection to the proceedings~~, shall be noted by the officer upon the ~~deposition~~ record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. ~~Evidence objected to shall be taken subject to the objections. Absent exceptional circumstances, a party or a lawyer for a party shall not instruct a deponent not to answer a question, except for reasonable, good faith claims of privilege~~ or to any other aspect of the proceedings. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on either (1) the party taking the deposition in which event he shall ~~(1)~~ transmit such questions to the officer, or (2) directly upon the officer, who shall propound them to the witness and record the answers verbatim.

~~(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district in which the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition as pro-

~~vided in Rule 26 (c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion.~~

(d) Schedule and Duration; Motion to Terminate or Limit Examination. (1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Absent exceptional circumstances, a party or a lawyer for a party may instruct a deponent not to answer only when necessary to preserve a reasonable, good faith claim of privilege, to enforce a limitation on evidence imposed by the court, or to present a motion under paragraph (3) of this subsection.

(2) The court may by order limit the time permitted for the conduct of a deposition, but shall allow additional time if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds that an impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an immediate sanction, including the reasonable costs and attorneys' fees incurred by any parties as a result thereof.

(3) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district in which the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

~~(e) Submission to Witness; Changes; Signing. When the tes-~~

~~timony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32 (e)(4), the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.~~

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

~~(f) Certification by Officer; Exhibits; Copies; Notice of Filing. (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness.~~

~~Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return,~~

~~the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to the deposition if it is to be used at trial.~~

~~(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent; provided that it shall be the duty of the party causing the deposition to be taken to furnish one copy to any opposing party, or in the event there is more than one opposing party, a copy may be filed with the clerk for the use of all opposing parties, and the party filing the deposition shall give prompt notice of its filing to all other parties.~~

(f) Certification by Officer, Exhibits; Copies; Notice of Filing. (1) The officer shall certify that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. The officer shall securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [name of witness]" and, if ordered by the court in which the action is pending pursuant to Rule 5(c), promptly file it with the clerk of that court. Otherwise, the officer shall send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness shall, upon the request of the party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to the deposition if it is to be used at trial.

(2) Unless otherwise order by the court or agreed by the parties, the officer shall retain, in accordance with the rules governing the record retention by official court reporters, stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent; provided that it shall be the duty of the party causing the deposition to be taken to furnish one copy to any opposing party, or in the event there is more than one opposing party, a copy may be filed with the clerk for the use of all opposing parties, and the party filing the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses. (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by an attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by an attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

The Reporter's Notes accompanying Rule 30 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The changes that have been made in subdivisions (b)-(f) of this rule track the 1993 amendments to federal Rule 30 and are designed in part to take into account the use of video and other recording methods. Provisions in the federal rule limiting the number of depositions were not adopted.

The last sentence of subdivision (b)(2), which dealt with use of the deposition of a party unable to obtain counsel, has

been deleted, and this matter is now covered by Rule 32(a)(3). The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel. Under paragraph (3), the party taking the deposition has the choice of the method of recording. Objections to nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court by motion pursuant to Rule 26(c). Other parties may arrange, at their own expense, for the recording of a deposition by a means in addition to the method designated by the person noticing the deposition. A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required if the deposition is later to be offered as evidence at trial under amended Rule 32(c) or on a dispositive motion under Rule 56.

Revised paragraph (4) of subdivision (b) requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically. Paragraph (7) has been amended to allow the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the court.

Minor changes have been made in subdivision (c). First, the reference to Rule 43(b) has been replaced with a reference to the Arkansas Rules of Evidence. The examination and cross-examination of a deponent are governed by those rules, with the exception of Rule 103, which deals with evidentiary rulings. Second, subdivision (c) has been revised to reflect the changes made in subdivision (b) regarding the method by which a deposition is to be recorded. Finally, the provision that dealt with instructing the deponent not to answer has been deleted and moved to subdivision (d)(1).

Unlike its federal counterpart, subdivision (c) does not contain an exception from Rule 615 of the Rules of Evidence. By virtue of this exception in the federal rule, other potential witnesses are not automatically excluded from a deposition at a par-

ty's request, although the court can order their exclusion via a protective order. Because such an exception is not included in revised subdivision (c), depositions in Arkansas will continue to be subject to Rule 615.

The first sentence of subdivision (d)(1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the witness should respond. While objections may, under the revised rule, be made during a deposition, they should ordinarily be limited to those that under Rule 32(d)(3) might be waived if not made at that time, *i.e.*, objections on grounds that might be immediately obviated or cured, such as the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

The second sentence of subdivision (d)(1) addresses an even more disruptive practice, *i.e.*, instructing the deponent not to answer a question. This provision previously appeared, in slightly different form, in subdivision (c), having been added in 1991. The former language has been retained as to "reasonable, good faith claims of privilege," but new grounds based on the federal rule — to enforce a limitation on evidence imposed by the court and to present a motion under what is now designated as paragraph (3) — have been added.

Paragraph (2) of subdivision (d) dispels any doubts regarding the power of the court to limit, by order, the length of a deposition. This provision also expressly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney. Unlike the federal rule, paragraph (2) does not empower a trial court to establish limits on deposition length by local rule, since such rules are not permissible in Arkansas.

Various changes have been made in subdivision (e) to reduce problems sometimes encountered when depositions are taken stenographically. Reporters frequently have difficulties obtain-

ing signatures from deponents and the return of depositions. Under the revision, pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made.

Subdivision (f) has been revised to reflect changes made in subdivision (b) as to the methods by which a deposition may be taken. If the court does not order the deposition to be filed pursuant to Rule 5(c), the reporter can transmit the transcript or recording to the attorney taking the deposition or ordering the transcript or record, who then becomes custodian for the court of the original record of the deposition. Pursuant to paragraph (2), as under the prior rule, any other party is entitled to secure a copy of the deposition from the officer designated to take it. New language makes clear that the officer must retain a copy of the record or the stenographic notes, unless otherwise ordered by the court or agreed by the parties. The retention period is determined by the rules that govern official court reporters in Arkansas.

Rule 31. DEPOSITIONS UPON WRITTEN QUESTIONS

~~(a) Serving Questions; Notice. After the commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.~~

~~A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30 (b)(6).~~

~~Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.~~

(a) Serving Questions; Notice. (1) Any party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(2) A party must obtain leave of court if the person to be examined is confined in prison or if, without the written stipulation of the parties, a plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required if a defendant has served a notice of taking deposition or otherwise sought discovery, or if special notice is given as provided in Rule 30(b)(2).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (A) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (B) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e) and (f) to take the testimony of the witness in response to the questions and to prepare, certify and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) Copies; Notice of Filing. The party causing the deposition to be taken shall furnish one copy of the deposition to any opposing party, or if there is more than one opposing party, a copy may be filed with the clerk for the use of all opposing parties, and the party filing the deposition shall give prompt notice of its filing to all other parties.

The Reporter's Notes accompanying Rule 31 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: Subdivision (a) has been divided into four numbered paragraphs. The first two paragraphs are designed to make the rule consistent with Rule 30 with respect to the circumstances under which leave of court is required. Paragraph (3) is the former second paragraph, without substantive change. Likewise, paragraph (4) is the former third paragraph, but a change has been made to reduce the total time for developing cross-examination, redirect, and recross questions from 50 days to 28 days.

Rule 32. USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any other purpose permitted by the Arkansas Rules of Evidence.

(2) The deposition of a party or of anyone who, at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30 (b)(6) or 31 (a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this state, unless it appears that the absence of a witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. A deposition taken without leave of court pursuant to a notice under Rule 30(b)(2) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the

former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Arkansas Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of Rule 28 (b) and subdivision ~~(e)(3)~~ (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Form of Presentation. Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

~~(c)~~ (d) Effect of Errors and Irregularities in Depositions.

(1) As To Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As To Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As To Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of

parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As To Completion And Return Of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such is, or with due diligence might have been ascertained.

The Reporter's Notes accompanying Rule 32 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: Subdivision (a)(3) has been amended by adding a new paragraph that includes not only the substance of provisions formerly found in Rule 30(b)(2), but also new language dealing with the situation in which a party who receives minimal notice of a deposition is unable to obtain a court ruling on a motion for protective order seeking to delay or change the place of the deposition. Ordinarily, a party does not obtain protection merely by the filing of a motion under Rule 26(c); any such protection is dependent upon the court's ruling. Under the revision, a party receiving less than 11 days notice of a deposition can, provided that its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon. Although the revision covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have "just cause" for failing to appear for purposes of Rule 37(d)(1). Inclusion of this provision is not intended to signify that 11 days' notice is the minimum advance notice for all depositions or that greater than 10 days should necessarily be deemed sufficient in all situations.

Former subdivision (c) has been redesignated as subdivision (d), without change, and a new subdivision (c) added to reflect the increased opportunities for video and audio recording of depositions under revised Rule 30. Under the new provision, a party may offer deposition testimony in any of the forms authorized under Rule 30(b) but, if offering it in a nonstenographic form, must provide the court with a transcript of the portions so offered. On request of any party in a jury trial, deposition testimony offered other than for impeachment purposes is to be presented in a nonstenographic form if available, unless the court directs otherwise.

Rule 33. INTERROGATORIES TO PARTIES

(a) Availability~~; Procedures for Use~~. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(b) Answers and Objections. (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection ~~shall be stated in lieu of an answer~~ and shall answer to the extent the interrogatory is not objectionable. (2) The party answering interrogatories shall repeat each interrogatory immediately before the answer or objection. The answers are to be signed by the person making them and the objections signed by the attorney making them. (3) The party upon whom the interrogatories have been served shall serve a copy of the answers, or objections within 30 days after the service of the interrogatories~~, except that a defendant must serve answers or objections within 30 days after the service of the interrogatories upon him or within 45 days after the summons and complaint have been served upon him, whichever is longer. The court may lengthen or shorten these time periods~~ 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. (4) All

grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown. (5) The party submitting the interrogatories may move for an order under Rule 37 (a) with respect to any objection to or other failure to answer an interrogatory.

~~(b)~~ (c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26 (b) (1), and the answers may be used to the extent permitted by the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

~~(c)~~ (d) Option to Produce Business Records. Where the answers to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

The Reporter's Notes accompanying Rule 33 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: Subdivision (a) of the former version of this rule has been divided into two subdivisions, and former subdivisions (b) and (c) have been redesignated as (c) and (d), respectively.

Paragraph (1) of subdivision (b) is based on the former second paragraph of subdivision (a). It emphasizes the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information

about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products. Similarly, the fact that additional time may be needed to respond to some questions or parts of questions should not justify a delay in responding to those questions or portions that can be answered within the prescribed time.

Paragraph (3) of subdivision (b) does not include language from the former version of the rule providing for a longer response time for defendants and to permit the parties to extend or shorten the response time by written agreement. Paragraph (4), which is new, makes clear that objections must be specifically justified and that unstated or untimely grounds for objection are ordinarily waived.

RULE 37. FAILURE TO MAKE DISCOVERY; SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to all parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the place where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the place where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested, or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall include a statement that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

~~If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion pursuant to Rule 26(c).~~

(3) Evasive or Incomplete Answer. For purposes of this subdivision, an evasive or incomplete answer or response is to be treated as a failure to answer or respond.

~~(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them, to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.~~

~~If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.~~

~~If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.~~

Expenses and Sanctions. (A) If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be hear, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them, to pay to the moving party the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds that the motion wa filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's response or objection was substantially justified or that other circumstance make an award of expense unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstance make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be hear, apportion the reasonable expenses incurred in relation to the motion among the parties and person in a just manner.

(b) Failure to Comply with Order.

(1) Sanctions By Court In Place Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the place in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions By Court In Which Action Is Pending. If a person or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing

the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B) and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party, or an officer, director or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party, fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interroga-

tories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a statement that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any other order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Rule 26(c).

(e) 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.

The Reporter's Notes accompanying Rule 37 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The major change in this rule appears in paragraph (2) of subdivision (a) and corresponds to an amendment to Rule 26(c). Under paragraph (2), a party moving to compel discovery must state in the motion, subject to Rule 11, that it has attempted to resolve the dispute informally before seeking judicial intervention. In addition, the last sentence of paragraph (2) has been moved to paragraph (4).

Under revised paragraph (3) of subdivision (a), evasive or incomplete disclosures and responses to interrogatories and production requests are treated as failures to disclose or respond. Interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical man-

ner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions.

Paragraph (4) of subdivision (a) has been divided into three subparagraphs for ease of reference, and in each the phrase "after opportunity for hearing" has been changed to "after affording an opportunity to be heard" to make clear that the court can consider such questions on written submissions as well as on oral hearings.

Subparagraph (A) has been revised to cover the situation in which information that should have been produced without a motion to compel is produced after the motion is filed but before a hearing. In addition, it provides that a party should not be awarded expenses for filing a motion that could have been avoided by conferring with opposing counsel. Subparagraph (C) has been amended to include the provision formerly contained in subdivision (a)(2) with respect to protective orders and to include the same requirement of an opportunity to be heard that is specified in subparagraphs (A) and (B).

Under revised subdivision (d), a party seeking discovery via interrogatory or production request must make an attempt to obtain responses before filing a motion for sanctions. The last sentence has been amended to clarify that it is the pendency of a motion for protective order that may be urged as an excuse for a violation of the subdivision. If a motion has been denied, the party cannot argue that its subsequent failure to comply would be justified. In this connection, it should be noted that the filing of a motion under Rule 26(c) is not self-executing. The relief authorized under that rule depends on obtaining the court's order to that effect.

Rule 54. JUDGMENTS; COSTS

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may

direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Costs authorized by statute or by these rules shall be allowed to the prevailing party if the court so directs, unless a statute or rule makes an award mandatory.

(e) Attorney's Fees. (1) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(2) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which the claim is made.

(3) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(c) or Rule 78. The court may determine issues of liability for fees before receiving sub-

missions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law, and a judgment shall be set forth in a separate document as provided in Rule 58.

(4) The court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof.

(5) The provisions of subparagraphs (1) through (4) do not apply to claims for fees and expenses as sanctions for violations of these rules.

The Reporter's Notes accompanying Rule 54 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: New subdivision (e) establishes a procedure for presenting claims for attorney's fees, a frequently recurring form of litigation not initially contemplated by the rules. It is based on federal Rule 54(d)(2), as amended in 1993. A related change has been made in Rule 58.

Paragraph (1) makes plain that the subdivision does not apply to attorneys' fees recoverable as an element of damages, as when sought under the terms of a contract. Such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Paragraph (2) provides a deadline for motions for attorneys' fees — 14 days after final judgment unless the court or a statute specifies some other time. Prior law did not prescribe any specific time limit on claims for attorneys' fees. *See Marsh & McLennan* v. *Herget*, 321 Ark. 180, 900 S.W.2d 195 (1995).

One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed. Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind. It also enables the court in appropriate cases to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits.

Filing a motion for fees under subdivision (e) does not affect

the finality or appealability of a judgment, though revised Rule 58 provides a mechanism by which prior to appeal the court can suspend the finality to resolve a motion for fees. If an appeal on the merits of the case is taken, the court may rule on the claim for fees, defer its ruling on the motion, or deny the motion without prejudice and direct under paragraph (2) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court may effectively extend the period by permitting claims to be filed after resolution of the appeal. A new period for filing will automatically begin if a new judgment is entered following a reversal or remand by the appellate court or the granting of a motion under Rule 59.

The new subdivision does not require that the motion for attorneys' fees be supported at the time of filing with the evidentiary material bearing on the fees. This material must be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees and the amount of such fees or a fair estimate.

If directed by the court, the moving party is required to disclose any fee agreement, including those between attorney and client, between attorneys sharing a fee to be awarded, and between adversaries made in partial settlement of a dispute where the settlement must be implemented by court action, as required by Rule 23 and similar provisions. This subdivision does not affect the practice in class action cases whereby claims for fees are presented in advance of hearings to consider approval of the proposed settlement, since the court is permitted to require submissions of fee claims in advance of the entry of judgment.

Paragraph (3) assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. In some cases, an evidentiary hearing may be needed, but this is not required in every case. The amount of time to be allowed for the preparation of submissions both in support of and in opposition to awards should be tailored to the particular case. The court is expressly authorized to make a determination of the liability for fees before receiving sub-

missions by the parties bearing on the amount of an award. This option may be appropriate in actions in which the liability issue is doubtful and the evaluation issues are numerous and complex.

The court may order disclosure of additional information, such as that bearing on prevailing local rates or on the appropriateness of particular services for which compensation is sought. On rare occasion, the court may determine that discovery would be useful to the parties. Fee awards should be made in the form of a separate judgment under Rule 58 since such awards are subject to appellate review. To facilitate such review, paragraph (3) requires the court to set forth its findings of fact and conclusions of law. It is anticipated that this explanation will be quite brief in most cases.

Paragraph (4) authorizes the court to refer issues regarding the amount of a fee to a master under Rule 53. This authorization eliminates any controversy as to whether such references are permitted under Rule 53(b) as "matters of account and difficult computation of damages." Paragraph (5) excludes from this rule the award of fees as sanctions for violations of these rules.

Rule 58. ENTRY OF JUDGMENT OR DECREE

Subject to the provisions of Rule 54 (b), upon a general or special verdict, or upon a decision by the court granting or denying the relief sought, the court may direct the prevailing party to promptly prepare and submit, for approval by the court and opposing counsel, a form of judgment or decree which shall then be entered as the judgment or decree of the court. The court may enter its own form of judgment or decree or may enter the form prepared by the prevailing party without the consent of opposing counsel.

Every judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Administrative order No. 2. Entry of judgment or decree shall not be delayed ~~for the taxing of costs~~, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(e), the court, before a notice of appeal has been filed and has become effective, may order that the motion would have the same effect under Rule 4(c) of the Rules of Appellate procedure as a timely motion under Rule 59.

The Reporter's Notes accompanying Rule 58 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The second paragraph of the rule has been revised to permit the court to delay the finality of the judgment for appellate purposes until a dispute over attorneys' fees is resolved. The new language is taken from the corresponding federal rule, as amended in 1993, and is related to new subdivision (e) of Rule 54. If the court so orders, a motion for fees is treated like a post trial motion under Rule 59 and extends the time period for filing the notice of appeal in accordance with Appellate Rule 4. Such an order allows the court to decide the fee question before an appeal is taken so that an appeal relating to the fee award can be heard at the same time as an appeal on the merits. In some cases, however, the court may choose to defer consideration of the claim for fees until the appeal on the merits is resolved.

Arkansas Inferior Court Rules

The following rules are amended by adding the underlined language and/or deleting the lined-through language. Additions to the Reporter's Notes follow each rule.

Rule 1. SCOPE OF RULES

These rules shall govern the procedure in all civil actions in the inferior courts of this State, except county courts. They shall apply in the small claims division of municipal courts to the extent that they do not conflict with Small Claims Procedure Act, A.C.A. §§ 16-17-601—16-17-614.

The Reporter's Notes accompanying Rule 1 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The second sentence has been added to make clear proceedings in the small claims division of a municipal court are governed by Small Claims Procedure Act. These rules are applicable in such cases to the extent that they do not conflict with the act.

Rule 3. COMMENCEMENT OF ACTION

A civil action ~~in an inferior court~~ is commenced by filing a ~~claim form~~ complaint with the clerk of the proper court who shall note thereon the date and precise time of filing ~~thereon~~. However, ~~A~~an action shall not be deemed ~~to have been~~ commenced as to any defendant not served with the ~~claim form~~ complaint, in accordance with these rules, within ~~sixty (60)~~ 120 days of the ~~filing of the claim form~~ date on which the complaint is filed, unless within that time and for good cause shown, the court, by written order or docket entry, extends the time for service.

The Reporter's Notes accompanying Rule 3 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The first sentence of the rule has been rewritten so that it is identical to Rule 3 of the Rules of Civil Procedure. The second sentence, which established a 60-day time limit for service, has been revised to make it consistent with Rule 4(i) of the Rules of Civil Procedure.

Rule 4. CLAIM FORM

A ~~claim form~~ complaint shall be in writing and signed by the plaintiff or his/her attorney, if any. ~~The form~~ It shall also state the names of the parties, the nature and basis of the claim ~~and the basis thereof and a statement as to the amount~~ and the nature and amount of the relief sought~~.~~; ~~The claim form shall~~ warn the defendant to ~~answer or appear on a certain date and time which shall be not less than twenty (20) days from the date of service and shall warn the defendant that if he shall fail to answer or otherwise appear on the date and time stated, a default judgment may be entered against him. The claim form shall recite the address of the claimant or his attorney, if any, and shall contain a return form which shall be completed by the person serving the defendant~~ file a written answer with the clerk of the court, and to serve a copy to the plaintiff or his or her attorney, within twenty (20) days after service of the complaint upon him; warn the defendant that failure to file an answer may result in a default judgment being entered against him; recite the address of the plaintiff or his or her attorney, if any; and contain a return form which shall be completed by the person serving the defendant.

Exhibit 4-A accompanying Rule 4 is retitled "Complaint — Form" and amended to read as follows:

COMPLAINT — FORM

_____ Court of _____, Arkansas

_____,
Plaintiff

vs. No. _____

_____,
Defendant

Plaintiff's Address: _____
Nature of Claim: _____
Nature and Amount
of Relief Claimed: _____
_____
_____
Date Claim Arose: _____

Factual Basis
of Claim: _____
_____
_____

Plaintiff's Attorney,
if any, and Address: _____
_____
_____

_____
[Signature of Attorney, if any, or of Plaintiff]

NOTICE TO DEFENDANT

You are hereby warned to file a written answer with the clerk of the court within twenty (20) days after the date that you receive this complaint and to send a copy to the plaintiff or to his or her attorney. If you do not file an answer within twenty (20) days, or if you fail to file an answer, a default judgment may be entered against you.

_____
[Signature of Clerk or Judge]

PROOF OF SERVICE

STATE OF ARKANSAS
CITY OF _____

I, _____, hereby certify that I served the within complaint on the defendant, _____, at __ o'clock __.m. on _____, 19__, by [state method of service].

_____
[Signature and Office, if any]

Subscribed and sworn to before me this ___ day of _____, 19__. [To be completed if service is by someone other than sheriff or constable.]

Notary Public or Court Clerk

My Commission Expires:

The Reporter's Notes accompanying Rule 4 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The rule has been amended to require that the complaint warn the defendant that he must file a written answer within 20 days of service, with a copy to the plaintiff or his or her attorney. This change is necessary in light of the revision in Rule 6, which now requires that the answer be in writing. Previously, a defendant was permitted to appear personally in court, without filing a written answer, on the day stated in the complaint. Rule 4 has also been rewritten for purposes of clarity, and the accompanying form has been revised to take into account the changes made in the rule.

Rule 5. SERVICE OF ~~CLAIM FORM~~ COMPLAINT

(a) By Whom Served. A copy of the ~~claim form~~ complaint shall be served upon each defendant by a sheriff or constable or any other person permitted to make service under Rule 4(c) of the Arkansas Rules of Civil Procedure.

(b) ~~Return~~ Proof of Service. The person serving the ~~summons~~ complaint shall promptly make proof of service thereof to the clerk of the court. Proof of service shall reflect that which has been done to show compliance with these rules. Service by one other than the ~~constable or~~ sheriff or constable shall state by affidavit the time, place and manner of service.

The Reporter's Notes accompanying Rule 5 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The rule has been amended to replace the term "claim form" with the word "complaint." In addition, subdivision (b) now refers to "proof of service" rather than to "return," a change in terminology consistent with a 1995 amendment to the Rules of Civil Procedure. The word "summons" in subdivision (b) has been replaced with "complaint."

Rule 6. ~~DEFENSES AND OBJECTIONS — WHEN AND HOW PRESENTED~~
CONTENTS OF ANSWER; TIME FOR FILING

(a) ~~Appearance. A defendant who personally appears in court on the day and time stated on the claim form served upon him shall be deemed to have entered his appearance. The court or the clerk thereof shall note on the docket the date and time of such appearance.~~ Contents of Answer. An answer shall be in writing and signed by the defendant or his or her attorney, if any. It shall also state: (a) the reasons for denial of the relief sought by the plaintiff, including any affirmative defenses and the factual bases therefor; (b) any affirmative relief sought by the defendant, whether by way of counter-claim, set-off, cross-claim, or third-party claim, the factual bases for such relief, and the names and addresses of other persons needed for determination of the claim for affirmative relief; and (c) the address of the defendant or his or her attorney, if any.

(b) ~~Written Answer or Response — When Required. In every instance where a defendant intends to raise any affirmative defense or where he seeks affirmative relief by way of counterclaim, set-off, cross-complaint or third-party complaint, he shall be required to set forth such defense or claim for affirmative relief in writing which shall be filed with the clerk of the court and served upon the opposing party in accordance with Rule 6 of the Arkansas Rules of Civil Procedure.~~ Time for Filing Answer or Reply. An answer to a complaint, cross-claim, or third-party claim, and a reply to a counterclaim, shall be filed with the clerk of the court within twenty (20) days of the date that the complaint or other pleading asserting the claim is served. A copy of an answer or reply shall also be served on the opposing party or parties in accordance with Rule 5(b) of the Rules of Civil Procedure.

~~(c) Time for Filing Answer or Response. The time for filing an answer or other response to the claim form or to a defendant's claim for affirmative relief shall be within the time periods provided by Rule 12(a) of the Arkansas Rules of Civil Procedure. Where a defendant has personally appeared before the court, the court in its discretion and for good cause shown may permit such defendant to file a written answer or response pursuant to section (b) hereof within 15 days from the date of his appearance.~~

Exhibit 6-A accompanying Rule 6 is retitled "Answer and Affirmative Relief—Form" and amended to read as follows:

ANSWER AND AFFIRMATIVE RELIEF — FORM

_____ Court of _____, Arkansas

_____,
Plaintiff

vs. No. _____

_____,
Defendant

Defendant's Address: _____
Reasons for Denial of Plaintiff's Claim: _____
Affirmative Defenses: _____
_____

Nature and Amount of Affirmative Relief Sought: _____
_____

Date Affirmative Claim Arose: _____

Factual Basis of Affirmative Claim: _____
_____
_____

Names and Addresses of Other Persons Needed for Determination of Affirmative Claim: _____
_____
_____

Defendant's Attorney, if any, and Address: _____
_____

_____
[Signature of Attorney, if any, or of Defendant]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing answer was served on [plaintiff or attorney for plaintiff, as appropriate] on the ____ date of _____, 19__, by [state method of service used, *e.g.*, hand delivery, mail, commercial delivery service].

_____

[Signature of Defendant or Defendant's Attorney]

The Reporter's Notes accompanying Rule 6 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: Subdivisions (a) and (b) have been collapsed into a single provision that requires a defendant to file a written answer. Under the previous version of the rule, a defendant could simply appear on the trial date without filing an formal answer, unless he intended to assert an affirmative defense or seek affirmative relief, in which case a written answer was necessary. In addition, subdivision (a) now specifies that the answer include information set out in the form accompanying the rule, which has also been revised slightly. Consistent with Rule 4, amended subdivision (b) provides that an answer to a complaint, cross-claim or third-party claim, as well as a reply to a counterclaim, must be filed within 20 days after service. Former subdivision (c) created confusion in this regard by referencing Rule 12(a) of the Rules of Civil Procedure, under which a longer response time is permitted in certain situations.

Rule 8. JUDGMENT — HOW ENTERED

(a) By Default. When a ~~defendant~~ party has failed to ~~appear or plead~~ file an answer or reply within the time specified by Rule 4 ~~hereof~~ 6(b), a default judgment may be rendered against him.

(b) Upon the Merits. Where the court has decided the case, it shall enter judgment in favor of the prevailing party for the relief to which he is deemed entitled.

(c) Docket Entry. The court shall timely enter in the docket the date and amount of the judgment, whether rendered by default or upon the merits.

(d) Judgment Lien. A judgment entered by an inferior court in this state shall not become a lien against any real property unless a certified copy of such judgment, showing the name of the judgment debtor, the date and amount thereof, shall be filed in the office of the circuit clerk of the county in which such land is situated.

The Reporter's Notes accompanying Rule 8 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: Subdivision (a) has been amended to take into account the requirement, imposed by amended Rule 6(a), that a formal answer be filed. The previous version provided for a default judgment if the defendant did not appear in court on the trial date. The subdivision has also been revised to correct the cross-reference and to make plain that it applies to any party against whom affirmative relief has been sought.

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) days from the date of the entry of 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. 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. ~~and t~~The appellant shall have the responsibility of filing such record in the office of the circuit clerk.

(c) 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 cer-

tify 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.

(d) Supersedeas Bond. Whenever an appellant entitled thereto desires a stay on appeal to circuit court in a civil case, he shall present to the inferior court for its approval a super-sedeas bond which shall have such surety or sureties as the court requires. The bond shall be to the effect that appellant shall pay to appellee all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree, or order of the inferior court. All proceedings in the inferior court shall be stayed from and after the date of the court's order approving the supersedeas bond.

The Reporter's Notes accompanying Rule 9 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The second sentence of subdivision (b) has been divided into two sentences and revised to make clear that the clerk's duty to prepare and certify the record for an appeal is conditioned upon the appellant's payment of any fees authorized by law. This requirement is consistent with the notion that the responsibility for perfecting an appeal rests with the appellant, not with the clerk. *See Hawkins* v. *City of Prairie Grove*, 316 Ark. 150, 871 S.W.2d 357 (1994).

Arkansas Rules of Appellate Procedure - Civil

The following rules are amended by adding the underlined language and/or deleting the lined-through language. Additions to the Reporter's Notes follow each rule.

Rule 3. APPEAL — HOW TAKEN

(a) Mode of Obtaining Review. The mode of bringing a judgment, decree or order to the Arkansas Supreme Court for review shall be by appeal.

(b) How Taken. An appeal shall be taken by filing a notice of appeal with the clerk of the court which entered the judgment, decree, or order from which the appeal is taken. Failure of the appellant or cross-appellant to take any further steps to secure review of the judgment or decree appealed from shall not affect the validity of the appeal or cross-appeal, but shall be ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or cross-appeal. If, however, the record on appeal has not been filed pursuant to Rule 5, the trial court in which the notice of appeal was filed may dismiss the appeal or cross-appeal upon petition of all parties to the appeal or cross-appeal accompanied by a joint stipulation that the appeal or cross-appeal is to be dismissed.

(c) Joint or Consolidated Appeals. If two or more persons are entitled to appeal and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in the appeal after filing separate, timely notices of appeal and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Arkansas Supreme Court upon its own motion or upon motion of a party.

(d) Cross-Appeals. A cross-appeal may be taken by filing a notice of cross-appeal with the clerk of the court which entered the judgment, decree or order being appealed.

(e) Content of Notice of Appeal or Cross-Appeal. A notice of appeal or cross-appeal shall specify the party or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal. The notice shall also contain a statement that the appellant has ordered the transcript, or specific portions

thereof, and has made any financial arrangements required by the court reporter pursuant to Ark. Code Ann. § 16-13-510(c). ~~have been ordered by the appellant.~~

(f) Service of Notice of Appeal or Cross-Appeal. A copy of the notice of appeal or cross-appeal shall be served by counsel for appellant or cross-appellant upon counsel for all other parties by any form of mail which requires a signed receipt. If a party is not represented by counsel, notice shall be mailed to such party at his last known address. Failure to serve notice shall not affect the validity of the appeal.

(g) Abbreviated Record; Statement of Points. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his notice of appeal and designation a concise statement of the points on which he intends to rely on the appeal.

The Reporter's Notes accompanying Rule 3 are amended by adding the following:

Addition to Reporter's Notes, 1995 Amendment: The last sentence of subdivision (e) has been revised to require an appellant to state, in the notice of appeal, that he or she not only has ordered the transcript or relevant portions thereof, but also has made the necessary financial arrangements with the court reporter for its preparation. By statute, the court reporter's duty to transcribe and certify the record "may be conditioned upon the payment, when requested by the court reporter, of up to fifty percent (50%) of the estimated cost of the transcript." Ark. Code Ann. § 16-13-510(c). The amendment is intended to eliminate delay that occurred under the previous version of the rule when a lawyer stated in the notice of appeal that he had ordered the transcript but the court reporter did not begin work because payment had not been received or financial arrangements made.

[New]

Rule 11. CERTIFICATION BY PARTIES AND ATTORNEYS; FRIVOLOUS APPEALS; SANCTIONS

(a) The filing of a brief, motion or other paper in the Supreme Court or the Court of Appeals constitutes a certification of the party or attorney that, to the best of his or her knowledge, infor-

mation and belief formed after reasonable inquiry, the document is well grounded in fact; is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and is not filed for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party or an attorney who files a paper in violation of this rule, or party on whose behalf the paper is filed, is subject to a sanction in accordance with this rule.

(b) The Supreme Court or the Court of Appeals shall impose a sanction upon a party or attorney or both for (1) taking or continuing a frivolous appeal or initiating a frivolous proceeding, (2) filing a brief, motion, or other paper in violation of subdivision (a) of this rule, (3) prosecuting an appeal for purposes of delay in violation of Rule 6-2 of the Rules of the Supreme Court and Court of Appeals, and (4) any act of commission or omission that has an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. For purposes of this rule, a frivolous appeal or proceeding is one that has no reasonable legal or factual basis.

(c) Sanctions that may be imposed for violations of this rule include, but are not limited to, dismissal of the appeal; striking a brief, motion, or other paper; awarding actual costs and expenses, including reasonable attorneys' fees; imposing a penalty payable to the court; awarding damages attributable to the delay or misconduct; and, where there has been delay, advancing the case on the docket and affirming.

(d) A party may by motion request that a sanction be imposed upon another party or attorney pursuant to this rule, or the court may impose a sanction on its own initiative. A motion shall be in the form required by Rule 2-1 of the Rules of the Supreme Court and Court of Appeals, with citations to the record where appropriate, and will be called for submission three weeks after filing. The opposing party may file a response within 21 days of the filing of the motion. If the court on its own initiative determines that a sanction may be appropriate, the court shall order the party or attorney to show cause in writing why a sanction should not be imposed on the party or attorney or both.

The following Reporter's Notes to accompany Rule 11 are adopted:

Reporter's Notes to Rule 11: This rule, added in 1995, addresses frivolous appeals and other misconduct, topics that were heretofore not covered by these rules. The Supreme Court has held that Rule 11 of the Rules of Civil Procedure does not apply on appeal, *Wright* v. *Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995), and the Rules of the Supreme Court and the Court of Appeals deal only with specific problems, such as insufficient abstracts and appeals prosecuted for purposes of delay. In contrast, Rule 38 of the Federal Rules of Appellate procedure expressly provides for an award of "just damages and single or double costs" to the appellee if an appeal is frivolous, and two federal statutes also deal with the issue. *See* 28 U.S.C. §§ 1912, 1927.

Rule 11 does not follow the federal model because confusion has arisen in the federal courts as to the relationship between Rule 38 and the two statutes. Rather, the new rule is based on a proposal offered in response to the problems that have arisen under the federal provisions. *See* Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 Duke L.J. 845. In addition, the new rule contains a cross-reference to Rule 6-2 of the Rules of the Supreme Court and Court of Appeals, which addresses delay, and sets forth the same procedure specified in that rule.

IN RE: ARKANSAS SUPREME COURT COMMITTEE ON APPELLATE COURT RECORDS RETENTION

Supreme Court of Arkansas
Delivered November 20, 1995

PER CURIAM. By a Per Curiam of May 24, 1993, we established the ad hoc Arkansas Supreme Court Committee on Appellate Court Records Retention for the purpose of making recommendations to the Court on records maintenance. The Committee has completed its task and a program is now in place concerning records retention. Accordingly, we now order that the Committee be dissolved.

The members of the Committee were: Glen-Peter Ahlers, John Ferguson, Lynn Foster, J.D. Gingerich, Frances Ross, and Leslie Steen. We thank these members for the valuable service which they have rendered to this Court.

IN RE: REVISED RULES OF APPELLATE PROCEDURE – CRIMINAL

Supreme Court of Arkansas
Delivered November 20, 1995

PER CURIAM. By per curiam order dated July 10, 1995, this court adopted the Revised Rules of Appellate Procedure to be effective January 1, 1996. *See In Re: In the Matter of the Adoption of Revised Rules of Appellate Procedure*, 321 Ark. 663, 900 S.W.2d 560 (1995). It has come to our attention that a conflict exists between Rule 5(b) of the Revised Arkansas Rules of Appellate Procedure – Criminal, and Rule 3-4(c) of our Supreme Court Rules on the handling of exhibits in criminal appeals. In order to make the revised Rules compatible with our Supreme Court Rules, we hereby amend Rule 5(b) of the Revised Arkansas Rules of Appellate Procedure – Criminal to read as follows:

> (b) Exhibits. Photographs, charts, drawings and other documents that can be inserted into the record shall be included. Documents of unusual bulk or weight shall not be transmitted by the trial court clerk unless the clerk is directed to do so by a party or by the Clerk of the Court. Physical evidence, other than documents, shall not be transmitted unless directed by an order of the Court.

The Revised Rules of Appellate Procedure, as amended by this per curiam order, will be effective on January 1, 1996.

IN RE: SUPREME COURT COMMITTEE ON CHILD SUPPORT

Supreme Court of Arkansas
Delivered November 20, 1995

PER CURIAM. The Honorable Terry Crabtree of Bentonville, Senator Jodie Mahony of El Dorado, and Larry Carpenter, Esq., of North Little Rock are hereby reappointed to our Committee on Child Support. These are four-year terms which will expire on November 30, 1999.

The Court thanks Judge Crabtree, Senator Mahony and Mr. Carpenter for accepting reappointment to this most important Committee.

IN RE: REVISED ARKANSAS RULES OF APPELLATE PROCEDURE – CRIMINAL AND A.R.CR.P. 33

Supreme Court of Arkansas
Delivered December 4, 1995.

PER CURIAM. By per curiam order dated July 10, 1995, this Court adopted the Revised Rules of Appellate Procedure to be effective January 1, 1996. One reason for this revision was to place rules pertaining to trials in the Arkansas Rules of Criminal Procedure and rules pertaining to appeals in the new Revised Rules of Appellate Procedure. We now believe that two of the proposed Criminal Appellate Rules are more appropriate for inclusion in the Arkansas Rules of Criminal Procedure. Accordingly, Rules 2 and 10 of the Revised Rules of Appellate Procedure – Criminal, as set out in the July 10, 1995, per curiam, are hereby deleted from those rules and are hereby added to the Rules of Criminal Procedure as Rules 33.2 and 33.3, respectively. The title to Rule 33.3 shall be renamed to read: "Post-Trial Motions." These rules are set out below and this change shall be effective January 1, 1996. The remaining sections of Rule 33 shall be renumbered successively.

Rules 3 through 20 of the Revised Rules of Appellate Procedure – Criminal are redesignated 2 through 18, and any references to the former numeration are hereby changed accordingly.

By per curiam order dated July 10, 1995, this Court renamed the title to Rule 33 of the Arkansas Rules of Criminal Procedure. We hereby amend, effective on January 1, 1996, the title to read: "Motions for Directed Verdict and Other Trial Procedures."

Effective January 1, 1996, sections of former Rule 36 of the Arkansas Rules of Criminal Procedure have been recodified in the Revised Rules of Appellate Procedure – Criminal or elsewhere in the Rules of Criminal Procedure. To that extent Rules 36.1 through 36.26 are deemed superseded.

RULE 33.2. SENTENCING AND ENTRY OF JUDGMENT

Upon the return of a verdict of guilty in a case tried by a jury, or a finding of guilty in a case tried by a circuit court without a jury, sentence may be pronounced and the judgment of the court may be then and there entered, or sentencing and the entry of the judgment may be postponed to a date certain then fixed by the court, not more than thirty (30) days thereafter, at which time probation reports may be submitted, matters of mitigation presented or any other matter heard that the court or the defendant might deem appropriate to consider before the pronouncement of sentence and entry of the formal judgment. The defendant may file a written demand for immediate sentencing, whereupon the trial judge may cause formal sentence and judgment to be made of record. At the time sentence is pronounced and judgment entered, the trial judge must advise the defendant of his right to appeal, the period of time prescribed for perfecting the appeal, and either fix or deny bond. [Amended by Per Curiam May 30, 1989, effective July 1, 1989; Amended by Per Curiam dated Oct. 29, 1990, effective Jan. 1, 1991.]

Reporter's Notes to Rule 33.2 (1995): This rule is former A.R.Cr.P. 36.4, with grammatical changes. At one time, it had been proposed to appear as Rule 2 of the Arkansas Rules of Appellate Procedure – Criminal.

Rule 33.3. POST-TRIAL MOTIONS

A person convicted of either a felony or misdemeanor may file a motion for new trial, a motion in arrest of judgment, or any other application for relief, but all motions or applications must be filed prior to the time fixed to file a notice of appeal. Such pleadings should include a statement that the movant believes the action to be meritorious and is not offered for the purpose of delay. A copy of any such motion shall be served on the representative of the prosecuting party. The trial court shall designate a date certain, if a hearing is requested or found to be necessary, to take evidence, hear, and determine all of the matters presented within ten (10) days of the filing of any motion or application unless circumstances justify that the hearing or determination be delayed. Upon the filing of any motion or other application for relief in the trial court, the time to file a notice of appeal shall not expire until thirty (30) days after the disposition of all motions or applications.

Reporter's Notes to Rule 33.3 (1995): This rule is former A.R.Cr.P. 36.22 with a new title. At one time, it had been proposed that it appear as Rule 10 of the Arkansas Rules of Appellate Procedure – Criminal. See Rule 2, R.A.P.Cr., as to when a notice of appeal must be filed.

IN RE: ARKANSAS RULE OF CIVIL PROCEDURE 78

Supreme Court of Arkansas
Delivered December 11, 1995

Rule 78 of the Rules of Civil Procedure is amended by the addition of the following subparagraph (d):

(d) **Mandamus and Prohibition.** Upon the filing of petitions for writs of mandamus or prohibition in election matters, it shall be the mandatory duty of the judge or chancellor having jurisdiction to fix and announce a day of court to be held no sooner than two (2) and no longer than seven (7) days thereafter to hear and determine the cause.

The Notes accompanying Rule 78 are amended by adding the following:

Court's Notes, 1995 Amendment: Subsection (d) is added to modify the effect of Act 582, § 1, of 1991 which amended Ark. Code Ann. § 16-115-104 (Supp. 1993). Act 582 increased the time to hear writs of prohibition and mandamus to 45 days. The Court has concluded that the abbreviated procedure formerly prescribed in Ark. Code Ann. § 16-115-104 is necessary in election matters because of their urgency.

IN RE: RULES OF THE SUPREME COURT AND COURT OF APPEALS

Supreme Court of Arkansas
Delivered December 11, 1995

PER CURIAM. We adopt the following rule changes, effective January 1, 1996. Rule 2-1(b) of the Rules of the Supreme Court and Court of Appeals is amended as follows:

(b) Number of Copies. In cases pending before the Supreme Court, eight (8) clearly legible copies must be filed on 8 1/2" x 11" paper. In cases pending before the Court of Appeals, eleven (11) clearly legible copies must be filed on 8 1/2" x 11" paper.

Appointments to Committees

IN RE: BOARD OF LAW EXAMINERS

Supreme Court of Arkansas
Delivered October 9, 1995

PER CURIAM. Matthew Horan, Esq., of Fort Smith, Third Congressional District, is appointed to the Board of Law Examiners for a term of three years ending September 30, 1998. Mr. Horan replaces Wyman K. Wade, Esq., of Fort Smith, whose term has expired.

The Court thanks Mr. Horan for accepting appointment to this most important Board.

The Court expresses its appreciation to Mr. Wade for his dedicated and faithful service as a member of the Board.

IN RE: B. Frank MACKEY, Jr., Arkansas Bar ID #75080

907 S.W.2d 140

Supreme Court of Arkansas
Delivered October 16, 1995

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the license of B. Frank Mackey, Jr., to practice law in the State of Arkansas and direct that Mr. Mackey's name be removed from the list of attorneys authorized to practice law in this state.

IN RE: COMMITTEE ON AUTOMATION

Supreme Court of Arkansas
Delivered October 30, 1995

PER CURIAM. The Honorable Terry Lynn, Municipal Judge of Heber Springs; Senator David Malone of Fayetteville; and Ms. Jacqueline Wright, Attorney at Law and Supreme Court Librarian of Little Rock, are reappointed to our Committee on Automation for three-year terms to end on October 31, 1998.

The Court thanks Judge Lynn, Senator Malone, and Ms. Wright for accepting reappointment to this most important Committee.

IN RE: IN THE MATTER OF THE ARKANSAS CODE REVISION COMMISSION

Supreme Court of Arkansas
Delivered November 6, 1995

PER CURIAM. The following persons are reappointed to the Arkansas Code Revision Commission: William H. Sutton, Esq., of Little Rock, Arkansas; and Douglas O. Smith, Jr., Esq., of Fort Smith, Arkansas. The Court thanks Mr. Sutton and Mr. Smith for accepting reappointment to this Commission. James H. McKenzie, Esq., of Prescott, Arkansas is appointed to the Commission. The Court thanks Mr. McKenzie for accepting appointment to this most important Commission. Each appointment is for a four-year term to end November 7, 1999.

The Court posthumously recognizes the dedicated and faithful service of William S. Arnold, Esq., of Crossett, Arkansas to the Commission.

IN RE: ARKANSAS BOARD OF LEGAL SPECIALIZATION

Supreme Court of Arkansas
Delivered December 4, 1995

PER CURIAM. Murrey L. Grider, Esq., of Pocahontas, Second Court of Appeals District, and A. Wyckliff Nisbet, Esq., of Little Rock, Sixth Court of Appeals District, are hereby reappointed to the Arkansas Board of Legal Specialization for three year terms to expire on December 5, 1998. Patricia A. Page, Esq., of Mena, Fourth Court of Appeals District, is hereby appointed to the Board of Legal Specialization for a three-year term to expire on December 5, 1998.

The Court thanks Mr. Grider and Mr. Nisbet for accepting reappointment, and Ms. Page for accepting appointment, to this most important Board.

The Court expresses its appreciation to Elizabeth Danielson, Esq., of Booneville, whose term has expired, for her faithful service on the Board.

IN RE: ARKANSAS CONTINUING LEGAL EDUCATION BOARD

Supreme Court of Arkansas
Delivered December 11, 1995

PER CURIAM. Margaret Woolfolk, attorney at law, of West Memphis, First Court of Appeals District, William G. Wright, Esq., of Arkadelphia, Fourth Court of Appeals District, and the Hon. Annabelle Imber of Little Rock, At-Large position, are hereby reappointed to our Board of Continuing Legal Education for three-year terms to expire on December 5, 1998.

The Court thanks Ms. Woolfolk, Mr. Wright, and Judge Imber for accepting reappointment to this most important Board.

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Death penalty, racially discriminatory application, discriminatory purpose must be proved, no proof offered to show how appellant's due process or equal protection rights were violated. *Nooner v. State*, 87.
Death penalty, burden of proof, fixed by state law as proof beyond a reasonable doubt. *Id.*
Ex Post Facto Clause, legislative acts respecting procedure may be applied to crimes that occurred prior to the act's effective date, admitting victim-impact testimony did not constitute *ex post facto* law. *Id.*
Exception to "fruit of the poisonous tree" doctrine, subsequent confession should be excluded when there is Fourth Amendment violation unless intervening events break causal connection. *Childress v. State*, 127.
No allegation of Fourth Amendment violation, Fifth Amendment Self-Incrimination Clause does not proscribe voluntary confessions and does not require suppression of confession where police obtained earlier voluntary but unwarned admission. *Id.*
Appellant's "double counting" and narrowing argument previously rejected, argument not considered here. *Reams v. State*, 336.
Batson argument raised, required procedures. *Id.*

Prima facie showing required that racial discrimination was the basis of prosecutor's juror challenges, what constitutes a prima facie case. *Id.*
Trial court's *Batson* rulings affirmed, no strike pattern shown, nor did the state's questions reflect a racially discriminatory motive. *Id.*
Right to counsel constitutional, counsel may be voluntarily, knowingly, and intelligently waived. *Daniels v. State*, 367.
Waiver of right to counsel, constitutional minimum for a knowing and intelligent waiver. *Id.*
Waiver of right to counsel, how a voluntary and intelligent waiver is established. *Id.*
No showing appellant voluntarily or intelligently waived right to counsel, trial court erred in allowing appellant to represent himself. *Id.*
Challenge to constitutionality of statute, vagueness test. *Dougan v. State*, 384.
Abuse-of-corpse statute not unconstitutionally vague. *Id.*
Statutes permitting aggravating circumstances are not unconstitutionally overbroad. *Bowen v. State*, 483.
Amendment 68 to Arkansas Constitution, public policy of State regarding unborn children. *Chatelain v. Kelley*, 517.
Public policy of State also found in legislation, General Assembly has not expanded definition of "person" beyond common law limits. *Id.*
Statutory definition of aggravating circumstance "especially cruel or depraved" not void on its face. *Willett v. State*, 613.
Statutory aggravating circumstance "especially cruel or depraved" not unconstitutional as applied to appellant. *Id.*
Capital-murder statute satisfies narrowing requirement. *Id.*
Constitutional convention, legislature not prohibited from calling convention and submitting call to people. *Priest v. Polk*, 673.
Constitutional convention, ballot form cannot be misleading, requirements, chancellor did not err in finding ballot form not misleading. *Id.*
Act prescribed procedures for constitutional convention, chancellor did not err in finding act was not submitted "measure" prohibited by Ark. Const. amend 7. *Id.*
One-person, one-vote principle does not apply to constitutional conventions. *Id.*

CONTEMPT:
Acting on advice of counsel is strong mitigating factor, dual function of penalty. *Osborne v. Power*, 229.
Supreme court's orders were flouted by appellant's three-day illumination of massive lighting displays, appellant held in contempt of court. *Id.*
Appellant's actions fell within inherent power of court to punish for contempt. *Id.*
Remedial and coercive nature of citation, appellant not entitled to jury trial. *Watson v. City of Fayetteville*, 324.
Possibility that appellant might have been asked questions in presentence evaluation that could have caused trial court to impose harsher sentence did not excuse violation of trial court's order, contempt ruling was proper. *Id.*
Criminal contempt, standard of review. *Witherspoon v. State*, 376.
Contemptuous act defined, purpose of contempt proceedings, contempt finding supported by substantial evidence. *Id.*

CONTRACTS:
Undue influence or duress sufficient to invalidate a contract, stronger party must show that no deception was practiced. *Dent v. Wright*, 256.
Privity of contract defined, appellant was not in privity of contract with appellee. *Swink v. Ernst & Young*, 417.
Liability in contract to persons not in privity, factors required. *Id.*
Appellant not in privity of contract with appellee, contract exceptions also inapplicable. *Id.*

Offer and acceptance, late acceptance constitutes a counteroffer. *Childs v. Adams*, 424.
Appellant knew deadline for acceptance of offer had passed when he signed the contract, appellant's late acceptance constituted a counteroffer. *Id.*
Assent to a contract may be proved by circumstantial evidence. *Id.*
Appellee's conduct manifested his unequivocal acceptance of appellant's counteroffer, trial court's ruling that a contract was formed not clearly erroneous. *Id.*

CONVERSION:
When committed. *Dent v. Wright*, 256.

COURTS:
Right to trial by jury, municipal and circuit court rights distinguished. *Lineberry v. State*, 84.
Untimely appeals from municipal to circuit court not allowed, appellants were not properly within the court's jurisdiction. *Id.*
Juvenile transfer cases, decision that juvenile should be tried in circuit court as adult must be supported by clear and convincing evidence. *Collins v. State*, 161.
Juvenile transfer cases, factors to be considered. *Id.*
Juvenile transfer cases, evidence of firearms involved in offense, repetitive pattern of offenses, and adverse prospects for rehabilitation, clear and convincing evidence to support transfer. *Id.*
Federal notice requirement should have been argued before federal agency, enforcement of federal statutes is not the responsibility of the State. *Hicks v. Madden*, 223.
Review of findings of master, "clearly erroneous" standard. *Osborne v. Power*, 229.
Review of findings of master, finding based on relative differences in number of lights used and amount of energy expended was not clearly erroneous. *Id.*
Review of findings of master, finding that number of visitors to neighborhood was reduced was not clearly erroneous. *Id.*
Review of findings of master, finding that appellant's conduct was calculated to reduce number of visitors to neighborhood was clearly erroneous. *Id.*
Review of findings of master, finding that appellant had reduced the volume of sound accompanying display so that it would not be audible within closest homes of neighbors was not clearly erroneous. *Id.*
Chancery courts will not interfere to enjoin anticipated criminal prosecutions, chancery court's conclusion correct. *Billy/Dot, Inc. v. Fields*, 272.
Exception to principle that chancery courts will refrain from interfering with prosecutorial functions, exception limited to chancery court's protection of property rights in the form of lawful business. *Id.*

CRIMINAL LAW:
Circumstantial evidence may constitute substantial evidence. *Nooner v. State*, 87.
State's proof met test of substantial evidence. *Id.*
Capital murder and first-degree murder statutes constitutional, argument rejected. *Id.*
Aggravated robbery will support a charge of capital-felony murder. *Id.*
Sentencing statutes, death sentence not mandatory, jury free to sentence to life without parole. *Id.*
Narrowing of death-penalty crimes, may occur at penalty phase of trial, statutes satisfy narrowing requirement. *Id.*
Aggravating circumstance, evidence of prior felony involving violence was sufficient, evidence of prior robbery conviction as aggravating circumstance. *Id.*
Aggravating circumstance, evidence of pecuniary gain was sufficient. *Id.*
Victim-impact testimony, states permitted to authorize, range of testimony, victim-impact statute not impermissibly vague. *Id.*
Two aggravating and no mitigating circumstances found, weighing of aggravating and mitigating circumstances provides check on arbitrariness. *Id.*

Voluntariness of confession, independent determination, review of totality of circumstances. *Trull v. State*, 157.
Voluntariness of confession, independent determination, trial court resolves conflicts in testimony. *Id.*
Voluntariness of confession, independent determination, appellant's statements to second police officer were voluntary. *Id.*
Admissibility of rape victim's prior sexual conduct discretionary, trial court overruled only upon a finding of a manifest abuse of discretion. *Harris v. State*, 167.
Possession of controlled substance, proof necessary for a conviction. *Darrough v. State*, 251.
Joint occupancy where contraband is found, elements of proof required for a conviction. *Id.*
Convictions for multiple crimes affirmed, trial court had sufficient evidence to revoke probation of sentence. *Id.*
Death penalty cases, aggravating and mitigating circumstances will be reviewed. *Reams v. State*, 336.
Death penalty case, only aggravating circumstances found, the record supported the jury's findings. *Id.*
Comparison of federal criminal Gun-Free Zones Act necessary for State's argument, pertinent section in act had been declared unconstitutional. *State v. Banks*, 344.
Sentencing, illegal sentence defined, sentence within maximum prescribed by law is not illegal on its face. *Cooley v. State*, 348.
Sentencing, appellant had opportunity to review judgment after it was filed and to seek correction. *Id.*
Sentencing, claim that sentence was imposed in illegal manner must be raised in petition filed under Ark. R. Crim. P. 37. *Id.*
Sentencing, modification of sentence must be determined by circuit court, appellate court constrained to dismiss appeal rather than modify judgment. *Id.*
Sentencing, appellant given sixty days in which to seek correction of sentence under Ark. R. Crim. P. 37.2(c). *Id.*
Use of prior convictions for enhancement purposes proper, appellant's argument without merit. *Daniels v. State*, 367.
Bifurcated sentencing procedures applicable to habitual offenders, appellant's argument without merit. *Id.*
Abuse of corpse defined. *Dougan v. State*, 384.
Witness tampering, proof of appellant's travel to Louisiana with witness on day set for trial was relevant circumstantial evidence of consciousness of guilt. *Henderson v. State*, 402.
Sentencing, appellant's sentence fell within statutory limits, appellate court not free to reduce sentence, exceptions to general rule. *Id.*
Sentencing, evidence showed sale of drugs not isolated incident, no proof offered to show sentence imposed was contrary to moral sense of community. *Id.*
Lesser included offense, aggravated robbery conviction reversed and dismissed, included in capital felony murder. *Bowen v. State*, 483.
Death penalty, when death sentence may be imposed. *Id.*
Death penalty, mitigating circumstances, jury not required to find just because defendant offers evidence that could serve as basis for finding mitigating circumstance. *Id.*
Death penalty, objection not required to trial court's failure to bring to jury's attention to a matter essential to its consideration of death penalty. *Id.*
Death penalty, statutory "cruel and depraved manner" aggravating circumstance for application of death penalty is substantive provision that cannot be applied retroactively, case remanded for resentencing. *Id.*
Custodial statements, standard of review. *Id.*
Custodial statements, evidence presented by State sufficient to overcome presumption. *Id.*

Custodial statements, waiver of rights, invocation must be made with specificity. *Id.*
Custodial statements, waiver of rights, answering questions may waive one's right to remain silent by implication. *Id.*
Custodial statements, conditional promise could not be considered coercive. *Id.*
Custodial statements, evidence lent credibility to State's position that appellant was not incapacitated by mental illness. *Id.*
Accused is presumed competent to stand trial, burden of proving incompetence on accused, no error in refusing further mental examination. *Id.*
Mitigating circumstances, nothing in jury forms indicated that mitigating circumstance must be found unanimously. *Id.*
Aggravating circumstances, State's failure to give notice, no prejudice. *Id.*
Chain of custody sufficient. *Id.*
Sentencing, State's closing argument for habitual offenders discussed. *Caldwell v. State*, 543.
Traditional criminal format followed as to closing arguments, no abuse of discretion found. *Id.*
Voluntary intoxication not a defense to criminal charges. *Id.*
Evidence relating to the element of purposeful intent for the jury to weigh, jury found the state met its burden. *Id.*
Juvenile of fourteen charged with aggravated robbery, prosecutor has discretion to file as an adult, factors considered. *Holmes v. State*, 574.
Juvenile defendant seeking transfer to juvenile court, burden of proof. *Id.*
Juvenile transfer case, trial court not required to give equal weight to each of the statutory factors, violence considered. *Id.*
Juvenile transfer case, standard of review. *Id.*
Juvenile transfer case, trial court could have relied on the violent nature of the crime in denying appellant's motion to transfer to juvenile court. *Id.*
Juvenile transfer denied, trial judge's decision not clearly erroneous. *Id.*

CRIMINAL PROCEDURE:
Confessions, review of voluntariness, factors considered. *Oliver v. State*, 8.
Confessions, review of voluntariness, totality of circumstances. *Id.*
Confessions, youth alone not sufficient reason to exclude confession, minor is capable of making admissible voluntary confession. *Id.*
Confessions, waiver of *Miranda* rights, low intelligence quotient alone will not render waiver involuntary. *Id.*
Confessions, totality of circumstances, admission of confession not clearly erroneous. *Id.*
Failure of appellant to object at trial level to court's refusal to exclude not a procedural bar to raising the issue on appeal, appellant's invocation of the right was sufficient to apprise the trial court of the issue. *King v. State*, 51.
Denial of Rule 37 petition based upon conflicting testimonies, appellant demonstrated prejudice as a result of the trial court's Rule 615 error, Rule 37 hearing granted. *Id.*
Prosecution required to give names and addresses of witnesses, continuing duty to disclose information, remedial options of court. *Nooner v. State*, 87.
Last-minute exchange of evidence before trial is sometimes inevitable, trial court's ruling of sufficient prior notice was not abuse of discretion. *Id.*
All grounds for post-conviction relief must be raised under Criminal Procedure Rule 37, petition for relief stemming from conviction obtained on a plea of guilty must be filed within ninety days of the date of the entry of judgment. *Cothrine v. State*, 112.
Appellant's petition untimely, denial of relief affirmed. *Id.*
Writ of habeas corpus and petition for post-conviction relief distinguished. *Id.*
Challenge to bifurcated proceeding groundless, no authority presented for due process argument. *Harris v. State*, 167.

Miranda warning, one valid warning sufficient, suspect's awareness of all charges in advance of interrogation not relevant to determination of voluntariness of waiver. *Griffin v. State*, 206.
State has no right of appeal beyond that conferred by the constitution or rules of criminal procedure. *State v. Banks*, 344.
When a Rule 36.10(b-c) appeal has been allowed, no substantial question here since situation unlikely to occur, supreme court does not render advisory opinions. *Id.*
Sentencing, trial court determines whether sentences run concurrently or consecutively. *Hadley v. State*, 472.
Trial court cannot modify sentence once it's placed into execution, when a sentence is executed. *Id.*
Appellant's appeal bond revoked at the time the original judgment of conviction was entered, trial court erred in later entering a second judgment of conviction. *Id.*
Trial court without power to enter second judgment of conviction, second judgment of conviction set aside. *Id.*
Court may enter judgment of acquittal on grounds of mental disease or defect pursuant to Ark. Code Ann. § 5-2-313 (Repl. 1993). *Bowen v. State*, 483.
Names and addresses of witnesses required to be furnished by State, statement of witness not required to be furnished. *Thompson v. State*, 586.
Medical report should have been furnished, no reversal where court was unable to ascertain whether any prejudice resulted from the State's failure.
Mistrial requested by appellant denied, no reversal absent a showing of unfair prejudice.
Custodial statements, accused may initiate further communication with law enforcement officials and waive previously invoked right to remain silent or right to counsel. factors considered in determining admissibility. *Willett v. State*, 613.
Custodial statements, appellant initiated contact with law enforcement officials, ruling admitting confession not clearly erroneous. *Id.*
Jury free to show mercy, death penalty not mandatory. *Id.*
The State has a continuing duty to disclose certain information to the defense, results of State's failure to comply. *Mills v. State*, 647.
State failed to disclose witness as required by the rules, trial court took the appropriate action, appellant not prejudiced. *Id.*
Admissibility of in-court identification, when ruling will be reversed. *Id.*
In-court identification, criteria for assessing whether an in-court identification is suspect, factors considered in determining reliability. *Id.*
Photographic lineup and in-court identification properly allowed, lineup not so suggestive as to create a substantial possibility of misidentification. *Id.*

DAMAGES:
Circuit court has power to reduce damage awards to conform to the established facts, Rule 55(c) does not permit a setting aside of the damage award when lability against the defendant remains fixed and is not in dispute. *Byrd v. Dark*, 640.

DECLARATORY JUDGEMENT:
When appealable, order not final if significant issues relating to damages and relief are left open. *Vanderpool v. Fidelity & Cas. Ins. Co.*, 308.
Intended to supplement not replace ordinary causes of action, administrative relief should be sought before resorting to declaratory procedure. *Regional Health Care Facilities, Inc. v. Rose Care, Inc.*, 780.
Declaratory judgment procedure is not the proper means of trying a case, failure to seek a rehearing before an administrative agency is failure to exhaust administrative remedies. *Id.*
Exhaustion of administrative remedies generally required, exception to rule. *Id.*

DESCENT & DISTRIBUTION:
Remainder dependent upon a contingency which may or may not arise or which is granted to a person not in existence is contingent, neither relative had a vested remainder. *Rushing v. Mann*, 528.
Contingent remainderman's interest ceased to exist when he predeceased life tenant, chancellor's award of summary judgment to the children of the deceased contingent remainderman reversed. *Id.*

DISCOVERY:
Accused entitled to know before trial the range of possible punishment. *Bray v. State*, 178.
Determination of reversible discovery violation. *Id.*
Appellant's burden to establish that omission was sufficient to undermine confidence in outcome of trial. *Id.*
Admission of evidence of attempted-escape conviction, appellant did not demonstrate prejudice, conviction affirmed. *Id.*
Granting of continuance for further discovery discretionary with the trial court. *Alexander v. Flake*, 239.
Trial court's denial of continuance upheld, no abuse of discretion found. *Id.*
Plaintiff failed to prove that postponing the ruling for further discovery would have enabled him to rebut the motion for summary judgment, plaintiff's assertion without merit. *Id.*

ELECTIONS:
Appellant's assertion candidate never certified in error, candidate was certified as the unopposed winning candidate at the primary election. *Tittle v. Woodruff*, 153.
Qualifications and eligibility of candidates may be challenged by any citizen, law prohibiting inclusion of ineligible candidate enforceable by filing an action for mandamus. *Id.*
Issue of eligibility not raised until after the election, elections will not be invalidated for alleged wrongs unless they would render the election results doubtful. *Id.*
Pleading merely alleging a conclusion without stating facts which would disclose that the result of the election was different from that shown on the returns does not state a cause of action. *Binns v. Heck*, 277.
Official election returns are considered *prima facie* correct in election contests, presumption exists that all votes cast were lawful, appellee failed to present proof of how the illegal votes were cast. *Id.*
Board of Election Commissioners has no power to call or hold a new election, it is the function of the legislature to create new causes of action. *Id.*
Circuit court erred in directing that a new election be held, appellee failed to present proof that any of the voters in question voted for his opponent, action should have been dismissed. *Id.*

EQUITY:
Set off and double recovery distinguished. *Almond v. Cigna Property & Casualty Ins. Co.*, 268.
Allowing claimant to recover more than once for the same injury, practice disapproved of. *Id.*
Appellant's claim for medical payments would result in a double recovery, general policy of declining to allow such recovery followed, court can affirm trial court for a different reason than that used at trial. *Id.*
No error in trial court's granting specific performance, equity arguments without merit. *Childs v. Adams*, 424.
Unjust enrichment, goal of restitution. *Id.*
Restitution argument meritless, improvements were not critical and could have waited. *Id.*
Purpose of equitable compensation payments, no error for trial court to deny request for reimbursement. *Id.*

ESTOPPEL:
Collateral estoppel, one element, circuit judge's conclusions not essential to judgment in view of his ruling that statute of limitations barred claim. *Alexander v. Twin City Bank*, 478.

EVIDENCE:
No abuse of discretion in trial court's allowing photographs to be admitted, when purported inflammatory nature of photographs not enough to cause their exclusion. *Williams v State*, 38.
Use of State Crime Lab report as evidence properly allowed, such records are admissible through the analyst subject to cross examination by the defendant. *Id.*
Hearsay, no reversible error, even if improperly admitted where properly admitted through another source. *Suggs v. State*, 40.
Purpose of A.R.E. 615 discussed, the Rule should not be easily circumvented. *King v. State*, 51.
Impeachment of criminal defendant's credibility, factors considered by trial court and on review. *Schalski v. State*, 63.
Admission of prior conviction for impeachment purposes, factors to consider, no limitation as to the number of prior convictions that can be used. *Id.*
Credibility of appellant's testimony critical, trial court did not abuse its discretion in allowing impeachment by appellant's false imprisonment conviction. *Id.*
Rebuttal evidence defined, allowance of rebuttal testimony by the victim not in error. *Id.*
Admission of photographs relevant, even inflammatory photos are admissible if they tend to shed light on any issue. *Id.*
Photographs of different injuries on the victim's body admitted, no abuse of discretion found. *Id.*
Illegal evidence erroneously admitted, subject to constitutional harmless-error analysis. *Id.*
Challenged evidence cumulative, no prejudice demonstrated from its admission, any error harmless beyond a reasonable doubt. *Id.*
Sufficiency of the evidence challenged, factors on review. *Huggins v. State*, 70.
When circumstantial evidence constitutes substantial evidence, trier of fact must determine whether a reasonable hypothesis exists. *Id.*
Evidence upon which conviction was based was circumstantial, no error in jury's determination that there was no other reasonable hypothesis which would explain the death. *Id.*
Unauthorized control exercised over car, evidence sufficient to constitute substantial evidence of theft. *Id.*
Lay witness, opinion testimony, standard of review. *Nooner v. State*, 87.
Lay witness, opinion testimony, witnesses had ample contact with appellant to develop opinions based on perceptions, no abuse of discretion. *Id.*
Lay witness, opinion testimony, testimony from people who had special familiarity with suspect would qualify as aid to jury. *Id.*
Lay witness, opinion testimony. *Id.*
Silent witness theory, permits introduction of surveillance videotape based on context and without sponsoring witness, identification of person in videotape does not vitiate theory. *Id.*
Admissibility of enhanced videotapes and photographs, reliability attested to by witnesses, no evidence of distortion, no abuse of discretion. *Id.*
Exclusion of evidence under Ark. R. Evid. 403, matter of trial court's discretion, evidence of victim's checkbook in appellant's possession was part of State's evidence establishing robbery. *Id.*
Police transcription of taped statements, admissibility, accuracy, trial court's discretion. *Childress v. State*, 127.
Police transcription of taped statement, accuracy, trial court's discretion. *Id.*
Police transcription of taped statement, authenticity, determined by trial court. *Id.*

Police transcript of taped statement, cautionary instruction, appellant argued transcript was in error, no prejudice shown. *Id.*
Use of prior convictions for impeachment, steps necessary to preserve the issue for review. *Harris v. State*, 167.
Balancing test required for use of prior conviction for impeachment, precise nature of defendant's testimony must be known. *Id.*
Proffered testimony insufficient, it could not be assumed that the trial court's ruling motivated the appellant's decision not to testify, issue not preserved for review. *Id.*
Admissibility of prior sexual conduct of rape victim, evaluation made by trial court, purpose of Rape Shield Statute discussed. *Id.*
Trial court limited questions concerning victim's bruises, no abuse of discretion found. *Id.*
Chain of custody of victim's clothes challenged, minor uncertainties in the proof of chain of custody to be weighed by the jury. *Id.*
Admissibility of evidence discretionary with the trial court, purpose of establishing a chain of custody, the state need not eliminate every possibility of tampering. *Id.*
Items of clothing admitted at trial, no abuse of discretion found. *Id.*
Cumulative evidence admitted without objection is not prejudicial, trial court did not abuse discretion in denying motion for mistrial. *Griffin v. State*, 206.
Hearsay, Sixth Amendment, State must usually produce or demonstrate unavailability of declarant, no constitutional objection raised, constitutional argument waived. *Id.*
Appellant's burden to demonstrate prejudice from admission of hearsay statement. *Id.*
Appellant charged with possession of drugs and a shotgun, substantial evidence presented for conviction on charges. *Darrough v. State*, 251.
Substantial evidence defined, factors on review. *Id.*
Evidence linked appellant to drugs found at salvage yard, substantial evidence existed to sustain appellant's convictions. *Id.*
Ark. R. Evid. 103(a)(2), requiring proffer of evidence when objection to evidence has been sustained, was not applicable to hearing limited to construction of forfeiture statute, supreme court reached State's point of appeal. *State v. Gray*, 301.
Sufficiency of evidence of sexual contact, not affected by child's failure to demonstrate knowledge of significance of breast, statutory definition of "sexual contact" plainly refers to touching female breast. *Strickland v. State*, 312.
Sufficiency of evidence of sexual gratification, not necessary for State to provide direct proof that act is done for sexual gratification if desire for sexual gratification can be assumed as plausible reason for act, evidence sufficient to sustain conviction. *Id.*
Sufficiency of, not necessary for defendant to challenge in order to raise issue on appeal. *Witherspoon v. State*, 376.
Arkansas Rules of Evidence govern proceedings in courts of this state. *Id.*
Sufficiency of, jury could have concluded from evidence that appellant's conduct amounted to physical mistreatment of corpse. *Dougan v. State*, 384.
Admission of pleas in subsequent trials, *nolo contendere* and guilty pleas discussed. *Patterson v. Odell*, 394.
Plea of guilty in open court generally admissible as a declaration against interest. *Id.*
Nolo contendere defined. *Id.*
Nolo contendere discussed, plea an admission of guilt for the purposes of the case. *Id.*
Plea of *nolo contendere* not receivable in another proceeding as evidence of guilt, inadmissible as an admission for purposes of impeachment. *Id.*
Evidence of plea excluded altogether, trial court's decision affirmed for a different reason. *Id.*
Sufficiency of, substantial evidence defined. *Henderson v. State*, 402.

State's evidence sufficient to support conviction. *Id.*
Evidence of witness tampering not inadmissible as collateral matter, witness's written statement merely cumulative. *Id.*
Hearsay, motel register not hearsay evidence, no abuse of discretion in admitting for impeachment purposes. *Id.*
Jurors not required to set aside their common knowledge, should consider all the evidence in light of their own observations and experiences. *Hadley v. State*, 472.
When circumstantial evidence is sufficient for a conviction, jury must determine whether the evidence excludes any other reasonable hypothesis. *Id.*
Circumstantial evidence sufficient for a conviction, trial court correctly denied appellant's motion for a directed verdict. *Id.*
Expert testimony, jury not bound to accept as conclusive. *Bowen v. State*, 483.
Chain of custody, purpose, proof of authenticity at trial. *Id.*
Hearsay, defined, standard of review. *Id.*
Hearsay, statement taken from appellant admissible as admission of party-opponent. *Id.*
Trial court's refusal to admit medical progress note, no legal basis asserted for allegation of error. *Id.*
Hearsay, expert's testimony based on hearsay presents jury question regarding weight to be assigned opinion. *Id.*
Hearsay, argument that trial court erred in allowing testimony concerning statement by appellant in medical record not preserved for appeal. *Id.*
Hearsay, psycho-social history of appellant, offered for truth of the matter asserted, no error in refusing to allow. *Id.*
Hearsay, statement by appellant in progress note offered to show that appellant made it and not for truth of the matter asserted. *Id.*
Hearsay, review of each allegation of error on which any specific argument was made. *Id.*
No error to exclude testimony, no proffer made. *Id.*
Challenge to the sufficiency of evidence precluded, appellant failed to renew his motion for a directed verdict after the State's rebuttal testimony. *Heard v. State*, 553.
Appellant's contention evidence put on by appellee was not rebuttal evidence requiring him to renew his motion for a directed verdict without merit, merits of appellant's argument not reached. *Id.*
When evidence of other sexual acts with children is admissible, testimony of other rape victims is relevant in a criminal trial for the rape of an underage victim to show " motive, intent or plan." *Thompson v. State*, 586.
Photographs, when admissible, when inadmissible. *Willett v. State*, 613.
Photographs, admissible to help prove necessary element, photographs of victims helped jury understand testimony and were probative of elements of capital murder. *Id.*
Decision to delete portions of confession within trial court's discretion, references to "sanity" or "insanity" would have been confusing to jury, no abuse of discretion. *Id.*
Trial court's consideration of all requested omissions from confession and exclusion of all references to words "sane" or "insane" prevented appellate court from finding abuse of discretion. *Id.*
Challenge to sufficiency of, factors considered. *Mills v. State*, 647.
Forcible compulsion defined, sufficient evidence of forcible compulsion found. *Id.*
Proof of rape substantial, appellant's contention without merit. *Id.*
Evidence supported fact that victim was alive when driven from the restaurant, sufficient evidence of kidnapping presented. *Id.*
Sufficient evidence of capital murder, proof that the offense was committed is all that is needed in order to corroborate a confession. *Id.*

Rulings on admissibility of, when reversed. *Id.*
Witness's statements made under hypnosis not allowed, no abuse of discretion found. *Id.*
Demonstrative evidence allowed by the trial court, no abuse of discretion found. *Id.*
Opinion testimony by lay witnesses, limitations. *Thompson v. Perkins*, 720.
Opinion testimony by lay witnesses, A.R.E. Rule 701 conditionally favors opinions. *Id.*
Opinion testimony by lay witnesses, rational-connection test. *Id.*
Opinion testimony by lay witnesses, not objectionable because it embraces ultimate issue to be decided by trier of fact. *Id.*
Opinion testimony by lay witnesses, trial court did not abuse discretion in admitting. *Id.*
Cumulative evidence, prejudicial error not found. *Id.*
Relevant evidence generally admissible, irrelevant evidence inadmissible. *Id.*
Relevancy ruling, review. *Id.*
Relevancy ruling, no abuse of discretion. *Id.*
Relevancy ruling, testimony regarding appellee's familiarity with intersection relevant to issue of negligence. *Id.*
Appellee's testimony regarding wife's absence as witness, no abuse of discretion. *Id.*
When evidence is sufficient to support a conviction, factors on review. *Kilpatrick v. State*, 728.
Proof needed when possession of a controlled substance is an element of the offense, joint occupancy of vehicle not sufficient to establish possession. *Id.*
Joint occupancy of vehicle, linking factors considered by court. *Id.*
Jury found appellant in possession of drugs and a firearm, substantial evidence found to support the decision. *Id.*
Appellant's claim without merit, sufficient evidence of intent to deliver cocaine existed. *Id.*
Trial court given latitude on matter of evidence admissibility. *Id.*
Evidence probative, trial court properly issued a limiting instruction, no abuse of discretion found. *Id.*
Admission of prior convictions for impeachment purposes, state's use of appellant's prior conviction for impeachment proper. *Id.*
Trial judge properly refused to admit letter, letter was entirely consistent with proof previously admitted. *Id.*
Rulings on evidence under A.R.E. Rule 103, record must reflect timely objection or motion to strike stating specific ground. *Cheqnet Systems, Inc. v. Montgomery*, 742.
Rulings on evidence under A.R.E. Rule 103, evidence came in without objection or motion to strike, trial court committed no error. *Id.*
What is required for a challenge to sufficiency of, no specific basis for the motion was given, point not considered on appeal. *Haltiwanger v. State*, 764.
Challenge to a ruling on the evidence, what is required. *Id.*
Challenge to trial court's denial of admittance of video tapes, failure to proffer tapes at trial precluded review of the issue on appeal. *Id.*
Intent or state of mind for murder is seldom provable by direct evidence, circumstantial evidence is sufficient. *Russey v. State*, 786.
Evidence of previous acts prohibited to prove character, when such evidence may be used. *Id.*
Appellant claimed shooting accidental, proof of previous violent altercation properly admitted. *Id.*

GUARDIAN & WARD:
Interests of minor cannot be compromised by guardian without approval by court, court must make judicial investigation into merits of compromise. *Davis v. Office of Child Support Enforcement*, 352.

HOSPITALS:
Member of board of directors holds fiduciary relationship with hospital, board member may not assume position in which personal interest and fiduciary duty might conflict. *Berry v. Saline Memorial Hosp.*, 182.
Lawyer as board member, fiduciary duty, should not take any action to detriment of hospital where action is based upon confidential information. *Id.*

INSURANCE:
Uninsured motorist and no-fault coverage, rejection of mandatory coverage required when new declaration occurs. *Fimpel v. State Auto. Mut. Ins. Co.*, 797.
No-fault coverage, imprecise insurance statute should be construed against insurance company. *Id.*
No-fault coverage, failure to obtain rejection of no-fault coverage with respect to substituted vehicle resulted in effective no-fault coverage. *Id.*

JUDGES:
Must avoid even appearance of impropriety. *Henderson v. State*, 402.
Bias, failure to object to question at trial rendered argument frivolous. *Id.*
Bias, trial court's judgment call did not support allegation of bias. *Id.*
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ARKANSAS APPELLATE REPORTS

Volume 51

CASES DETERMINED
IN THE

Court of Appeals of Arkansas

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INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
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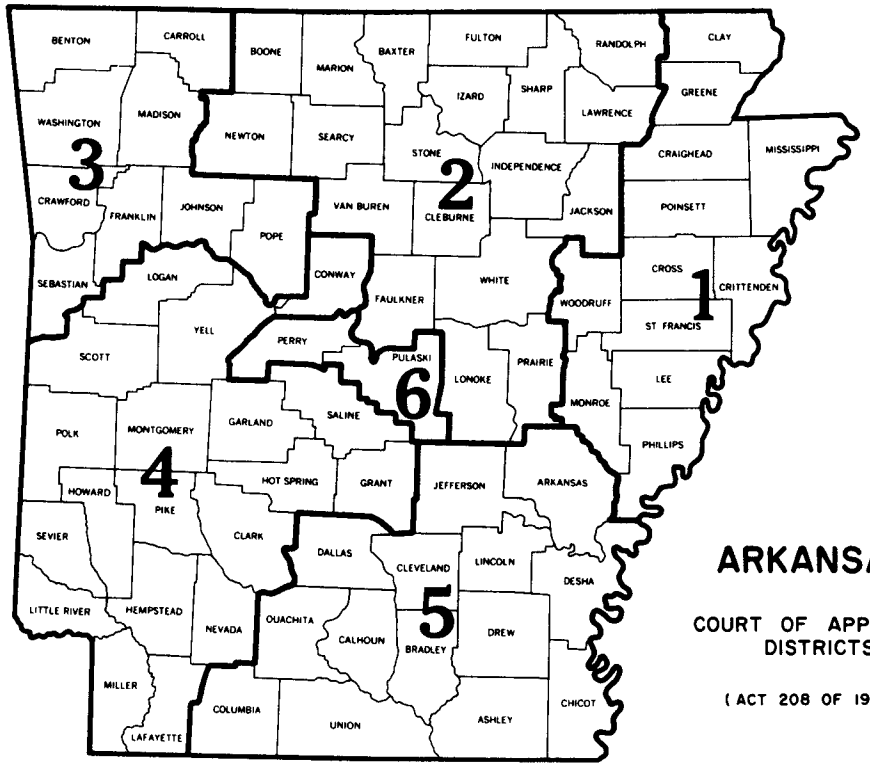

ARKANSAS

COURT OF APPEALS DISTRICTS

(ACT 208 OF 1979)

JUDGES AND OFFICERS
OF THE
COURT OF APPEALS
OF ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(October 4, 1995 –
December 20, 1995, inclusive)

JUDGES

JOHN E. JENNINGS	Chief Judge[1]
JOHN MAUZY PITTMAN	Judge[2]
JAMES R. COOPER	Judge[3]
JOHN B. ROBBINS	Judge[4]
MELVIN MAYFIELD	Judge[5]
JUDITH ROGERS	Judge[6]

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[6]District 6.

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STANDARDS FOR PUBLICATION OF OPINIONS

Rule 5-2

Rules of the Arkansas Supreme Court and Court of Appeals

OPINIONS

(a) SUPREME COURT — SIGNED OPINIONS. All signed opinions of the Supreme Court shall be designated for publication.

(b) COURT OF APPEALS — OPINION FORM. Opinions of the Court of Appeals may be in conventional form or in memorandum form. They shall be filed with the Clerk. The opinions need not contain a detailed statement of the facts, but may set forth only such matters as may be necessary to an understandable discussion of the errors urged. In appeals from decisions of the Arkansas Board of Review in unemployment compensation cases, when the Court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.

(c) COURT OF APPEALS — PUBLISHED OPINIONS. Opinions of the Court of Appeals which resolve novel or unusual questions will be released for publication when the opinions are announced and filed with the Clerk. The Court of Appeals may consider the question of whether to publish an opinion at its decision-making conference and at that time, if appropriate, make a tentative decision not to publish. Concurring and dissenting opinions will be published only if the majority opinion is published. All opinions that are not to be published shall be marked "Not Designated for Publication."

(d) COURT OF APPEALS — UNPUBLISHED OPINIONS. Opinions of the Court of Appeals not designated for publication shall not be published in the *Arkansas Reports* and shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue

such as res judicata, collateral estoppel, or law of the case). Opinions not designated for publication shall be listed in the *Arkansas Reports* by case number, style, date, and disposition.

(e) COPIES OF ALL OPINIONS. In every case the Clerk will furnish, without charge, one typewritten copy of all of the Court's published or unpublished opinions in the case to counsel for every party on whose behalf a separate brief was filed. The charge for additional copies is fixed by statute.

OPINIONS NOT DESIGNATED FOR PUBLICATION

Abel *v.* Kowalski, CA 94-988 (Per Curiam), Appellant's Pro Se Motion for Brief Time granted October 11, 1995.

Alexander *v.* State, CA CR 94-1299 (Pittman, J.), motion denied; rebriefing ordered December 13, 1995.

Anderson *v.* State, CA CR 94-1318 (Jennings, C.J.), affirmed November 29, 1995.

Arkansas Alcoholic Beverage Control Bd. *v.* Worbington, CA 94-1151 (Rogers, J.), affirmed November 1, 1995.

Arnold *v.* Anthony Timberlands, CA 94-1133 (Cooper, J.), affirmed October 11, 1995.

Atkins *v.* Dan King Trucking, Inc., CA 94-1383 (Jennings, C.J.), affirmed November 1, 1995.

Automated Prod. Equip. Corp. *v.* POM Inc., CA 94-902 (Jennings, C.J.), affirmed December 6, 1995.

Bailey *v.* St. Mary's Hosp., CA 94-1303 (Jennings, C.J.), affirmed November 22, 1995.

Barton *v.* State, CA CR 94-954 (Pittman, J.), affirmed November 8, 1995.

Bascue *v.* Director, E 94-85 (Mayfield, J.), affirmed October 11, 1995.

Bedingfield *v.* Tiger Lanes, Inc., CA 95-71 (Per Curiam), appeal dismissed December 13, 1995.

Beech Trucking Co. *v.* Taylor, CA 94-1195 (Rogers, J.), affirmed October 18, 1995.

Birchell *v.* M C Enter., CA 94-1374 (Rogers, J.), affirmed December 6, 1995.

Black *v.* Cache Valley Elec. Co., CA 94-1304 (Pittman, J.), affirmed November 8, 1995.

Bledsoe *v.* State, CA CR 94-1345 (Robbins, J.), affirmed December 6, 1995.

Blockburger *v.* St. Mary's Regional Medical Ctr., CA 94-1271 (Jennings, C.J.), affirmed October 11, 1995.

Bohannon *v.* Bohannon, CA 94-1305 (Jennings, C.J.), affirmed December 20, 1995.

Bonds *v.* State, CA CR 95-15 (Pittman, J.), affirmed December 13, 1995.

Brasfield *v.* State, CA CR 94-4 (Pittman, J.), affirmed October 18, 1995.

Brooks *v.* State, CA CR 95-65 (Rogers, J.), affirmed November 15, 1995.

Brooks *v.* State, CA CR 94-1225 (Mayfield, J.), remanded December 6, 1995.

Brown *v.* State, CA CR 94-1279 (Robbins, J.), affirmed December 13, 1995.

Burton *v.* Director, E 95-236 (Per Curiam), Motion for Rule on the Clerk to Lodge Petition for Review denied December 6, 1995.

Burton *v.* State, CA CR 95-6 (Jennings, C.J.), affirmed November 15, 1995.

Central Arkansas Tractor *v.* Rowland, CA 94-1208 (Mayfield, J.), affirmed October 4, 1995.

Chambers *v.* Allstate Roofing, CA 94-1324 (Mayfield, J.), affirmed November 8, 1995.

Chambers *v.* State, CA CR 94-1282 (Robbins, J.), affirmed October 18, 1995.

Charles *v.* State, CA CR 94-1337 (Jennings, C.J.), affirmed October 18, 1995.

Chatten *v.* State, CA CR 94-1175 (Rogers, J.), affirmed October 25, 1995. Rehearing denied December 6, 1995.

Christesson *v.* Thruston, CA 94-1041 (Per Curiam), Supplemental Opinion on Denial of Rehearing issued November 22, 1995.

City of Little Rock *v.* Ross Elec., Inc., CA 94-1200 (Mayfield, J.), affirmed November 15, 1995.

Clay *v.* State, CA CR 94-1062 (Jennings, C.J.), affirmed October 25, 1995.

Collie *v.* State, CA CR 94-1371 (Robbins, J.), affirmed November 22, 1995.

Combs *v.* Combs, CA 94-1335 (Pittman, J.), affirmed November 15, 1995.

Cox *v.* State, CA CR 94-1250 (Bullion, S.J.), affirmed November 29, 1995.

Croff *v.* State, CA CR 94-1417 (Bullion, S.J.), affirmed November 22, 1995.

Dean *v.* State, CA CR 94-1287 (Mayfield, J.), affirmed October 18, 1995.

Duff *v.* State, CA CR 94-1284 (Jennings, C.J.), affirmed December 20, 1995.

Ellison *v.* State, CA CR 94-974 (Mayfield, J.), affirmed December 20, 1995.

England *v.* Ronnie Dowdy, Inc., CA 94-1278 (Jennings, C.J.), affirmed October 25, 1995. Rehearing denied November 15, 1995.

Farr *v.* State, CA CR 94-1256 (Jennings, C.J.), affirmed November 22 1995.

Farver *v.* State, CA CR 94-913 (Jennings, C.J.), affirmed November 8, 1995.

Flippo *v.* Wyatt, CA 94-992 (Jennings, C.J.), affirmed October 11, 1995.

Fox *v.* State, CA CR 94-1390 (Mayfield, J.), affirmed November 22, 1995.

Franklin *v.* State, CA CR 94-1002 (Bullion, S.J.), reversed and remanded December 20, 1995.

Frye *v.* A-Temporary, Inc., CA 94-1259 (Cooper, J.), affirmed October 4, 1995.

Gallagher *v.* Wade, CA 93-1225 (Jennings, C.J.), affirmed December 13, 1995.

George's, Inc. *v.* Fenner, CA 94-1295 (Robbins, J.), affirmed October 18, 1995.

German *v.* German, CA 94-1129 (Pittman, J.), reversed and remanded November 15, 1995.

Gladden *v.* Whaley, CA 94-1199 (Robbins, J.), affirmed December 6, 1995.

Hedge *v.* State, CA CR 94-1159 (Cooper, J.), affirmed October 18, 1995.

Hendrix *v.* Director, E 94-263 (Mayfield, J.), reversed and remanded October 25, 1995.

Henry *v.* Dillard Dep't Stores, Inc., CA 94-1234 (Robbins, J.), reversed and remanded October 25, 1995.

Hervey *v.* State, CA 95-169 (Rogers, J.), reversed November 15, 1995.

Hobbs *v.* Rowlett, CA 94-1203 (Jennings, C.J.), affirmed October 18, 1994.

Hospitality Group, Inc. *v.* Leadingham, CA 95-26 (Jennings, C.J.), affirmed December 20, 1995.

Hudnall *v.* Arkansas Dep't of Human Servs., CA 95-295 (Per Curiam), Motion of Arkansas Department of Human Services and Motion of the Guardian Ad Litem to Modify and Correct the Record granted October 4, 1995.

Hudnall *v.* Department of Human Servs., CA 95-295 (Per Curiam), Appellant's Motion to Remand to Determine Record on Appeal denied December 6, 1995.

Hudnall *v.* Department of Human Servs., CA 95-295 (Per Curiam), Appellant's Motion to Certify to the Supreme Court denied December 6, 1995.

Hudson Ent., Inc. *v.* W & W Ford Sales, Inc., CA 94-1400 (Rogers, J.), affirmed December 20, 1995.

Hudson Foods, Inc. *v.* Morris, CA 94-1275 (Cooper, J.), affirmed October 18, 1995.

Jackson *v.* Little Rock School Dist., CA 94-1238 (Cooper, J.), affirmed October 11, 1995.

Jackson *v.* State, CA CR 95-1138 (Per Curiam), Motion of Edward G. Adcock to be Relieved as Counsel for Appellant, for Appointment of Counsel and for Brief Time granted in part December 20, 1995.

Jeffries *v.* State, CA CR 94-1437 (Pittman, J.), affirmed December 13, 1995.

Johnson *v.* Lake Village Seed & Tire Co., CA 94-1134 (Jennings, C.J.), affirmed October 18, 1995.

Johnson *v.* Land O'Frost, CA 94-1132 (Bullion, S.J.), affirmed November 29, 1995.

Johnson *v.* State, CA CR 94-1263 (Mayfield, J.), affirmed October 11, 1995.

Jones *v.* Little Rock Housing Auth., CA 95-222 (Jennings, C.J.), affirmed December 20, 1995.

Jones *v.* State, CA CR 94-1288 (Rogers, J.), affirmed October 18, 1995.

Kemp *v.* State, CA CR 94-1212 (Pittman, J.), affirmed December 6, 1995.

Kuppenheimer Mfg. Co. *v.* William Kay Mfg. Co., CA 94-1355 (Robbins, J.), affirmed December 13, 1995.

L.V.'s Used Cars *v.* Bratton, CA 94-1296 (Rogers, J.), affirmed October 11, 1995.

Lamb *v.* T.B.H., Inc., CA 94-1377 (Pittman, J.), affirmed December 20, 1995.

Lambert *v.* State, CA CR 94-1037 (Robbins, J.), affirmed November 8, 1995.

Ledbetter *v.* Earle Indus., Inc., CA 94-1297 (Cooper, J.), affirmed October 4, 1995.

Lusby *v.* Bryant, CA 94-1111 (Pittman, J.), affirmed October 25, 1995.

Lynum *v.* State, CA CR 94-1428 (Mayfield, J.), affirmed November 29, 1995.

Magness, Inc. *v.* Suddeth, CA 94-1009 (Jennings, C.J.), affirmed October 18, 1995.

Martinez *v.* Arrow Mechanical, CA 94-1369 (Cooper, J.), affirmed October 25, 1995.

McCauley *v.* Petit Jean Poultry, CA 94-1368 (Rogers, J.), affirmed November 29, 1995.

McCoy *v.* State, CA CR 94-1330 (Cooper, J.), affirmed October 18, 1995.

McCraw *v.* McCraw, CA 94-1117 (Pittman, J.), dismissed November 22, 1995.

McMillen *v.* Taylor, CA 94-1328 (Cracraft, J.), affirmed November 8, 1995.

Meadors *v.* State, CA CR 94-1349 (Robbins, J.), affirmed November 1, 1995.

Meredith *v.* State, CA CR 94-1292 (Rogers, J.), affirmed December 6, 1995.

Mills *v.* Mills, CA 95-24 (Jennings, C.J.), affirmed December 13, 1995.

Moore *v.* Georgia-Pacific Corp., CA 94-489 (Jennings, C.J.), affirmed October 18, 1995.

Motes *v.* Director, E 94-81 (Rogers, J.), affirmed October 11, 1995.

Murphy *v.* Wal-Mart Stores, Inc., CA 94-1403 (Mayfield, J.), affirmed in part; reversed and remanded in part November 15, 1995.

Nichols *v.* Williams, CA 94-1202 (Bullion, S.J.), affirmed November 29, 1995.

Owens *v.* State, CA CR 94-1314 (Rogers, J.), affirmed December 13, 1995.

Paden *v.* Becton Timber Co., CA 94-1237 (Pittman, J.), affirmed October 4, 1995.

Palmer *v.* State, CA CR 94-1339 (Rogers, J.), affirmed December 20, 1995.

Parker *v.* State, CA CR 94-1405 (Jennings, C.J.), affirmed November 22, 1995.

Patterson *v.* State, CA CR 94-1118 (Pittman, J.), affirmed November 8, 1995.

Pearson *v.* Pearson, CA 94-1163 (Robbins, J.), affirmed october 11, 1995.

Pearson *v.* State, CA CR 94-1144 (Bullion, S.J.), affirmed November 15, 1995.

Rankin *v.* City of Fort Smith, CA CR 94-1060 (Mayfield, J.), affirmed October 25, 1995.

Rece *v.* Schueck/Yamamoto, CA 95-51 (Robbins, J.), affirmed November 22, 1995.

Redmon *v.* State, CA CR 94-1254 (Rogers, J.), affirmed November 8, 1995.

Richardson *v.* Word Constr. Co., CA 94-1290 (Mayfield, J.), affirmed December 13, 1995.

Rosser *v.* State, CA CR 94-579 (Pittman, J.), affirmed November 8, 1995.

Schabazz *v.* State, CA CR 94-1397 (Rogers, J.), affirmed October 25, 1995.

Schuchman *v.* Cate, CA 94-1171 (Robbins, J.), affirmed November 22, 1995.

Scoggins *v.* Mitchell, CA 94-1048 (Robbins, J.), affirmed October 4, 1995. Rehearing denied November 1, 1995.

Shoffner *v.* State, CA CR 94-906 (Robbins, J.), affirmed October 25, 1995.

Simco *v.* Sky, Inc., CA 94-1410 (Robbins, J.), affirmed December 20, 1995.

Simmons Eastside 66 *v.* Edmonds, CA 94-1426 (Rogers, J.), affirmed November 15, 1995.

Smith, Lakeith *v.* State, CA CR 94-1112 (Jennings, C.J.), affirmed November 22, 1995.

Smith, Louis Calvin *v.* State, CA CR 94-1365 (Rogers, J.), affirmed November 29, 1995.

Swaim *v.* State, CA CR 94-1286 (Jennings, C.J.), affirmed October 4, 1995.

Taggart *v.* State, CA CR 94-1251 (Bullion, S.J.), affirmed December 13, 1995.

Talbert *v.* State, CA CR 94-1333 (Pittman, J.), affirmed October 18, 1995.

Tanner *v.* State, CA CR 94-1261 (Jennings, C.J.), affirmed December 20, 1995.

Taylor *v.* State, CA CR 94-1188 (Robbins, J.), affirmed October 11, 1995.

Tee *v.* Tee, CA 94-1327 (Mayfield, J.), affirmed November 22, 1995.

Thompson *v.* State, CA CR 94-1281 (Cooper, J.), affirmed October 25, 1995.

Todd *v.* Ruth's Employment Serv., CA 94-1152 (Mayfield, J.), reversed and remanded November 1, 1995.

Toll *v.* Director, E 95-134 (Per Curiam), Motion for Rule on the Clerk to Lodge Petition for Review denied November 15, 1995.

Toney *v.* State, CA CR 94-1204 (Robbins, J.), affirmed November 22, 1995.

Tri-State Ins. Co. *v.* Keeton, CA 94-1130 (Pittman, J.), affirmed November 22, 1995.

Union Standard Ins. Co. *v.* Forte, CA 95-357 (Robbins, J.), affirmed December 13, 1995.

Vann *v.* State, CA CR 94-1415 (Robbins, J.), reversed and remanded December 20, 1995.

Virginia L. Harrison Animal Shelter *v.* Talley, CA 94-1252 (Mayfield, J.), affirmed October 11, 1995.

Walls *v.* State, CA CR 94-1298 (Mayfield, J.), affirmed November 22, 1995.

White River Regional Housing Dev. Corp. *v.* Ward, CA 94-1140 (Robbins, J.), affirmed November 8, 1995.

Wild River Country Ltd. Partnership *v.* Corporate Finance Partners, CA 94-1262 (Pittman, J.), affirmed December 13, 1995.

Williams, Carolyn *v.* State, CA CR 94-1272 (Cooper, J.), affirmed October 18, 1995.

Williams *v.* Little Rock Mun. Waterworks, CA 94-1215 (Rogers, J.), affirmed October 25, 1995.

Williams *v.* State, CA CR 94-1164 (Rogers, J.), affirmed October 11, 1995.

Wilson *v.* Riceland Foods, CA 94-1381 (Pittman, J.), affirmed December 6, 1995.

Wilson *v.* State, CA CR 94-1367 (Mayfield, J.), affirmed October 25, 1995.

Wright *v.* State, CA CR 94-1044 (Mayfield, J.), affirmed November 15, 1995.

Yeary *v.* Carter-Cox Seed, Inc., CA 94-1357 (Rogers, J.), affirmed November 1, 1995.

Young *v.* State, CA CR 94-850 (Mayfield, J.), affirmed December 13, 1995.

CASES AFFIRMED BY THE ARKANSAS COURT OF APPEALS WITHOUT WRITTEN OPINION PURSUANT TO RULE 5-2(b), RULES OF THE ARKANSAS SUPREME COURT AND COURT OF APPEALS

Banfield *v.* Director of Labor, E 94-258, November 29, 1995.
Barnes *v.* Director of Labor, E 94-271, December 13, 1995.
Barrett *v.* Director of Labor, E 95-123, October 4, 1995.
Brooks *v.* Director of Labor, E 94-254, October 18, 1995.
Carter *v.* Director of Labor, E 94-247, November 22, 1995.
Cruz *v.* Director of Labor, E 94-283, October 25, 1995.
Dawson, Jewel *v.* Director of Labor, E 94-183, October 18, 1995.
Dawson, Margaret *v.* Director of Labor, E 94-220, October 18, 1995.
DeMoney *v.* Director of Labor, E 94-245, November 22, 1995.
Dunlap *v.* Director of Labor, E 94-249, November 22, 1995.
Dunn *v.* Director of Labor, E 94-290, December 13, 1995.
Epperson *v.* Director of Labor, E 94-233, November 15, 1995.
Falkner *v.* Director of Labor, E 94-260, November 29, 1995.
Fells *v.* Director of Labor, E 94-274, December 20, 1995.
Ferrell *v.* Director of Labor, E 95-073, October 4, 1995.
Gary *v.* Director of Labor, E 94-270, October 18, 1995.
Harrison *v.* Director of Labor, E 94-222, October 18, 1995.
Harrison *v.* Director of Labor, E 94-264, December 13, 1995.
Horton *v.* Director of Labor, E 94-286, December 13, 1995.
Jackson *v.* Director of Labor, E 94-250, November 22, 1995.
Johnson *v.* Director of Labor, E 95-080, October 4, 1995.
Jones *v.* Director of Labor, E 94-262, December 13, 1995.
Kistner *v.* Director of Labor, E 94-282, December 13, 1995.
Lovewell *v.* Director of Labor, E 94-303, December 20, 1995.
McAfee *v.* Director of Labor, E 94-248, November 22, 1995.
McNeary *v.* Director of Labor, E 94-259, November 29, 1995.
Michelsen *v.* Director of Labor, E 94-288, November 8, 1995.
Mitchell *v.* Director of Labor, E 94-179, November 22, 1995.
Moore *v.* Director of Labor, E 95-074, October 4, 1995.
Myers *v.* Director of Labor, E 94-265, December 13, 1995.
New *v.* Director of Labor, E 94-225, December 6, 1995.

Oliver *v.* Director of Labor, E 95-117, October 4, 1995.
Owens *v.* Director of Labor, E 94-278, December 13, 1995.
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Perry *v.* Director of Labor, E 94-238, December 6, 1995.
Roberts *v.* Director of Labor, E 94-272, October 25, 1995.
Sales *v.* Director of Labor, E 94-229, November 15, 1995.
Shelton *v.* Director of Labor, E 94-194, October 4, 1995.
Sherlock *v.* Director of Labor, E 94-298, December 20, 1995.
Slaughter *v.* Director of Labor, E 94-221, October 18, 1995.
Smith, Joyce *v.* Director of Labor, E 94-276, October 25, 1995.
Stone *v.* Director of Labor, E 94-246, October 18, 1995.
Tu *v.* Director of Labor, E 95-087, October 4, 1995.
Vann *v.* Director of Labor, E 94-289, December 13, 1995.
Wacaster *v.* Director of Labor, E 94-207, October 18, 1995.
Welch *v.* Director of Labor, E 94-241, November 22, 1995.
Whiteside *v.* Director of Labor, E 94-240, November 22, 1995.
Wilkes *v.* Director of Labor, E 94-285, November 8, 1995.
Williams, Randall *v.* Director of Labor, E 95-151, October 4, 1995.
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Appellant failed to cite any regulation requiring appellee to establish validity of stock certificate. *Id.*
Appellant failed to produce any evidence that should have made appellee suspicious of another party's possession of stock certificate. *Id.*
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Appellant failed to demonstrate how statutory provision on staleness as notice of adverse claims applied to stock certificate, appellee filed lawsuit within six months of default. *Id.*
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Appellant failed to produce any evidence to show that appellee had been unjustly enriched. *Id.*
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