ARKANSAS REPORTS
VOLUME 331

ARKANSAS
APPELLATE REPORTS
VOLUME 60

[T]he law is the last result of human wisdom acting upon human experience for the benefit of the public.

— SAMUEL JOHNSON
(1709-1784)

THIS BOOK CONTAINS THE OFFICIAL

ARKANSAS REPORTS

Volume 331

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
January 8, 1998 — February 19, 1998
INCLUSIVE[1]

AND

ARKANSAS APPELLATE REPORTS

Volume 60

CASES DETERMINED
IN THE

Court of Appeals of Arkansas

FROM
December 22, 1997 — February 19, 1998
INCLUSIVE[2]

PUBLISHED BY THE
STATE OF ARKANSAS
1998

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[1]Arkansas Supreme Court cases (ARKANSAS REPORTS) are in the front section, pages 1 through 536. Cite as 331 Ark. ___ (1998).
[2]Arkansas Court of Appeals cases (ARKANSAS APPELLATE REPORTS) are in the back section, pages 1 through 317. Cite as 60 Ark. App. ___ (1997 or 1998).

ERRATA

302 Ark. at 487; second paragraph, line five:
Section "26-52-507" should be "26-18-507."

302 Ark. at 488; italicized subsection "2":
Section "*26-52-507*" should be "*26-18-507.*"

302 Ark. at 488; fourth paragraph, line one:
Section "26-52-507" should be "26-18-507."

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ARKANSAS REPORTS

Volume 331

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
January 8, 1998 — February 19, 1998
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

PUBLISHED BY THE
STATE OF ARKANSAS
1998

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JUSTICES AND OFFICERS
OF THE
SUPREME COURT OF ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(January 8, 1998 —
February 19, 1998, inclusive)

JUSTICES

W.H. "DUB" ARNOLD	Chief Justice
DAVID NEWBERN	Justice
TOM GLAZE	Justice
DONALD L. CORBIN	Justice
ROBERT L. BROWN	Justice
ANNABELLE CLINTON IMBER	Justice
RAY THORNTON	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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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

Allen *v.* State, CR 96-881 (Per Curiam), Pro Se Motion for Trial Transcript, for Appointment of Counsel and to File Supplemental Brief, granted in part and denied in part January 22, 1998.

Baker *v.* State, CR 96-502 (Per Curiam), Pro Se Motion for Extension of Time to File Pro Se Brief, granted January 22, 1998.

Beck *v.* State, CR 97-1257 (Per Curiam), Pro Se Motion for Rule on Clerk to File Petition, denied January 22, 1998.

Cannon *v.* State, CA CR 96-1018 (Per Curiam), Pro Se Motion for Photocopy of Trial Transcript at Public Expense, denied February 12, 1998.

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Davis *v.* State, CR 97-1200 (Per Curiam), Pro Se Motions for Extension of Time to File Brief, for Writ of Certiorari, and to Supplement Record denied and appeal dismissed February 5, 1998.

Dinwiddie *v.* State, CR 97-926 (Per Curiam), Pro Se Motion for Appointment of Counsel and Pro Se Motion for Extension of Time denied and appeal dismissed January 29, 1998.

Dix *v.* State, CR 97-1261 (Per Curiam), Pro Se Motion for Rule on Clerk denied February 5, 1998.

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Gilbert *v.* State, 97-433 (Per Curiam), Pro Se Petition for Writ of Mandamus and Pro Se Motion to File Belated Brief and for Duplication of Brief at Public Expense, denied and appeal dismissed January 15, 1998.

Grabow *v.* State, CR97-1290 (Per Curiam), Pro Se Motion for Appointment of Counsel, denied and appeal dismissed February 19, 1998.

Heffernan *v.* Cole, CR 97-1390 (Per Curiam), Pro Se Petition for Writ of Mandamus moot January 29, 1998.

Hughes *v.* State, CR 97-1078 (Per Curiam), Pro Se Motion for Appointment of Counsel denied and appeal dismissed January 29, 1998.

Jones *v.* State, CR 97-1167 (Per Curiam), Pro Se Motion for Extension of Time to File Brief, February 19, 1998.

Kain *v.* Burnett, CR 97-1389 (Per Curiam), Pro Se Petition for Writ of Mandamus and Pro Se Motion to Supplement Record; moot January 15, 1998.

Knee *v.* State, CR 96-1461 (Per Curiam), affirmed January 29, 1998.

Ladwig *v.* Taylor, CR 98-22 (Per Curiam), Pro Se Petition for Writ of Mandamus moot February 5, 1998.

Malone *v.* State, CR 97-656 (Per Curiam), Pro Se Motion to File a Supplemental Appellant's Brief, denied and appeal dismissed February 12, 1998. Rehearing denied March 19, 1998.

Morris *v.* State, CR 97-1003 (Per Curiam), Appellant's Pro Se Motion for Copy of Material in Counsel's Possession; denied January 15, 1998.

Moss *v.* Norris, CR 97-1176 (Per Curiam), Pro Se Motion for Belated Appeal of Order, denied February 19, 1998.

Mullenax *v.* State, CR 97-1256 (Per Curiam), Pro Se Motion for Rule on Clerk to File Petition, denied January 22, 1998.

Norman *v.* McCorkindale, CR 97-298 (Per Curiam), Pro Se Petition for Writ of Mandamus moot January 29, 1998.

Pardue *v.* Keith, CR 97-1443 (Per Curiam), Pro Se Petition for Writ of Mandamus moot January 29, 1998.

Partin *v.* Norris, CR 97-1449 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied February 5, 1998.

Partin *v.* State, CR 93-682 (Per Curiam), Pro Se Motion for Photocopying at Public Expense, denied as moot February 5, 1998.

Perez *v.* State, CR 96-1317 (Per Curiam), affirmed January 15, 1998.

Redmon *v.* State, CR 96-1197 (Per Curiam), affirmed February 5, 1998.

Rucker *v.* State, CR 96-1029 (Per Curiam), affirmed January 15, 1998.

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Skinner *v.* State, CR 96-1284 (Per Curiam), affirmed February 5, 1998.

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Taylor *v.* State, CR 88-21 (Per Curiam), Pro Se Motion for Photocopies at Public Expense denied January 29, 1998.

Phillips *v.* State, CR 97-940 (Per Curiam), Pro Se Motion to File Amended Abstract, granted February 19, 1998.

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Thompson *v.* State, CR 97-1091 (Per Curiam), Pro Se Motion to File Brief with Enlarged Argument, granted; Pro Se Motions to Supplement Record and to Supplement Abstract, granted in part and denied in part January 22, 1998.

Weaver *v.* State, CR 97-690 (Per Curiam), Pro Se Motion to Withdraw Appellant's Briefs granted in part and denied in part; Pro Se Motion to Proceed with Fifteen Copies of Tendered Reply Brief moot February 5, 1998.

Wells *v.* State, CR 96-1118 (Per Curiam), affirmed January 29, 1998.

Young *v.* State, CR 96-1462 (Per Curiam), affirmed January 15, 1998. Rehearing denied February 19, 1998 (Per Curiam).

APPENDIX

Rules Adopted or Amended by Per Curiam Orders

IN RE: PROCEDURES OF THE ARKANSAS SUPREME COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW

963 S.W.2d 562

Supreme Court of Arkansas
Opinion delivered January 8, 1998

PER CURIAM. By Per Curiam dated July 16, 1990, this Court adopted revised rules of procedures entitled "Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law". At that time the court expressed its desire to review The Model Rules For Lawyer Disciplinary Enforcement adopted by the American Bar Association to ascertain the merit and suitability of those model rules for possible incorporation into the lawyer disciplinary process in this State. The Supreme Court Committee on Professional Conduct subsequently undertook a comprehensive and exhaustive review and study of all aspects of the lawyer regulatory system.

The Committee has now completed that laborious task and has presented the Court a petition recommending a substantial revision of the existing "Procedures". The Court carefully considered the proposed revisions and caused some modifications and changes to be made. The Court now approves and adopts the revised "Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law", a copy of which is appended to this order and made a part hereof by reference, to become effective on January 15, 1998.

We again express the gratitude of this Court to the past and present membership of the Committee and to its staff for their dedicated and conscientious endeavor in this project and for their devoted and inestimable service to the public, bar and bench in discharging the duties and responsibilities attendant to the matters assigned to the Committee.

It is so ordered.

IN THE SUPREME COURT OF THE STATE OF ARKANSAS

IN RE: COMMITTEE ON PROFESSIONAL CONDUCT RECOMMENDATION FOR ADOPTION OF REVISED PROCEDURES REGULATING PROFESSIONAL CONDUCT OF ATTORNEY AT LAW

PETITION

Comes now the Arkansas Supreme Court Committee on Professional Conduct (hereafter Committee), by and through its Executive Director, James A. Neal, and petitions the Court as follows:

1. Following the Court's adoption of the present Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law (hereafter Procedures) by Per Curiam dated July 16, 1990, and consonant with the Court's expression of its desire to have the merits and suitability of the American Bar Association's Model Rules For Lawyer Disciplinary Enforcement examined for possible incorporation in the lawyer regulatory process of this State, the Committee set about the lengthy task of conducting a comprehensive review and study of the complete body of the procedural rules relating to the lawyer disciplinary system. In addition to the Court's request for a study of The Model Rules For Lawyer Disciplinary Enforcement, the Committee's experience in administering the lawyer regulatory system strongly suggested the need for substantial revision of the existing Procedures, both from a practical and a philosophical perspective.

2. The Committee examined the procedural rules of numerous jurisdictions' lawyer disciplinary programs, consulted the several works produced by the American Bar Association relating to regulation of the legal professions, reviewed the applicable case law of this and other jurisdictions, and considered a number of factors that are unique to the structure and methodology of the lawyer regulatory system in place in Arkansas.

3. After the examination, analysis and consideration of numerous proposed revisions, comparisons of alternative positions, and engaging in extensive modifications the Committee produced a proposed revision of the Procedures which contained some substantial changes in the existing Procedures. The Committee strived to create a comprehensive body of procedural rules which would aid the Court in the regulation of the legal profession, and would promote and enhance the Committee's ability to discharge its duties and responsibilities to the public and the legal profession in a fair, efficient and economic manner.

4. The draft of the Committee's proposed revision of the Procedures was submitted to the Court for consideration. Following extensive review and deliberation, including a number of discussions with the Committee's staff, the Court offered a number of modifications and changes to the Committee's proposed revision. The Court's modifications have been incorporated into the Committee's proposed revision of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, a copy of which is attached hereto.

5. The Committee respectfully and earnestly requests that the attached Procedures be favorably considered and adopted by the Court to become effective on January 15, 1998, or as soon thereafter as the Court deems appropriate.

WHEREFORE, Petitioner prays that the Court, pursuant to its constitutional and inherent authority, adopt and promulgate the revised Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law attached hereto.

Respectfully submitted,
Arkansas Supreme Court Committee on
Professional Conduct

By: (signed)
JAMES A. NEAL
Executive Director

PROCEDURES OF THE ARKANSAS SUPREME COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW

SECTION 1. SCOPE

A. PURPOSE. These Procedures are promulgated for the purposes of regulating the professional conduct of attorneys at law and shall apply to complaints filed and formal complaints instituted against attorneys after the effective date of these procedures, and within the purview of the jurisdiction and the authority of the Supreme Court Committee on Professional Conduct. From the effective date hereof, these Procedures shall apply to transfers to inactive status, to reinstatements, and to the extent that limitations and special requirements pertain, to attorneys presently suspended, disbarred or who have surrendered their law licenses. Every attorney now or hereafter licensed to practice law in the State of Arkansas shall be a member of the Bar of this State and subject to these Procedures. The jurisdiction of the Supreme Court Committee on Professional Conduct shall extend to lawyers in active, inactive or suspended status.

B. RULES OF PROFESSIONAL CONDUCT ADOPTED. The court has adopted the Model Rules of Professional Conduct of the American Bar Association, as amended, as the standard of professional conduct of attorneys at law. An attorney who violates any provision of the Model Rules, or these Procedures, shall be subject to the provisions herein.

C. NATURE OF PROCEEDINGS. Disciplinary proceedings are neither civil nor criminal but are sui generis.

D. REPEALER. To the extent that former rules or existing provisions of the Arkansas Code Annotated are in conflict with these Procedures, they are hereby overruled and superseded. These Procedures shall not be deemed exclusive of, but supplemental to those provisions of the Arkansas Code Annotated that are not in conflict herewith.

E. DEFINITIONS. As used in these Procedures, unless the context otherwise requires:

(1) "CLERK" means the Clerk of the Arkansas Supreme Court;

(2) "COMMITTEE" means the Supreme Court Committee on Professional Conduct; to the extent that the context of any of the provisions of these Procedures requires and as may be necessary to the performance of the duties and the acts imposed by these Procedures and the policies and directives established by the Supreme Court Committee on Professional Conduct, the meaning of Committee shall include the office of the Executive Director.

(3) "COMPLAINANT" means the person(s) initiating a complaint, or the Committee when acting at its own instance or on behalf of another in initiating a complaint;

(4) "COMPLAINT" means an inquiry, allegation, or information of whatever nature and in whatever form received by or coming to the attention of the Committee and concerning the conduct of a person subject to the jurisdiction of the Committee;

(5) "FORMAL COMPLAINT" means a complaint directed to an attorney by the Committee, setting forth the alleged violation(s) of the Model Rules and informing the attorney of the right to file a written response;

(6) "MODEL RULES" means the Model Rules of Professional Conduct of the American Bar Association, as amended, and any statutory provisions, or rules adopted by the Arkansas Supreme Court regulating the professional conduct of attorneys at law;

(7) "RESPONDENT" or "RESPONDENT ATTORNEY" means an attorney against whom a formal complaint has been initiated whether or not the attorney has failed to file a written response.

(8) "SERIOUS CRIME" means any felony or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or any crime a neces-

sary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a "serious crime."

(9) "SUBSTANTIAL" when used for the purposes of these procedures in reference to degree or extent, means beyond mere suspicion or conjecture and of sufficient force and character to compel a conclusion one way or another with reasonable and material certainty and precision.

(10) "UNAVOIDABLE CIRCUMSTANCES" means circumstances not attributable to negligence, carelessness, fault, or the lack of diligence on the part of the respondent attorney.

SECTION 2. COMMITTEE

A. COMPOSITION/TERM OF OFFICE. The Committee shall consist of seven members appointed by the Arkansas Supreme Court to assist in enforcing these Procedures. The present Committee members shall continue to serve their present terms. Five members of the Committee shall be lawyers, one from each Congressional District and one from the State at large, and shall be appointed for seven-year terms. The other two members shall not be lawyers, shall be selected from the State at large, and shall be appointed for seven-year terms. Committee members shall serve until their successors are appointed and certified. The Committee shall elect one of its members as Chairperson and another as Secretary. The Committee, consistent with the provisions herein, may adopt such internal, operating rules and policies as may be necessary to facilitate the performance of its duties, responsibilities, and administrative functions.

B. QUORUM. A majority of the Committee shall constitute a quorum.

C. AUTHORITY/POWERS.

(1) The Committee shall have, and is hereby granted, authority to investigate all complaints alleging violation of the Model Rules that may be brought to its attention and impose any

sanctions deemed appropriate as provided in Section 5 (Procedure) and Section 7 (Sanctions).

(2) The Committee is hereby authorized to take action by written ballot subject to the requirements and limitations set out in Section 5 of these Procedures.

(3) The Committee is authorized to conduct hearings at either:

(a) The request of the Committee; or

(b) The request of the respondent attorney after written ballots are taken.

(4) The Committee is authorized to hold meetings to conduct the business of the Committee which consists of, but is not limited to, the election of officers, the determination of pending complaints, and such administrative matters as required.

(5) The seal heretofore adopted by the Committee shall be the official seal for its use in the performance of the duties imposed by these Procedures.

(6) The Committee shall have the authority to issue summonses for any person(s), or subpoenas for any witness(es), including the production of documents, books, records, or other evidence, in the same manner as is provided for civil process pursuant to the Arkansas Rules of Civil Procedure, requiring the presence of any person, or the attendance of any witness before the Committee for the purpose of testimony, or in furtherance of an investigation. Such process shall be issued under the seal of the Committee provided for in subsection C(5) of this Section and be signed by the Chairperson, Secretary, or by the Executive Director. Any subpoenas issued herein shall clearly indicate that the subpoenas are issued in connection with a confidential investigation under these Procedures and that it is regarded as contempt of the Supreme Court for a person subpoenaed to breach the confidentiality of the investigation. If found to be in contempt of the Supreme Court under these Procedures, a person may be punished by incarceration, imposition of a fine, or both. In addition, it shall be grounds for discipline under these Procedures for a sub-

poenaed attorney to breach the confidentiality of the investigation. It shall not be regarded as a breach of confidentiality for a person subpoenaed to seek or consult with legal counsel in regard to the subpoena, nor shall the confidentiality apply to subpoenas issued in connection with a public hearing.

(7) The Committee may seek immunity from criminal prosecution for a reluctant witness, using the procedure of Ark. Code Ann. 16-43-601 to 606 (1987).

(8) The Committee shall have the authority to employ an Executive Director who will not be a member of the Committee, and shall not have a vote on any matter presented to the Committee for decision. The Committee may employ a special Executive Director in any case in which the Executive Director is unable to act.

(9) The Committee shall maintain a permanent office under the supervision of the Executive Director for the conduct of its business and the maintenance of the various records of the Committee.

(10) When so requested by a Federal Judge under the Uniform Federal Rules of Disciplinary Enforcement adopted by the United States District Courts of Arkansas on May 1, 1980, or successor rules, the Committee may act as the disciplinary agency and the Executive Director as counsel in a federal disciplinary action. Any additional expense incurred in the processing of a federal complaint will be paid from the funds arising from the assessments levied pursuant to the Uniform Federal Rules and available for that purpose. When final action is taken under a federal complaint, a report of that action will be made to the Federal Judge who referred the matter, and the Committee may also furnish to the Federal Judge any other information from its files necessary to fulfill its duties as disciplinary agency.

D. IMMUNITY. The Committee, its individual members, Executive Director and employees and agents of the Committee are absolutely immune from suit or action for their activities in discharge of their duties hereunder to the full extent of judicial immunity in Arkansas.

E. EXPENSES. From the funds established and appropriated by the Arkansas Supreme Court and in accordance with budgetary limitations, members of the Committee shall be entitled to receive their travel and hotel expenses, reimbursement for postage, stationery, communications, an attendance allowance, and other incidental expenses including stenographic bills and court costs chargeable against them. All such items shall be paid by the Clerk by check on such funds. Accounts must be itemized and certified by the Chairperson, Secretary, or the Executive Director of the Committee as true and correct.

F. ALTERNATE COMMITTEE.

(1) An Alternate Supreme Court Committee on Professional Conduct shall be established and its members shall be appointed in the manner, composition, and terms of service as provided for the Committee. The present Alternate Committee members shall continue to serve their current terms.

(2) Upon notice by the Committee Chairperson, Secretary, or Executive Director, members of the Alternate Committee shall serve, individually or collectively as the situation requires, in those instances in which members of the Committee consider themselves disqualified from participation in a matter before the Committee. Alternate Committee members serving as replacements for less than the full Committee shall be selected so as to maintain the appropriate lawyer/non-lawyer composition. Except for exigent circumstances or upon waiver by a respondent attorney, an Alternate Committee member shall be selected to serve in place of any disqualified or unavailable regular Committee member at all public hearings pursuant to Section 5J of these Procedures. Alternate Committee members need not be selected for determination of formal complaints by written ballots unless a quorum of the Committee is unable to participate.

(3) When serving pursuant to Section 2F(2), Alternate Committee members shall possess the authority, powers, immunities and entitlements as provided for the Committee by these Procedures, and which are necessary and appropriate for the discharge of their duties and function.

SECTION 3. EXECUTIVE DIRECTOR

A. GENERAL. The Executive Director shall be an attorney actively licensed to practice law in the State of Arkansas, shall serve at the will of the Court, and shall devote full time and effort to promptly and efficiently perform the duties stated in subsection B of this Section, and such other duties as directed by the Committee.

B. DUTIES.

(1) It shall be the duty of the Executive Director to receive all complaints against any member of the Bar.

(2) Upon a determination by the Executive Director that a complaint sets out allegations falling within the purview of the Committee, and those allegations are supported by sufficient evidence, the Executive Director shall provide any assistance needed in the preparation of the complainant's affidavit, and shall process a formal complaint pursuant to the procedures of the Court and the Committee. At such time as a formal complaint is directed to an attorney for response, the Executive Director shall assign the case a docket control number.

(3) If a complaint does not set forth sufficient grounds to reasonably support preparation of a formal complaint but contains information indicative of a misunderstanding or controversy between an attorney and a client or a third party who may be aggrieved by the conduct or circumstances, and the best interests of the integrity of the profession and the valid concerns of the complainant would be served by reconciliation or communication between the parties, the Executive Director may, at the request of the complainant or in the judgment of the Executive Director, contact the attorney by telephone or letter advising the attorney of the nature of the complaint. The aforementioned procedure will not be considered a formal complaint.

(4) (a) A complainant, who is not satisfied with the Executive Director's determination that the allegations of the complaint fall outside the purview of the Committee or that the allegations are not supported by sufficient evidence to file a formal complaint, may request a review of that determination.

(i) The request for review will be made to the Executive Director in writing within twenty (20) days from the date of the letter notifying the complainant of the determination of the lack of a basis for filing a formal complaint.

(ii) The written request will set out in general terms the complainant's grounds for objection to the Executive Director's decision.

(b) (i) Upon receipt of a request for review, the Executive Director will acknowledge in writing the request, and shall forward the complaint information to the Chairperson of the Alternate Committee on Professional Conduct for review.

(ii) The Chairperson of the Alternate Committee shall forward copies of the Complaint provided by the Executive Director to three members of the Alternate Committee, one of whom will be a nonlawyer, directing that they review the Executive Director's disposition of the matter.

(iii) The reviewing members, by majority vote, may approve the Executive Director's disposition of the matter, direct that an affidavit of formal complaint be prepared, or, request further investigation of the matter by the Executive Director. Votes may be taken by written ballots on forms supplied by the Executive Director or by telephone. The result of the vote will be made known to the Chairperson of the Alternate Committee by a member of the three member reviewing body.

(iv) The Alternate Committee Chairperson shall notify the Executive Director in writing of the results of the review. The Executive Director shall then notify the complainant in writing of the results of the review and dismiss the complaint, initiate a formal complaint, or request additional information as appropriate.

(v) There shall be no further review or appeal of the Alternate Committee's final decision.

(5) The Executive Director may attend and, at the request of the Committee, act as counsel in presenting testimony and other evidence at any hearing conducted by the Committee.

(6) The Executive Director shall have power to administer oaths in all matters incident to the duties imposed by these Procedures and such power and authority shall be coextensive with the State.

(7) The Executive Director shall be responsible for the administration of the business office and the security of the records. As authorized by and upon such terms as the Committee shall direct, the Executive Director may employ such personnel, including temporary employees, and retain independent counsel, as may be required to perform the administrative, investigative or legal functions of the Committee.

C. STAFF ATTORNEYS.

(1) Staff Attorneys may be employed by the Executive Director to assist in the discharge of his or her duties and shall be actively licensed to practice law in the State of Arkansas.

(2) Staff Attorneys shall serve at the direction of the Executive Director and may perform all duties and possess all authority of the Executive Director as the Executive Director may delegate except for the final determination of sufficiency of formal complaints, and the authority and responsibilities provided in Sections 2C(6) and 3B(6).

(3) In the event of the temporary inability of the Executive Director to fully discharge the duties of office, or when a vacancy exists in that office, the Committee Chairperson may appoint the Senior Staff Attorney as acting Executive Director.

D. COMPENSATION/EXPENSES. The Executive Director will be paid such reasonable salary and expenses as deemed necessary and appropriate by the Committee. Employee salaries, benefits and expenses of the office shall be payable from funds allotted to the Committee by, and subject to the approval of, the Arkansas Supreme Court.

SECTION 4. CONFIDENTIALITY/RECORDS

A. COMMUNICATIONS CONFIDENTIAL. Subject to the exceptions listed in subsections B and C of this Section:

(1) All communications, complaints, formal complaints, testimony, and evidence filed with, given to or given before the Committee, or filed with or given to any of its employees and agents during the performance of their duties, that are based upon a complaint charging an attorney with violation of the Model Rules, shall be absolutely privileged; and

(2) All actions and activities arising from or in connection with an alleged violation of the Model Rules by an attorney licensed to practice law in this State are absolutely privileged.

B. EXCEPTIONS.

(1) Except for disbarment actions, proceedings under these Procedures are not subject to the Arkansas Rules of Civil Procedure regarding discovery except those relating to depositions and subpoenas.

(2) The records of public hearings conducted by the Committee pursuant to subsection J of Section 5 of these Procedures are public information.

(3) In the case of a disbarment action, the Committee is authorized to release any information that the Committee deems necessary for that purpose.

(4) The Committee is authorized to release information:

(a) For statistical data purposes;

(b) To a corresponding lawyer disciplinary authority or an authorized agency or body of a foreign jurisdiction engaged in the regulation of the practice of law;

(c) To the State Board of Law Examiners;

(d) To the Committee on the Unauthorized Practice of Law;

(e) To the Arkansas Client Security Fund Committee;

(f) To the Commission on Judicial Discipline and Disability;

(g) To any other committee, commission, agency or body within the State empowered to investigate, regulate or adjudicate matters incident to the legal profession when such information will assist in the performance of those duties;

(h) To any agency, body, or office of the federal government or this State charged with responsibility for investigation and evaluation of a lawyer's qualifications for appointment to a governmental position of trust and responsibility; or,

(i) Pursuant to the provisions of Section 5E and Section 6C of these Procedures.

(5) Any attorney against whom a formal complaint is pending may have disclosure of all information in the possession of the Committee concerning that complaint including any record of prior complaint about that attorney.

(6) The attorney about whom a complaint is made may waive, in writing, the confidentiality of the information.

(7) In all cases, the complainant shall be provided with a copy of the respondent attorney's affidavit of response and afforded an opportunity to reply.

C. SANCTIONS MADE PUBLIC. When a letter of caution, reprimand, or suspension becomes final under these Procedures, or when the Committee decides to initiate disbarment proceedings, a copy of such shall be forwarded to the Clerk and shall be maintained as a public record by the Clerk.

SECTION 5. PROCEDURE

A. GENERAL. The Committee shall investigate and adjudicate all complaints alleging violation of the Model Rules that may be brought to its attention in the form of an affidavit, or in respect of which any member of the Committee may have information, and shall give the attorney involved an opportunity to explain or refute the charge. The Committee shall accept and treat as a formal complaint any writing signed by a judge of a court of record in this State regardless of whether such signature is verified.

B. STANDARD OF PROOF. Formal charges of misconduct, petitions for reinstatement, and petitions for transfer to or from inactive status shall be established by a preponderance of the evidence.

C. BURDEN OF PROOF. The burden of proof in proceedings seeking discipline or involuntary transfer to inactive status is on the Executive Director. The burden of proof in proceedings seeking reinstatement or transfer from involuntary or voluntary inactive status is on the attorney seeking such action.

D. LIMITATIONS ON ACTIONS. The institution of disciplinary actions pursuant to these Procedures shall be exempt from all statutes of limitation.

E. NOTICE TO ATTORNEY. At the direction of the Committee or upon a determination by the Executive Director that a complaint should be processed as a formal complaint, the Executive Director shall:

(1) Furnish to the attorney complained against a copy of the formal complaint and advise the attorney that he or she may file a written response in affidavit form with any supporting evidence desired. The attorney's mailing address on record with the Clerk shall constitute the address for service by mail. Attorneys shall be responsible for informing the Clerk in writing and within a reasonable time of any change of such address. Certified mailing of the formal complaint to said address shall be deemed a waiver of confidentiality for purposes of Section 5E(2)(c).

(2) Service may be effected on a respondent attorney by:

(a) Mailing a copy of the formal complaint to attorney's address of record by certified, restricted delivery, return receipt mail; or,

(b) Personal service as provided by the Arkansas Rules of Civil Procedure; or,

(c) When reasonable attempts to accomplish service by Section 5E(2)(a) or Section 5E(2)(b) have been unsuccessful, then a warning order, in such form as prescribed by the Committee, shall be published weekly for two consecutive weeks in a

newspaper of general circulation within this State or within the locale of the attorney's address of record. In addition, a copy of the formal complaint and warning order shall be sent to the respondent attorney's address of record by regular mail.

(3) An attorney's failure to provide an accurate, current mailing address as required by Section 5E(1), or the failure or refusal to receipt certified mailing of a formal complaint, shall be deemed a waiver of confidentiality for the purposes of the issuance of a warning order.

(4) Unless good cause is shown for an attorney's non-receipt of a certified mailing of a formal complaint, the attorney shall be liable for the actual costs and expenses for service or the attempted service of a formal complaint, to include all expenses associated with the effectuation of service. Such sums will be due and payable to the Committee before any response to a formal complaint will be accepted or considered by the Committee.

(5) After service has been effected by any of the aforementioned means, subsequent mailings by the Committee to the respondent attorney may be by regular mail to the attorney's address of record, address at which service was accomplished, or to such address as may have been furnished by the attorney, as the appropriate circumstance may dictate, except that notices of hearings and letters of caution, reprimand, suspension or initiation of disbarment proceedings shall also be sent by certified, return receipt mail.

(6) Service on a non-resident attorney may be accomplished pursuant to Section 5E(2)(a), (b) or (c), or in any manner prescribed by the law of the jurisdiction to which the service is directed.

F. TIME AND MANNER OF RESPONSE

(1) Upon service of a formal complaint, pursuant to Section 5E(2)(a) or Section 5E(2)(b), or the date of the first publication pursuant to Section 5E(2)(c), the attorney shall have twenty (20) days in which to file a written response consisting of an original and eight (8) copies with the Executive Director, except when service is upon a non-resident of this State, in which event the

attorney shall have thirty (30) days within which to file a response. In the event that the Executive Director has not received a response within twenty (20) days or within thirty (30) days, as the appropriate case may be, following the date of service, and an extension of time has not been granted, the Executive Director shall proceed to issue ballots as provided in subsection G of this Section.

(2) The Executive Director is authorized to grant, at the request of an attorney, an extension of reasonable length for the filing of a response. Subsequent requests for extensions must be in written form and will be ruled on by the Chairperson of the Committee.

(3) The Executive Director shall provide a copy of the attorney's response to the complainant within ten (10) days of receiving it and advise that the complainant has seven (7) days in which to rebut or refute any allegations or information contained in the attorney's response. The Executive Director may include any rebuttal made by the complainant as a part of the material submitted to the Committee for decision and any such rebuttal shall be provided to the respondent attorney for informational purposes only, with no response required. If rebuttal to be submitted to the Committee contains allegations of violation of the Model Rules not previously alleged, it shall be in the form of a supplemental affidavit of complaint and the respondent attorney shall be provided a copy and permitted surrebuttal in the manner prescribed in subsection F(1) of this Section, except the time for doing so shall be ten (10) days.

(4) The calculation of the time limitations specified in Section 5F shall commence on the day following service upon the respondent. If the due date of a response or surrebuttal falls on a Saturday, Sunday, or legal holiday, the due date will be extended to the next regular business day.

G. VOTE BY BALLOT.

(1) At such time as the Executive Director has received from the attorney a written response or the attorney has failed to respond within the period provided in subsection F of this

Section, the Executive Director shall cause to be prepared seven copies of the complainant's affidavit, the response, rebuttal, exhibits, and prior sanctions imposed on the attorney, if any, and such other information, memoranda, and recommendations which the Executive Director may deem relevant and shall send a copy thereof to each member of the Committee.

(2) Each ballot shall contain appropriate spaces for:

(a) The signature of the Committee member;

(b) The date;

(c) The member's vote on the action to be taken on the formal complaint; and,

(d) A place for the members to state which Section(s) of Model Rules are found to be violated.

H. RESULTS OF BALLOT VOTE.

(1) In the event a majority of the Committee votes to take no disciplinary action against a respondent attorney, the Executive Director shall so notify the complainant and the respondent attorney. The Executive Director shall file a monthly report of such cases by number only, as a public record in the office of the Clerk.

(2) If the vote is to warn, an appropriate letter shall be sent to the respondent and the complainant. The Executive Director shall file a monthly report of such cases by number only, as a public record in the office of the Clerk.

(3) If a majority of the Committee returns written ballots to caution, reprimand, or suspend the attorney, the attorney shall be notified of the findings and decision of the Committee, and be advised that he or she has a right, upon written request within twenty (20) days of service as defined by Section 5E(2), to a hearing before the Committee as provided in subsection J of this Section. The attorney shall also be advised that in the absence of a request for a hearing, such findings and order of the Committee will be entered in the files of the Committee and will be filed as a public record in the office of the Clerk.

(4) If a majority of the Committee returns written ballots expressing a desire to cause a respondent attorney, complainant, or other person to appear for the purposes of eliciting testimony, production of records and documents, provision of additional information or evidence, or for any other relevant purposes involved with a matter pending before the Committee, a hearing will be scheduled and summonses or subpoenas may issue as required. Such evidentiary hearing shall not be public and no adjudicative decision will be pronounced or rendered at that time. The Committee, upon written ballot or voice vote, subsequently shall notify the respondent attorney of the decision and notify the complainant if no disciplinary action was warranted. Otherwise, the provisions of Section 5H(3) shall apply. Any recorded testimony, records, documents, exhibits or other evidence adduced at an evidentiary hearing may be received and made part of the record at a subsequent public hearing.

(5) If a majority of the Committee votes by paper ballot to initiate disbarment proceedings, the Committee shall proceed as set out in subsection K of this Section and there shall be no hearing before the Committee.

I. FAILURE TO RESPOND.

(1) An attorney's failure to provide, in the prescribed time and manner, a written response to a formal complaint served in compliance with Section 5E(2) shall constitute separate and distinct grounds for the imposition of sanctions notwithstanding the merits of the underlying, substantive allegations of the complaint; or,

(2) May be considered for enhancement of sanctions imposed upon a finding of violation of the Model Rules.

(3) The separate imposition or the enhancement of sanctions for failure to respond may be accomplished by the Committee's notation of such failure in the appropriate sanction letter or order and shall not require any separate or additional notice to the respondent attorney.

(4) Failure to respond to a formal complaint shall constitute an admission of the factual allegations of the complaint and shall extinguish a respondent's right to a de novo hearing.

(a) Provided, however, that a respondent attorney, within the time specified in Section 5H(3), may file with the Executive Director an original and eight (8) copies of a petition for reconsideration, stating, on oath, compelling and cogent evidence of unavoidable circumstances sufficient to excuse or justify the failure to respond. Otherwise, the Committee's decision shall be final and will be filed of record with the Clerk.

(b) Upon the filing of a petition for reconsideration, the Executive Director shall provide each member of the Committee a copy of the petition for vote by written ballot consistent with provisions of Section 5G.

(c) If a majority of the Committee upon a finding of clear and convincing evidence, votes to grant the petition for reconsideration, the Committee may:

(i) Permit the attorney to submit a belated affidavit of response to the substantive allegations of the formal complaint and the matter shall proceed as though the response had been made timely; and/or

(ii) Set aside any sanction imposed solely on the basis of the attorney's failure to respond.

(d) If the petition for reconsideration is denied, the Committee's original decision and imposition of sanctions become final and will be filed of record with the Clerk. Appeal from the Committee's denial of reconsideration and the imposition of sanctions may be taken in the time and manner prescribed by the applicable provisions of Sections 5(L)(1) and (5). Provided, however, that such appeal cannot attack the substantive allegations of the complaint and shall be limited to the Committee's denial of reconsideration.

J. PUBLIC HEARING. If a hearing is requested:

(1) The Committee will be so notified, and the written ballots if any, will be destroyed. The prior findings and decision

shall be for naught and the Committee will hear the complaint de novo under the rules for public hearings.

(2) The Executive Director shall set a date for the hearing and shall notify the respondent attorney and the complainant of the hearing date.

(3) Once a hearing is set, the granting of any request for a continuance shall be at the discretion of the Committee Chairperson.

(4) All pleadings filed before the Committee shall be captioned "Before the Supreme Court Committee on Professional Conduct" and be styled "In re ___" to reflect the name of the respondent attorney.

(5) At the end of the hearing, the Committee shall hold an executive session to deliberate upon any disciplinary action to be taken. The findings and decision of the Committee shall be announced immediately. The votes of the individual members shall be announced if the decision is not unanimous.

(6) If a majority of the Committee votes to caution, reprimand, or suspend an attorney, the Executive Director shall notify the complainant of the specific action taken against the attorney and file a copy of the letter of caution, reprimand, or suspension as a public record in the office of the Clerk.

(7) If a majority of the Committee votes to disbar, the Committee may retain independent counsel and file an action for disbarment in the Circuit Court of proper venue as provided in subsection K of this Section.

K. ACTIONS FOR DISBARMENT.

(1) An action for disbarment shall be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or maintains an office, individually or in association with others; or the alleged violation(s) occurred; or in Pulaski County, Arkansas, in the case of a non-resident attorney having no office within the State and the alleged violation(s) occurred outside the State. An action for disbarment in which venue is established solely upon the alleged conduct or violation(s) by the attorney, and the con-

duct or violation(s) occurred in more than one county, may be brought in any county in which any part of the alleged conduct or violation(s) occurred. When jurisdiction and venue are established, the Circuit Court may hear all allegations of violation(s) of the Model Rules by the attorney notwithstanding the situs of the alleged conduct. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings in the Circuit Court shall be held in compliance with the Arkansas Rules of Civil Procedure and trial shall be had before the Circuit Judge without a jury.

(2) If the Circuit Judge finds that the attorney has violated the Model Rules, he or she shall caution, reprimand, suspend, or disbar such attorney as the evidence may warrant. If the Judge finds that the complaint of the Committee is not sustained by the evidence, the proceedings shall be dismissed.

L. APPEAL.

(1) A respondent attorney aggrieved by an action of the Committee taken subsequent to a hearing, may appeal to the Arkansas Supreme Court by filing a Notice of Appeal with the Executive Director within thirty (30) days after the filing of the Committee action with the Clerk. In appeals directly from the Committee, the action shall proceed as an action between the Executive Director and the respondent. The Committee may stay the effective date of any action pending appeal to the Arkansas Supreme Court.

(2) Either the Committee or the respondent attorney may appeal to the Arkansas Supreme Court from the action taken by the Circuit Judge. The Circuit Judge may stay the effective date of any action pending appeal to the Arkansas Supreme Court.

(3) Appeals from any action by the Committee after hearing shall be heard de novo on the record and the Arkansas Supreme Court shall pronounce such judgment as in its opinion should have been pronounced below.

(4) Appeals from any judgment of a Circuit Court in a disbarment proceeding shall be heard in accordance with the rules governing appeals of civil cases.

(5) Notice of appeal and perfection of appeal shall be in accordance with applicable Arkansas Code provisions and Rules of the Arkansas Supreme Court governing appeals in civil matters. If no appeal be perfected within the time allowed and in the manner provided, the order of the Judge or the action of the Committee shall be final and binding on all parties.

M. DOCTOR-PATIENT PRIVILEGE WAIVED. Raising the defense of mental or physical disability by one who is the subject of a disciplinary proceeding shall constitute a waiver of the doctor-patient privilege.

N. IMMUNITY FOR DISCIPLINARY PROCEEDINGS. Except for perjury and false swearing, complainants, respondents and witnesses are absolutely immune from suit or action for all communications with the Committee and all statements made within the disciplinary proceeding.

SECTION 6. CRIMINAL ACTIVITY

A. REPORTING CRIMINAL CONVICTIONS. All prosecuting attorneys and judges participating in or presiding over a hearing in which an attorney is convicted of, pleads guilty to, or pleads nolo contendere to, a crime which is a Class A misdemeanor or greater offense, shall have the duty to report such conviction or plea to the Executive Director.

B. PROCEDURES UPON CONVICTION.

(1) When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct, the Committee shall institute an action of disbarment.

(2) Actions for disbarment based on the conviction of a crime shall proceed in accordance with the procedures in subsection K of Section 5 of these procedures.

(3) A certified copy of the judgment of conviction shall be conclusive evidence of the attorney's guilt.

(4) The attorney may not offer evidence inconsistent with the essential elements of the crime for which he or she was convicted.

C. NOTIFICATION OF POSSIBLE CRIMINAL ACTIVITY. When, in connection with its investigation or hearing on a complaint filed against an attorney, the Committee is presented with any substantial evidence of criminal conduct by any party which would constitute a felony or Class A misdemeanor under Arkansas law, or the federal equivalent if the conduct is not within the State's jurisdiction, the Committee will instruct the Executive Director to notify the appropriate prosecutorial authority.

SECTION 7. SANCTIONS

A. GROUNDS FOR DISCIPLINE. It shall be grounds for discipline for a lawyer to:

(1) Violate or attempt to violate the Model Rules of Professional Conduct, or any other rules of this jurisdiction regarding professional conduct of lawyers; or

(2) Engage in conduct violating applicable rules of professional conduct of another jurisdiction in which the attorney is licensed or practices.

B. SERIOUS MISCONDUCT. Serious misconduct is conduct in violation of the Model Rules that would warrant a sanction terminating or restricting the lawyer's license to practice law. Conduct will be considered serious misconduct if any of the following considerations apply:

(1) The misconduct involves the misappropriation of funds;

(2) The misconduct results in or is likely to result in substantial prejudice to a client or other person;

(3) The misconduct involves dishonesty, deceit, fraud, or misrepresentation by the lawyer;

(4) The misconduct is part of a pattern of similar misconduct;

(5) The lawyer's prior record of public sanctions demonstrates a substantial disregard of the lawyer's professional duties and responsibilities; or,

(6) The misconduct constitutes a "Serious Crime" as defined in these Procedures.

C. LESSER MISCONDUCT. Lesser misconduct is conduct in violation of the Model Rules that would not warrant a sanction terminating or restricting the lawyer's license to practice law.

D. TYPES OF SANCTIONS. Misconduct shall be grounds for one or more of the following sanctions:

(1) DISBARMENT: The termination of the lawyer's privilege to practice law and removal of the lawyer's name from the list of licensed attorneys.

(2) SUSPENSION: A limitation for a fixed period of time on the lawyer's privilege to engage in the practice of law.

(3) INTERIM SUSPENSION: A temporary suspension for an indeterminate period of time of the lawyer's privilege to engage in the practice of law pending the final adjudication of a disciplinary matter.

(4) REPRIMAND OR CAUTION: A public censure issued against the lawyer.

(5) WARNING: A non-public censure issued against the lawyer.

(6) PROBATION: Written conditions imposed for a fixed period of time, and with the lawyer's consent, permitting the lawyer to engage in the practice of law under the supervision of another lawyer.

E. IMPOSITION OF SANCTIONS. When the Committee finds that an attorney has violated any provision of the Model Rules, the Committee is authorized:

(1) To cause a complaint for disbarment to be prepared and filed against the lawyer in accordance with Section 5K.

Disbarment proceedings are appropriate when mandated by Section 6B of the Procedures or upon a finding of "serious misconduct" for which a lesser sanction would be inappropriate. Actions for disbarment address the overall fitness of a lawyer to hold a license to practice law. The Committee's written notice to institute a disbarment proceeding need not state specific findings as to the misconduct or Model Rule violations.

(2) To suspend the lawyer's privilege to practice law for a fixed period of time not in excess of two (2) years. Suspension is appropriate when the Committee finds that the lawyer has engaged in "serious misconduct", and consonant with the pertinent factors enunciated in Section 7F, the nature and degree of such misconduct do not warrant disbarment.

(3) To temporarily suspend the lawyer's privilege to practice law pending final adjudication and disposition of a disciplinary matter. Interim suspension shall be appropriate in the following situations:

a. Immediately on decision to initiate disbarment;

b. Immediately upon conviction of a felony notwithstanding pending post-conviction actions; and,

c. When the Committee is in receipt of sufficient evidence demonstrating that the lawyer has engaged or is engaging in misconduct involving:

(i) Misappropriation of funds or property;

(ii) Abandonment of the practice of law; or,

(iii) Substantial threat of serious harm to the public or to the lawyer's clients.

(4) To issue the lawyer a letter of reprimand. A reprimand is appropriate when the Committee finds that a lawyer has engaged in "lesser misconduct" that, by application of the factors enunciated in Section 7F, warrants a sanction more severe than a caution. Additionally, in certain very limited circumstances, the Committee may find that a reprimand is appropriate for conduct otherwise falling within the definition of "serious misconduct"

when application of the aforementioned factors substantially demonstrates clear and compelling grounds for sanctions less severe than restriction of the privilege to practice law.

(5) To issue the lawyer a letter of caution. A caution is appropriate when the Committee finds that a lawyer has engaged in "lesser misconduct" and application of the aforementioned factors does not warrant a reprimand.

(6) To issue a letter of warning. Prior to the preparation of an affidavit of complaint, or subsequent to a lawyer's affidavit of response but before the Committee has issued a formal letter of disposition in a pending matter, the Executive Director, with the written consent of the attorney and with the approval of and at the direction of the Chairperson of the Committee, is authorized to issue a non-public letter of warning against the lawyer. Only in cases of "lesser misconduct" of a minor nature, when there is little or no injury to a client, the public, the legal system or the profession, and when there is little likelihood of repetition by the lawyer, should a warning be imposed. A warning is not a sanction available to the Committee when issuing a formal letter of disposition following public adjudication of the disciplinary matter.

(7) To impose probationary conditions. Prior to or subsequent to the filing of a formal complaint, the Committee may, with the written consent of the lawyer, place the lawyer on probation for a period not exceeding two (2) years. Probation shall be used only in cases where there is little likelihood that the lawyer will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised. Probation may be utilized concurrently with imposition of other sanctions not restricting the privilege to practice law or may follow a period of suspension. The probationary conditions shall be in writing and acknowledged, in writing, by the lawyer. A lawyer amenable to probation shall be responsible for obtaining the agreement of another lawyer, acceptable to the Committee, to supervise, monitor, and assist the lawyer as required to fulfill the conditions of probation. Assent to undertake supervision shall be acknowledged in writing to the Committee. Probation shall be terminated upon the filing of an affidavit by the lawyer showing compliance with

the conditions and an affidavit by the supervising lawyer stating probation is no longer necessary and summarizing the basis for that statement. Willful or unjustified non-compliance with the conditions of probation will terminate the probation and subject the lawyer to further disciplinary action, to include imposition of a more severe sanction which could have been imposed originally but for the agreement to probation. An attorney subjected to such further disciplinary action may only offer evidence or argument relating to the willful or unjustified nature of the non-compliance. Unsuccessful rehabilitation or incompletion of the probation conditions will subject the lawyer to further disciplinary proceedings consistent with these Procedures. Except as necessary to the Committee's discharge of its responsibilities, terms and conditions of probation and reports related thereto which involve the lawyer's mental, physical or psychological condition shall be confidential.

F. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS. In addition to any other considerations permitted by these Procedures, the Committee, in imposing any sanctions, shall consider:

(1) The nature and degree of the misconduct for which the lawyer is being sanctioned.

(2) The seriousness and circumstances surrounding the misconduct.

(3) The loss or damage to clients.

(4) The damage to the profession.

(5) The assurance that those who seek legal services in the future will be protected from the type of misconduct found.

(6) The profit to the lawyer.

(7) The avoidance of repetition.

(8) Whether the misconduct was deliberate, intentional or negligent.

(9) The deterrent effect on others.

(10) The maintenance of respect for the legal profession.

(11) The conduct of the lawyer during the course of the Committee action.

(12) The lawyer's prior disciplinary record, to include warnings.

(13) Matters offered by the lawyer in mitigation or extenuation except that a claim of disability or impairment resulting from the use of alcohol or drugs may not be considered unless the lawyer demonstrates that he or she is successfully pursuing in good faith a program of recovery.

G. CONTEMPT. The following shall be regarded as contempt of the Arkansas Supreme Court:

(1) Willful disobedience of any Committee order, summons or subpoena;

(2) The refusal to testify on matters not privileged by law;

(3) Knowingly to testify falsely before the Committee;

(4) Engaging in the practice of law during a period of suspension;

(5) Engaging in the practice of law after a disbarment or surrender of license; or,

(6) Violation of these Procedures by any person.

H. VOLUNTARY SURRENDER OF LICENSE.

(1) With the consent of the attorney and approval of the Arkansas Supreme Court, the attorney, in lieu of formal disbarment proceedings, may surrender his or her license upon the conditions agreed to by the Committee and the attorney.

(2) No petition to the Supreme Court for voluntary surrender of license by an attorney shall be granted until referred to the Committee on Professional Conduct and the recommendations of the Committee are received by the Supreme Court.

I. DUTY OF SANCTIONED ATTORNEY. In every case in which an attorney is disbarred, suspended, or surrenders

his or her license, the attorney shall, within twenty (20) days of the disbarment, suspension or surrender:

(1) Notify all of his or her clients in writing and any counsel of record in pending matters, that he or she has been disbarred, or suspended, or surrendered his or her license;

(2) In the absence of co-counsel, notify all clients to make arrangements for other representation, calling attention to any urgency in seeking the substitution of another attorney;

(3) Deliver to all clients being represented in pending matters any papers or property to which they are entitled, or notify them or co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers and other property;

(4) Refund any part of the fees paid in advance that have not been earned;

(5) File with the Court, agency or tribunal before which any litigation is pending a copy of the notice to the opposing counsel, or adverse parties if no opposing counsel;

(6) Keep and maintain a record of the steps taken to accomplish the foregoing;

(7) File with the Clerk and the Committee a list of all other state, federal and administrative jurisdictions to which he or she is licensed or admitted to practice. Upon such filing, the Clerk shall notify those entitled of the disbarment, suspension or surrender.

(8) The attorney shall, within thirty (30) days of disbarment, suspension or surrender of license, file an affidavit with the Committee that he or she has fully complied with the provisions of the order and completely performed the foregoing or provide a full explanation of the reasons for his or her noncompliance. Such affidavit shall also set forth the address where communications may thereafter be directed to the respondent.

(9) Failure to comply with these Procedures shall subject the attorney to contempt of the Arkansas Supreme Court.

J. EMPLOYMENT OF CERTAIN DISCIPLINED ATTORNEYS.

(1) When attorneys have been placed on inactive status, suspended, disbarred, or have surrendered their licenses, they are ineligible to practice law within this jurisdiction until readmitted or reinstated.

(2) While on suspension or inactive status, an attorney shall not be employed in any capacity whatsoever with a lawyer, law firm or lawyer professional association. Employment is construed as the provision of any services or labor for the benefit of the law practice of the employing lawyer or lawyers, whether compensated or not, and irrespective of the location where the services or labor may be performed.

(3) An attorney who has been disbarred or has surrendered his or her law license may be employed by a lawyer, law firm or lawyer professional association to perform such services only as may be ethically performed by other lay persons employed in the law offices. Provided, however, that the following conditions apply:

(a) Notice of such employment along with a full job description will be provided to the Executive Director before employment commences;

(b) Information reports verified by the employee and the employer will be submitted to the Executive Director semi-annually and will contain a statement by the employing attorney that no aspect of the employee's work for the period involved the unlicensed practice of law; and,

(c) The employed former lawyer shall have no direct contact with any client or receive, disburse, or otherwise handle trust funds or property.

K. REINSTATEMENT.

(1) Following any period of suspension from the practice of law, an attorney desiring reinstatement shall file with the Executive Director a verified petition requesting reinstatement.

(2) The petition for reinstatement shall be accompanied by proof of payment of an application fee of $100.00 to the Clerk.

(3) The petition for reinstatement shall set out the following:

(a) That the attorney has fully and promptly complied with the requirements of subsection I of this Section.

(b) That the attorney has refrained from practicing law during the period of suspension;

(c) That the attorney's license fee is current or has been tendered to the Clerk; and

(d) That the attorney has fully complied with any requirements imposed by the Committee as conditions for reinstatement.

(4) Any knowing misstatement of fact may constitute grounds for contempt, denial or revocation of reinstatement.

(5) Failure to comply with the provisions of subsections (7) and (8) of this Section shall preclude consideration for reinstatement.

(6) No attorney shall be reinstated to the practice of law in this State until the Arkansas Supreme Court has received an affirmative vote by a majority of the Committee.

L. READMISSION TO THE BAR

(1) No attorney who has been disbarred or surrendered his or her law license in this State shall thereafter be readmitted to the Bar of Arkansas except upon application made to the State Board of Law Examiners in accordance with the Rules Governing Admission To The Bar, or any successor rules, and the approval of the Arkansas Supreme Court.

(2) Provided, however, that application for readmission to the Bar of Arkansas shall not be allowed in any of the following circumstances:

(a) Less than five (5) years have elapsed since the effective date of the disbarment or surrender;

(b) The disbarment or surrender resulted from conviction of a felony criminal offense other than commission of a felony offense for which the culpable mental state was that of negligence or recklessness; or

(c) Any of the grounds found to be the basis of a disbarment or any grounds presented in a voluntary surrender of law license are of the character and nature of conduct that reflects adversely on the individual's honesty or trustworthiness, whether or not the conviction of any criminal offense occurred.

M. DISBARMENT RECIPROCAL.

(1) The disbarment or suspension of any person from the practice of law in any other state shall operate as a disbarment or suspension of such person from the practice of law in this State under any license issued to such person by the Arkansas Supreme Court prior to his or her disbarment or suspension in such other state.

(2) Upon presentation of a certified order or other proper document of a tribunal or a corresponding disciplinary authority of another jurisdiction evidencing disbarment or suspension, the Committee by summary proceeding shall cause a like sanction to be imposed and shall notify the Clerk of such action. Notice of the Committee's action shall be sent to the attorney's mailing address of record with the Clerk.

N. INACTIVE STATUS.

(1) Temporary Transfer to Inactive Status. The Committee is authorized to temporarily transfer an attorney to inactive status in the event that:

(a) The attorney has been judicially declared incompetent; or

(b) The attorney has been involuntarily committed due to incapacity or disability; or

(c) The attorney has alleged incapacity during the course of a disciplinary proceeding against him or her; or

(d) The attorney is found by the Committee to be culpable of habitual drunkenness or drug use substantially affecting the attorney's fitness to practice law; or

(e) The attorney is found by the Committee to have appeared in Court while under the influence of alcohol or drugs; or

(f) The attorney is found by the Committee to be unfit to practice law due to mental infirmity whether or not he or she has been judicially declared incompetent; or

(g) Without cause, the attorney requests to be transferred to a voluntary inactive status.

(2) All trial judges have the duty to, and shall report to the Committee any attorney appearing before them who, in the trial judge's opinion, is under the influence of alcohol or drugs.

(3) The Committee may vote by ballot as provided in subsection G of Section 5 of these Procedures, on the issue of temporary transfer to inactive status or reinstatement due to an event described in subsections (1)(a), (b), (c) or (g) of this Section.

(4) All other temporary transfers of an attorney to inactive status shall be made only after hearings initiated by the Executive Director or others and conducted in the same manner, where applicable, as provided in subsection J of Section 5 of these Procedures. Provided further, however, the Committee may in its sound discretion hold a closed hearing and seal the record thereof.

(5) For good cause shown, the Committee may order the attorney to submit to a medical, psychiatric or psychological examination by a Committee-appointed expert.

(6) No attorney shall be entitled to practice in Arkansas while on inactive status in this State. Upon a transfer to inactive status the attorney, or his or her counsel as may be appropriate, shall comply with subsection I of Section 7 of these Procedures.

(7) The Committee may reinstate an attorney to active status upon a showing that any disability has been removed and the attorney is fit to resume the practice of law.

(8) Reinstatement shall be accomplished in accordance with the provisions of subsection K of this Section.

(9) The filing of a petition for reinstatement shall be deemed a waiver of the doctor-patient privilege regarding the disability.

SECTION 8. SPECIAL PROVISIONS.

A. COSTS, FINES, AND RESTITUTION. In addition to the Committee's authority set forth in Section 7 of these Procedures, the Committee in any case where a disciplinary sanction is imposed, may:

(1) Assess the respondent attorney the costs of the proceedings, including the costs of investigations, witness fees, service of process, and a court reporter's services;

(2) Impose a fine of not more than $1,000.00; and,

(3) Order restitution to persons financially injured by the conduct.

B. PROCEDURE FOR INTERIM SUSPENSION.

(1) An action for the interim suspension of a lawyer is initiated, adjudicated and imposed in the following manner:

(a) Pursuant to Section 7E(3)(a), an interim suspension may be imposed immediately upon the Committee's decision to institute disbarment action on any formal complaint pending before it;

(b) Pursuant to Section 7E(3)(b), an interim suspension may be imposed upon presentation to the Committee of a file marked copy of a judgment of a court of proper jurisdiction reflecting that the attorney has been convicted of, pleaded guilty to, or entered a nolo contendere plea to a felony;

(c) Pursuant to Section 7E(3)(c), the Committee may impose an interim suspension upon presentation of a verified petition by the Executive Director containing sufficient evidence to demonstrate that the attorney poses a substantial threat of serious harm to the public or to the lawyer's clients.

(2) The attorney shall be given immediate notice of interim suspension consistent with the provisions of Section 5E. Within seven (7) days of notice of the imposition of interim suspension, the attorney may submit an affidavit in rebuttal of the evidence before the Committee and a request for the dissolution or modification of the interim suspension. An original and eight (8) copies of the rebuttal and request will be submitted to the Executive Director which shall be forthwith disseminated by mail or facsimile transmission to the Committee for its reconsideration and expeditious action. Upon receipt of the Committee's decision, the Executive Director shall promptly notify the attorney pursuant to Section 5E(2).

(3) An attorney suspended pursuant to Section 7E(3) shall comply with the requirements of Section 7I. The imposition of an interim suspension does not abate any pending disciplinary actions against the attorney.

(4) An interim suspension imposed pursuant to Section 7E(3)(c) shall be dissolved upon the following conditions:

(a) The alleged misconduct did not result in a decision to initiate disbarment or in action by the Committee pursuant to Sections 5(E)(1), 5(F), and 5(H)(3); and

(b) Ninety (90) days have elapsed from the denial of a request to dissolve or modify the suspension; and,

(c) The attorney complied with the requirements of Section 7I.

C. DISCIPLINE BY CONSENT.

(1) An attorney against whom a formal complaint has been served may at any stage of the proceedings prior to the pronouncement of a decision following a public hearing before the Committee, tender a conditional acknowledgement and admission of violation of the Model Rules alleged, or to particular provisions of Model Rules so alleged, in exchange for a stated disciplinary sanction in accordance with the following:

(a) With service of a complaint the attorney will be advised that if a negotiated disposition by consent is contemplated

that the respondent attorney should contact the Executive Director to undertake good faith discussion of a proposed disposition. Upon a proposed disposition acceptable to the respondent and to the Executive Director, the respondent shall execute and submit a consent to discipline on a document prepared by the Executive Director setting out the necessary factual circumstances, admission of violation of the Model Rules, and the proposed sanction.

(b) The consent to discipline, along with copies of the formal complaint, and the recommendations of the Executive Director, shall be presented to the Alternate Committee for their votes by written ballot to accept or reject the proposed disposition. The respondent will be notified immediately in writing of the decision. Rejection will result in the continuation of the formal complaint process. The Alternate Committee's acceptance of the consent to discipline will cause a letter of sanction from the Chairperson of the Committee to be filed of record with the Clerk.

(c) If after request for a de novo hearing but prior to commencement of such hearing, a respondent attorney decides to seek consent to discipline in exchange for a stated sanction the attorney shall immediately contact the Executive Director for assistance in the preparation of the appropriate documents. The proposed consent to discipline will be presented to the Committee for action consonant with the applicable provisions of the preceding subsection. If the tender of a consent to discipline is made without reasonably sufficient time in which to present the matter to the Committee prior to the hearing, the respondent may offer the proposal to the Committee at the commencement of the proceeding. If accepted, the necessary elements of the consent to discipline and the agreed sanction shall be duly recorded and reported of record.

(2) No appeal can be taken from a disciplinary sanction entered by consent.

(3) The provisions of this subsection are not applicable to the voluntary surrender of a law license.

IN RE: RULES GOVERNING ADMISSION TO THE BAR OF ARKANSAS

Supreme Court of Arkansas
Opinion delivered January 15, 1998

PER CURIAM. Our student practice rule (Rule XV of the Rules Governing Admission to the Bar) is meant to encourage law schools to provide clinical instruction for their students. Presently, that rule requires that such clinical education be provided in the context of legal or administrative proceedings. This deprives law students of the opportunity to acquire practical legal skills outside a legal forum. Such skills include client counseling, preparation of legal documents such as contracts and incorporation papers, filings required by various governmental agencies, or other legal documents.

The Court has before it proposed amendments to Rule XV which would allow "transactional" practice in limited circumstances. We attach a copy of the proposed amendments for review and comment from the bench and the bar. Language in Rule XV which would be deleted is **stricken through**, and language which is added is **underlined**.

Comments should be filed with:

Mr. Leslie Steen
Clerk of the Supreme Court
625 Marshall
Little Rock, AR 72201

Comments must be received no later than ninety (90) days from date of this order.

RULE XV.
STUDENT PRACTICE

A. Purpose

The bench and the bar are primarily responsible for providing competent legal services for all persons, including those unable to pay for these services. As one means of providing assistance to lawyers who represent clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds, this rule is adopted by the Arkansas Supreme Court (Court).

B. Activities

1. An eligible law student (student) may appear in any court or before any administrative tribunal in this State on behalf of any person if the person on whose behalf the student is appearing has indicated in writing consent to that appearance and the supervising lawyer (lawyer) has also indicated in writing approval of that appearance.

2. A student may also appear in any criminal matter on behalf of the State or prosecuting authority with the written approval of the prosecuting attorney (lawyer) or his or her authorized representative.

3. When a student appears pursuant to paragraphs B(1) or (2) above the lawyer must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

4. In civil cases and cases in which the student represents a defendant in a criminal case, the written consent of the person on whose behalf an appearance is being made and the approval of the lawyer shall be filed in the record of the case. In courts or administrative tribunals in which the student represents the State or prosecuting authority,the approval of the lawyer shall be filed of record with the clerk of the court or administrative tribunal.

5. An eligible law student may also participate in a law school clinical program emphasizing transactional and drafting skills including client counseling.

C. Requirements of Eligibility

In order to make an appearance *or provide counsel* pursuant to this rule, the law student shall:

1. Be duly enrolled in a law school approved by the American Bar Association;

2. Have completed ~~legal studies amounting to at least forty-eight (48) credit hours, or the equivalent if the school is on some basis other than a semester basis, including~~ a courses in ~~civil procedure, evidence, criminal procedure, and~~ professional responsibility, or the equivalent of such a courses;

3. File with the Clerk of this Court the law school dean certification described in paragraph E of this rule;

4. File with the Clerk of this Court the supervising lawyer certification described in paragraph F of this rule;

5. Neither ask for nor receive any compensation or remuneration of any kind directly from the person on whose behalf services are rendered, but this shall not prevent an attorney, law firm, legal aid bureau, public defender agency, or the state, county, or municipality from paying compensation not otherwise prohibited by these rules to the student.

6. Certify in writing that he or she has read and will comply with this rule and with the Model Rules of Professional Conduct adopted by this Court. This certification shall be incorporated in the law school dean certification described in paragraph E of this rule.

7. If appearing under paragraphs B(1), (2) or (3), have completed legal studies amounting to at least forty-eight (48) credit hours, or the equivalent if the school is on some basis other than a semester basis, including courses in civil procedure, evidence, criminal procedure, and professional responsibility or the equivalent of such courses.

D. Limitations

1. A student is authorized to practice under this rule only under the supervision of:

(a) The lawyer who signs the supervising lawyer certification described in paragraph F of this rule; or,

(b) A lawyer who is admitted to practice in this State and who otherwise meets the requirements of Section H of this rule and is a member of the same law firm as the supervising lawyer; or, a lawyer who is admitted to practice in this State and is employed by the same law school or public office as the supervising lawyer; or,

(c) A lawyer employed ~~as a~~ full time ~~supervising attorney in a program of clinical legal education in~~ by an Arkansas Law School accredited by the American Bar Association, may engage in supervision under this section for no more than one year without being admitted to practice in this State, providing the lawyer:

(1) is admitted to practice and is in good standing in another state; and;

(2) has had at least five years of practice or law teaching in another state or states; and,

(3) it shall be the responsibility of the Arkansas law school which employs a full time ~~supervising~~ lawyer pursuant to this section to secure and maintain documentation confirming that the lawyer meets the requirements of this section, and, the law school dean certification shall contain an affirmation by the dean to that effect.

2. The authority of a law student to practice under this rule may be terminated by this Court at any time without notice or hearing and without any showing of cause. Notice of the termination shall be filed with the Clerk of this Court.

3. After a law student has appeared in a court or administrative tribunal on one or more occasions, a judge of the trial court or tribunal may terminate, for good cause, the authority of any such student to appear subsequently in the court or division thereof, or the administrative tribunal, over which the Judge presides.

E. Law School Dean Certification

The certification of a law student by the law school dean shall:

1. Unless sooner withdrawn, remain in effect until: the expiration of eighteen (18) months after it is filed; or, the student graduates; or, the student officially withdraws from law school;

2. Certify that the law student is of good moral character and competent legal ability and is adequately trained to perform as an eligible law student under this rule;

3. Be subject to withdrawal by the dean at any time by mailing a notice to that effect to the Clerk of this Court and it is not necessary that the notice state the cause for withdrawal; and,

4. The law school dean certification required by this section shall contain an affirmation that the dean of the certifying institution will promptly notify the Clerk of this Court in the event the student's eligibility ceases pursuant to this section.

F. Supervising Lawyer Certification

The certification of a law student by a lawyer shall:

1. Be signed by a lawyer admitted to practice in this State who agrees to act as a supervising lawyer with respect to practice by a law student under this rule;

2. Unless sooner withdrawn, remain in effect until: the expiration of six (6) months after it is filed; or, the student graduates; or, the student officially withdraws from law school;

3. Be subject to renewal by filing a new certification;

4. Certify that the lawyer has read and will comply with this rule and with the Model Rules of Professional Conduct adopted by this Court; and,

5. Be subject to withdrawal by the lawyer at any time by mailing a notice to that effect to the Clerk of this Court and it is not necessary that the notice state the cause for withdrawal.

G. Other Activities

1. In addition, a student may engage in other activities, but outside the personal presence of the lawyer, including:

(a) Preparation of pleadings and other documents to be filed in any matter in which the student is eligible to appear under paragraphs B(1), (2) or (3), but such pleadings or documents must be signed by the lawyer;

(b) Preparation of briefs, abstracts, and other documents to be filed in appellate courts of this State by a student eligible under paragraphs B(1), (2) or (3), but such documents must be signed by the lawyer; and,

(c) Preparation of contracts, incorporation papers and by-laws, agreements, filings required by a state, federal or other governmental agency or body, proposed legislation and other documents for a client's consideration by a student certified under paragraph B(5). Such documents must be reviewed by the lawyer prior to presentation to the client and signed by the lawyer if a lawyer's signature is necessary. In preparation of these documents, the student may give legal advice if such advice has been approved or is supervised by the lawyer. Approval or supervision by the lawyer shall be accomplished through preparation of the student and videotaping of client contacts or the lawyer's presence during client contacts. The other activities set forth in this paragraph (c) are authorized exclusively for students representing persons receiving assistance from a law school clinical program which emphasizes transactional and drafting skills including client counseling.

2. The taking of a deposition shall be considered a court appearance subject to the provisions and requirements of section B of this rule.

H. Supervision

The lawyer under whose supervision a student does any of the things permitted by this rule shall:

1. Be a lawyer who is licensed in this State (except as may be otherwise provided by this rule) and who has been actively engaged in the practice of law in this State or any other jurisdiction for a period of at least two years and is in good standing with the Supreme Court of Arkansas;

2. Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work;

3. Assist the student in preparation to the extent the lawyer considers it necessary; and,

4. The lawyer may not charge the client for services of a student practitioner pursuant to activities under section B of this rule.

I. Duties of the Clerk of this Court

The Clerk shall establish such records as are appropriate to administer and enforce the provisions of this rule.

J. Miscellaneous

Nothing contained in this rule shall affect the right of any person who is not admitted to practice law to do anything that he or she might lawfully do prior to the adoption of this rule. (Adopted April 27, 1987; republished December 20, 1993; amended by Per Curiam July 17, 1995.)

IN RE: ADMINISTRATIVE ORDER NUMBER 10: ARKANSAS CHILD SUPPORT GUIDELINES

Supreme Court of Arkansas
Opinion delivered January 22, 1998

PER CURIAM. On September 25, 1997, based on recommendations received from the Supreme Court Committee on Child Support pursuant to P.L. 100-485 and Ark. Code Ann. §9-12-312(a), this Court published Administrative Order Number 10, adopting the most recent version of the child-support guidelines including the weekly and monthly family support charts and the Affidavit of Financial Means. The Order became effective October 1, 1997, and certain corrections were made to the charts before the Order reached the printer.

The Committee has now apprised the Court of an unintended omission on the Affidavit of Financial Means. On page one of the Affidavit, Number 10 should include "(h) child care." This item is not a new consideration, having been included on the Affidavit of Financial Means since the Court first adopted it for use in 1991.

THEREFORE, effective immediately, the Court republishes Administrative Order Number 10: Arkansas: Arkansas Child Support Guidelines in its entirety, including the corrected weekly and monthly family support charts and the corrected Affidavit of Financial Means.

NEWBERN, J. dissents. I dissent for the reasons stated in the dissenting opinion of Hickman, J., when the *per curiam* order adopting the guidelines was issued. *In re: Guidelines for Child Support Enforcement*, 301 Ark. 627, 784 S.W.2d 589 (1990).

ADMINISTRATIVE ORDER NUMBER 10 — CHILD SUPPORT GUIDELINES

SECTION I. AUTHORITY AND SCOPE.

Pursuant to Act 948 of 1989, as amended, codified at Ark. Code Ann. § 9-12-312(a) and the Family Support Act of 1988, Pub. L. No. 100-485 (1988), the Court adopts and publishes Administrative Order Number 10 — Child Support Guidelines. This Administrative Order includes and incorporates by reference the attached weekly and monthly family support charts and the attached Affidavit of Financial Means.

It is a rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the Family Support Chart is the amount of child support to be awarded in any judicial proceeding for divorce, separation, paternity, or child support. The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support.

It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a specific written finding within the Order that the amount so calculated, after consideration of all relevant factors, including the best interests of the child, is unjust or inappropriate. Findings that rebut the guidelines shall state the payor's income, recite the amount of support required under the guidelines, recite whether or not the Court deviated from the Family Support Chart and include a justification of why the order varies from the guidelines as may be permitted under SECTION V. hereinafter.

SECTION II. DEFINITION OF INCOME.

Income means any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, worker's compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions for:

1. Federal and state income tax;
2. Withholding for Social Security (FICA), Medicare, and railroad retirement;
3. Medical insurance paid for dependant children, and
4. Presently paid support for other dependents by Court order.

SECTION III. CALCULATION OF SUPPORT.

a. Basic Considerations.

The most recent revision of the family support charts is based on the weekly/monthly income of the payor parent as defined in Section II.

For purposes of computing child support payments, a month consists of 4.334 weeks. Biweekly means a payor is paid once every two weeks or 26 times during a calendar year. Bimonthly means a payor is paid twice a month or 24 times during a calendar year.

Use the lower figure on the chart for income to determine support. Do not interpolate (i.e., use the $200.00 amount for all income pay between $200.00 and $210.00 per week.)

The amount paid to the Clerk of the Court or to the Arkansas Clearinghouse for administrative costs pursuant to Ark. Code Ann. § 9-12-312(e)(3); § 9-10-109(b)(1); and § 9-14-804 is not to be included as support.

b. Income Which Exceeds Chart.

When the payor's income exceeds that shown on the chart, use the following percentages of the payor's weekly or monthly income as defined in SECTION II. to set and establish a sum certain dollar amount of support:

One dependent: 15%
Two dependents: 21%
Three dependents: 25%
Four dependents: 28%
Five dependents: 30%
Six dependents: 32%

c. Nonsalaried Payors.

For Social Security Disability recipients, the court should consider the amount of any separate awards made to the disability recipient's spouse and/or children on account of the payor's disability.

For Veteran's Administration disability recipients, Workers' Compensation disability recipients, and Unemployment Compensation recipients, the court shall consider those benefits as income.

For military personnel, see latest military pay allocation chart and benefits. BAQ (quarters allowance) should be added to other income to reach total income. Military personnel are entitled to draw BAQ at a "with dependents" rate if they are providing support pursuant to a court order. However, there may be circumstances in which the payor is unable to draw BAQ or may draw BAQ only at the "without dependents" rate. Use the BAQ for which the payor is actually eligible. In some areas, military personnel receive a variable allowance. It may not be appropriate to include this allowance in calculation of income since it is awarded to offset living expenses which exceed those normally incurred.

For commission workers, support shall be calculated based on minimum draw plus additional commissions.

For self-employed payors, support shall be calculated based on last year's federal and state income tax returns and the quarterly estimates for the current year. Also the court shall consider the amount the payor is capable of earning or a net worth approach based on property, life-style, etc.

d. Imputed Income.

If a payor is unemployed or working below full earning capacity, the court may consider the reasons therefor. If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a payor up to his or her earning capacity, including consideration of the payor's life-style. Income of at least minimum wage shall be attributed to a payor ordered to pay child support.

e. Spousal Support.

The chart assumes that the custodian of dependent children is employed and is not a dependent. For the purposes of calculating temporary support, a dependent custodian should be counted as two dependents as a guide in determining support. For final hearings, the court should consider all relevant factors, including the chart, in determining the amount of any spousal support to be paid.

f. Allocation of Dependents for Tax Purposes.

Allocation of dependents for tax purposes belongs to the custodial parent pursuant to the Internal Revenue Code. However, the Court shall have the discretion to grant dependency allocation, or any part of it, to the noncustodial parent if the benefit of the allocation to the noncustodial parent substantially outweighs the benefit to the custodial parent.

g. Health Insurance.

In addition to the award of child support, the court order shall provide for the child's health care needs, which would normally include health insurance if available to either parent at a reasonable cost.

SECTION IV. AFFIDAVIT OF FINANCIAL MEANS.

The Affidavit of Financial Means shall be used in all family support matters. The trial court shall require each party to complete and exchange the Affidavit of Financial Means prior to a hearing to establish or modify a support order.

SECTION V. DEVIATION CONSIDERATIONS.

a. Relevant Factors.

Relevant factors to be considered by the court in determining appropriate amounts of child support shall include:

1. Food;
2. Shelter and utilities;
3. Clothing;
4. Medical expenses;

5. Educational expenses;
6. Dental expenses;
7. Child care;
8. Accustomed standard of living;
9. Recreation;
10. Insurance;
11. Transportation expenses; and
12. Other income or assets available to support the child from whatever source.

b. Additional Factors.

Additional factors may warrant adjustments to the child support obligations and shall include:

1. The procurement and/or maintenance of life insurance, health insurance, dental insurance for the children's benefit;
2. The provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children (e.g. orthopedic shoes, glasses, braces, etc.);
3. The creation or maintenance of a trust fund for the children;
4. The provision or payment of special education needs or expenses of the child;
5. The provision or payment of day care for a child;
6. The extraordinary time spent with the noncustodial parent, or shared or joint custody arrangements; and
7. The support required and given by a payor for dependent children, even in the absence of a court order.

SECTION VI. ABATEMENT OF SUPPORT DURING EXTENDED VISITATION.

The guidelines assume that the noncustodial parent will have visitation every other weekend and for several weeks during the summer. Excluding weekend visitation with the custodial parent, in those situations where a child spends in excess of 14 consecutive days with the noncustodial parent, the court should consider whether an adjustment in child support is appropriate, giving consideration to the fixed obligations of the custodial parent which are attributable to the child, to the increased costs of the noncustodial parent associated with the child's visit, and to the relative incomes of both parents. Any partial abatement or reduction of child sup-

port should not exceed 50% of the child support obligation during the extended visitation period of more than 14 consecutive days.

In situations in which the noncustodial parent has been granted annual visitation in excess of 14 consecutive days, the court may prorate annually the reduction in order to maintain the same amount of monthly child support payments. However, if the noncustodial parent does not exercise said extended visitations during a particular year, the noncustodial parent shall be required to pay the abated amount of child support to the custodial parent.

SECTION VII. PROVISION FOR PAYMENT.

All orders of child support should fix the dates on which payments should be made. All support orders issued shall include a provision for immediate implementation of income withholding, absent a finding of good cause not to require immediate income withholding or a written agreement of the parties incorporated in the order setting forth an alternative agreement as required by Ark. Code Ann. § 9-14-218(a)(3)(A). Payment should be made through the Clerk of the Court or the Arkansas Clearinghouse pursuant to Ark. Code Ann. § 9-14-805. Times for payment should ordinarily coincide with the payor's receipt of salary, wages, or other income.

ARKANSAS WEEKLY FAMILY SUPPORT CHART

PAYOR NET WEEKLY INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN
100	24	35	42	46	50
110	26	39	46	50	55
120	29	42	50	55	59
130	31	45	54	59	64
140	34	49	58	64	69
150	36	52	61	68	74
160	38	55	65	72	78
170	40	58	69	76	83
180	43	62	73	80	87
190	45	65	77	85	92
200	47	68	80	89	96
210	49	72	84	93	101
220	52	75	88	97	106
230	54	78	92	102	110
240	56	82	96	106	115
250	59	85	100	110	120
260	60	87	102	113	123
270	61	89	104	115	125
280	62	90	106	117	127
290	64	92	108	120	130
300	65	94	110	122	132
310	66	95	112	124	134
320	67	97	114	126	136
330	68	98	115	128	138
340	69	100	117	129	140
350	70	101	119	131	142
360	71	103	121	133	144
370	73	105	123	136	147
380	74	107	125	138	150
390	76	109	128	141	153
400	77	111	130	144	156
410	79	114	133	147	159
420	80	116	136	150	162
430	82	118	138	153	165
440	83	120	141	155	168
450	85	122	143	158	171
460	86	124	146	161	174
470	88	126	148	164	177
480	89	128	150	166	180
490	91	130	153	169	183
500	92	132	155	171	186
510	93	134	157	174	188
520	95	136	160	176	191
530	96	138	162	179	194
540	98	140	164	182	197
550	99	142	167	184	200
560	100	144	169	187	202
570	102	146	171	189	205

ARKANSAS WEEKLY FAMILY SUPPORT CHART

PAYOR NET WEEKLY INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN
580	103	148	174	192	208
590	104	150	176	195	211
600	106	152	178	197	214
610	107	154	181	200	217
620	108	156	185	202	219
630	109	158	186	204	222
640	110	159	187	206	224
650	111	161	189	208	226
660	112	162	190	210	228
670	113	164	192	212	230
680	115	165	194	214	232
690	116	167	196	216	235
700	117	168	198	219	237
710	118	170	200	221	239
720	119	171	201	223	241
730	120	173	203	225	243
740	121	174	205	227	246
750	122	176	207	229	248
760	123	178	209	231	251
770	124	180	212	234	253
780	126	182	214	236	256
790	127	183	216	238	258
800	128	185	218	241	261
810	129	187	220	243	263
820	130	189	222	245	266
830	132	190	224	248	268
840	133	192	226	250	271
850	134	194	228	252	273
860	135	195	230	254	275
870	136	197	232	256	278
880	137	198	234	258	280
890	138	200	235	260	282
900	139	202	237	262	284
910	140	203	239	264	286
920	142	205	241	266	289
930	143	206	243	268	291
940	144	208	245	270	293
950	145	209	247	272	295
960	146	211	248	274	297
970	147	213	250	275	300
980	148	214	252	276	302
990	149	216	254	281	304
1000	150	217	256	283	306

ARKANSAS MONTHLY FAMILY SUPPORT CHART					
PAYOR NET MONTHLY INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN
500	122	177	210	232	252
550	133	193	229	253	274
600	144	210	248	274	297
650	155	226	266	294	319
700	166	242	285	315	342
750	178	258	304	336	364
800	189	274	323	357	387
850	200	290	342	377	409
900	212	307	361	399	433
950	223	323	381	421	456
1000	235	340	400	442	479
1050	246	357	420	464	503
1100	257	372	438	485	525
1150	263	381	448	495	537
1200	269	389	458	506	548
1250	275	397	467	516	560
1300	280	405	477	527	571
1350	286	413	486	537	582
1400	291	421	495	547	593
1450	297	429	503	556	603
1500	302	436	512	566	613
1550	308	444	521	575	624
1600	314	453	531	587	636
1650	322	464	544	601	651
1700	330	475	556	615	667
1750	338	486	569	629	682
1800	345	497	582	643	697
1850	353	508	595	657	712
1900	360	518	607	671	727
1950	368	529	620	685	742
2000	375	540	632	698	757
2050	382	550	645	712	772
2100	389	560	656	725	786
2150	396	570	668	738	800
2200	404	581	679	751	814
2250	411	591	691	764	828
2300	418	601	703	776	841
2350	425	611	714	789	856
2400	431	620	726	802	870
2450	438	630	738	815	884
2500	445	640	750	828	898
2550	452	650	762	842	912
2600	458	660	773	855	926
2650	465	670	785	868	940
2700	471	679	796	879	953
2750	476	686	805	889	964
2800	481	694	814	899	975
2850	486	701	823	910	986

ARKANSAS MONTHLY FAMILY SUPPORT CHART					
PAYOR NET MONTHLY INCOME	ONE CHILD	TWO CHILDREN	THREE CHILDREN	FOUR CHILDREN	FIVE CHILDREN
2900	491	709	832	920	997
2950	496	716	841	930	1008
3000	501	724	851	940	1019
3050	506	731	860	950	1030
3100	511	739	869	960	1041
3150	517	746	878	970	1052
3200	522	755	888	981	1064
3250	528	764	899	993	1076
3300	534	772	909	1004	1089
3350	540	781	919	1016	1101
3400	546	790	930	1028	1114
3450	552	799	940	1039	1126
3500	558	807	951	1051	1139
3550	564	816	961	1062	1151
3600	570	825	972	1074	1164
3650	576	834	982	1085	1176
3700	582	842	991	1095	1187
3750	587	849	1000	1106	1198
3800	593	857	1010	1116	1209
3850	598	865	1019	1126	1220
3900	604	873	1028	1136	1231
3950	609	881	1037	1146	1242
4000	615	889	1046	1156	1254
4050	620	897	1056	1167	1265
4100	626	905	1065	1177	1276
4150	631	913	1074	1187	1287
4200	637	920	1083	1197	1298
4250	642	928	1092	1207	1309
4300	648	936	1102	1217	1320
4350	653	944	1111	1228	1331
4400	659	952	1120	1238	1342
4450	664	960	1129	1248	1353
4500	670	968	1138	1258	1364
4550	675	976	1148	1268	1375
4600	681	983	1157	1278	1386
4650	686	991	1166	1289	1397
4700	691	998	1174	1297	1406
4750	695	1004	1182	1306	1415
4800	699	1011	1189	1314	1425
4850	704	1017	1197	1323	1434
4900	708	1024	1205	1331	1443
4950	713	1030	1213	1340	1453
5000	717	1037	1220	1348	1462

IN THE CHANCERY COURT OF _____COUNTY, ARKANSAS

_____Division

STATE OF ARKANSAS)
) SS
COUNTY OF)

AFFIDAVIT OF FINANCIAL MEANS
REVISED 01-98

_____
Plaintiff

vs.

_____
Defendant

Case No._____

THE AFFIANT, BEING DULY SWORN, SAYS UNDER PENALTY OF PERJURY THAT AFFIANT IS THE PLAINTIFF( ) DEFENDANT( ) PARTY( ) *(CHECK ONE)* TO THIS SUPPORT ACTION HEREIN, HAS PREPARED THIS FINANCIAL STATEMENT, KNOWS THE CONTENTS THEREOF, AND THAT IT IS TRUE AND CORRECT.

INCOME

Complete item 27 on page 3

1. My weekly take-home pay *(from line 27 (i) on page 3)*_____|____.
2. I claim____dependents for the purpose of determining my State of Arkansas withholding. I claim____dependents for the purpose of determing my federal withholding. I did( ) or did not( ) *(check one)* claim myself as dependent. I do( ) or do not( ) *(check one)* have additional amount withheld from my payroll checks for tax purposes and, if so, that amount is _____|____per week of _____|____per pay period and itemized on reverse side. All other deductions taken from my payroll check before I receive it: total:_____|____*(from line j8 on page 3)*.
3. I have income from the following other sources:_____
4. I have cash on hand in the amount of _____|____from the following source(s):_____
5. I have on deposit in banks and savings institutions_____|____ and its source was_____
6. I have stocks and bonds in the amount of_____|____and their source was_____

(Attach additional schedules as needed)

CREDITORS

Complete items 28,29 and 30 on page 4

7. Debts in the name of the plaintiff only: ALL CREDITORS LISTED ON PAGE 4
   TOTAL UNPAID BALANCES $ (a)_____|____TOTAL MONTHLY PAYMENTS $ (b)_____|____
8. Debts in the name of defendant only: ALL CREDITORS LISTED ON PAGE 4
   TOTAL UNPAID BALANCES $ (a)_____|____TOTAL MONTHLY PAYMENTS $ (b)_____|____
9. Debts in our JOINT NAMES are: ALL CREDITORS LISTED ON PAGE 4
   TOTAL UNPAID BALANCES $ (a)_____|____TOTAL MONTHLY PAYMENTS $ (b)_____|____

MONTHLY EXPENSES

10. My present necessary monthly expenses to support myself and _____child(ren) are:

(a)	Rent or housepayment	$_____|____	(i)	Medical	$_____|____
(b)	Gas and electricity	$_____|____	(j)	Drugs	$_____|____
(c)	Water	$_____|____	(k)	Life Insurance	$_____|____
(d)	Telephone	$_____|____	(l)	Auto Insurance	$_____|____
(e)	Food	$_____|____	(m)	Fire Insurance	$_____|____
(f)	Clothing	$_____|____	(n)	Transportation	$_____|____
(g)	Laundry	$_____|____	(o)	Other Expenses	$_____|____
(h)	Child Care	$_____|____		*(Attach schedules if needed)*	
				TOTAL.....	$_____|____

A check mark should be placed by all expenses which are not being paid currently.

GENERAL INFORMATION

11. My full name is _____

12. My social security number is _____ Military I.D. No. (if applicable) _____

13. My Arkansas Driver's License Number is _____

14. My date of birth is _____ My place of birth is _____

15. My present resident address is _____
Zip Code

16. The full name of children born (or legally adopted) of this marriage are:

(1) _____ Date of Birth _____ S.S. No. _____

(2) _____ Date of Birth _____ S.S. No. _____

(3) _____ Date of Birth _____ S.S. No. _____

(4) _____ Date of Birth _____ S.S. No. _____

(5) _____ Date of Birth _____ S.S. No. _____

(6) _____ Date of Birth _____ S.S. No. _____
(Attach additional schedule for additional children)

17. My employer is _____

18. My employer's full address is _____
Zip Code

19. My home telehone number is _____ My work telephone number is _____

INFORMATION ABOUT OPPOSING PARTY IN THIS CASE, IF KNOWN (DO NOT GUESS)

20. The opposing party's full name is _____

21. The opposing party's social security number is _____ Military I.D. No. (if applicable) _____

22. The opposing party's Arkansas Driver's License Number is _____

23. The opposing party's present resident address is _____
Zip Code

24. The opposing party's employer is _____

25. The opposing party's employer's address _____
Zip Code

26. The opposing party's home telephone number _____ work telephone _____

INCOME

27. How often are you paid, and what are your gross wages,salary or commissions due each time?

WEEKLKY	BIWEEKLY	SEMI-MONTHLY	MONTHLY	OTHER
52 times a year	26 times a year	24 times a year	12 times a year	explain

PAYROLL DEDUCTIONS

(a) GROSS WAGES.....(a) $_____|___

(b) Federal Income Tax Withheld.....(b)_____|___

(c) Arkansas Income Tax Withheld.....(c)_____|___

(d) Social Security (FICA), Medicare, or railroad retirement equivalent.....(d)_____|___

(e) Health Insurance (children only).....(e)_____|___

(f) Court ordered child support for dependents of previous marriage or previously legally determined adopted or illegitimate children.....(f)_____|___

(g) TOTAL WITHHELD (b) thru (f) above.....(g) $_____|___

(h) INCOME PAY PER PAY PERIOD (Subtract (g) from (a) above.....(h) $_____|___

(i) CONVERT TO WEEKLY INCOME & CARRY TO LINE 1 *(on front)*.....27 (i) $_____|___

Example: h above $300 & is received bi-weekly,
26 X $300 = $7,800 divided by 52 = $150 per week
Carry $150 to line 1 on front

(j) OTHER ITEMS WITHHELD FROM MY CHECK ARE:

(1) Union Dues.....(1)_____|___
(2) Credit Union, thrift plans.....(2)_____|___
(3) Pension Benefits, stock purchase plans.....(3)_____|___
(4) Charitable contributions.....(4)_____|___
(5) Debt Payments, garnishments.....(5)_____|___
(6) Life Insurance payments.....(6)_____|___
(7) Other (identify)_____(7)_____|___

Items (1) through (7) above are not allowed in computing income.

(8) TOTAL WITHHELD (total (1) thru (7) above).....j (8)_____|___

CREDITORS & DEBTS

28. Debts in the name of PLAINTIFF/Party only are:

Creditors	(Total Unpaid Balance)	(Monthly Payments)
1.	1. $	1. $
2.	2. $	2. $
3.	3. $	3. $
4.	4. $	4. $
5.	5. $	5. $
6.	6. $ *	6. $ *
Attach additional schedules as needed, the TOTAL:	*Carry to line 7a on page 1	* Carry to line 7b on page 1

29. Debts in the name of DEFENDANT only are:

Creditors	(Total Unpaid Balance)	(Monthly Payments)
1.	1. $	1. $
2.	2. $	2. $
3.	3. $	3. $
4.	4. $	4. $
5.	5. $	5. $
Attach additional schedules as needed, the TOTAL :	6. $ *	6. $ *
	*Carry to line 8a on page 1	*Carry to line 8b on page1

30. Debts in our JOINT NAMES are:

Creditors	(Total Unpaid Balance)	(Monthly Payments)
1.	1. $	1. $
2.	2. $	2. $
3.	3. $	3. $
4.	4. $	4. $
5.	5. $	5. $
Attach additional schedules as needed, then TOTAL :	6. $ *	6. $ *
	*Carry to line 9a on page 1	*Carry to line 9b on page1

31. The weekly income of the opposing party is.....$_____

32. All other income of the opposing party is.....$_____

_____
Signature of Affiant

Subscribed and sworn to before me on this_____day of _____
(month) (year)

My commission expires:

_____ _____

NOTICE

BOTH PARTIES MUST COMPLETE AND EXCHANGE THIS FOUR PAGE AFFIDAVIT PRIOR TO ANY HEARING TO ESTABLISH OR MODIFY A SUPPORT ORDER. BOTH PARTIES MUST SUPPLY THE ORIGINAL NOTARIZED AFFIDAVIT TO THE COURT. THE COURT WILL PUNISH PERJURY BY APPROPRIATE ACTION.

IN RE: ARKANSAS RULES OF CIVIL PROCEDURE, RULES 4, 30, 32, 35, and 50; ARKANSAS RULE OF EVIDENCE 503; ADMINISTRATIVE ORDER NUMBER 2; and RULE 4 of the ARKANSAS RULES OF APPELLATE PROCEDURE—CIVIL

Supreme Court of Arkansas
Opinion delivered January 22, 1998

PER CURIAM. The 1997 report of the Arkansas Supreme Court Committee on Civil Practice contained a number of suggested rules changes. The Committee's suggestions were published in our *per curiam* order of December 4, 1997, so that members of the bench and bar could have an opportunity to comment. We thank those who took the time to review the proposals and submit comments.

As a result of the comments received, we are referring the changes suggested by the Committee to Rule 5 of the Rules of Civil Procedure and one of the changed suggested to Administrative Order No. 2 back to the Committee for further study. The other proposals published in our December 4, 1997 order will, with only minor revisions, be implemented. We again express our gratitude to the members of our Civil Practice Committee, chaired by Judge John Ward, and to the Committee Reporter, Professor John J. Watkins, for the Committee's diligence in performing the important task of keeping our civil rules current, efficient, and fair. We adopt the following amendments to be effective immediately, and republish the rules and Administrative Order as set out below.

Arkansas Rules of Civil Procedure

1. **Rule 4. SUMMONS** is amended to read as follows:

> **(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 appointed 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; (3) any person authorized to serve process under the law of the place outside this state where service is made; or (4) 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.

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

Addition to Reporter's Notes, 1998 Amendment: Former clause (3) has been redesignated as clause (4), and a new clause (3) has been added. The new provision, based on Ark. Code Ann. § 16-4-102(B), is designed to eliminate any confusion as to who may make service on an out-of-state defendant. Clause (3) is consistent with Rule 4(e)(2), under which service outside the state may be made "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." Although this paragraph appears to be broad enough to allow service by someone authorized to make service in the state where service is to be made, some federal courts held that an analogous federal rule addressed only how service is to be made, not who may make service. *E.g., Veeck v. Commodity Enterprises, Inc.*, 487 F.2d 423 (9th Cir. 1973).

2. Paragraph (f) of **Rule 30. DEPOSITIONS UPON ORAL EXAMINATION** is amended to read as follows:

(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 place 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 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.

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

Addition to Reporter's Notes, 1998 Amendment: As amended in 1997, Rule 30(f)(1) provided that the officer taking the deposition "shall securely seal" it in an envelope or package and either file it with the clerk, if so ordered, or send it to the attorney who arranged for the deposition. The term "seal" could be read as implying that the attorney who received the deposition was obligated to keep it sealed. Such a result was not intended, and Rule 30(f)(1) has been amended to require that the officer "place" the deposition in an envelope. The obligation that the attorney "store it under conditions that will protect it against loss, destruction, tampering, or deterioration" remains unchanged.

3. Paragraph (c) of **Rule 32. USE OF DEPOSITIONS IN COURT PROCEEDINGS** is amended to read as follows:

(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. The transcript must be prepared by a certified court reporter from the nonstenographic recording. 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.

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

Addition to Reporter's Notes, 1998 Amendment: Subdivision (c) requires that the court be furnished with a transcript of any deposition testimony presented at trial in nonstenographic form. It was not clear, however, whether the transcript had to be certified by the officer before whom the deposition was taken. If that were so, the rule would as a practical matter require the presence of a court reporter at video depositions; under Section 9 of the rules providing for certification of court reporters, "transcripts . . . will be accepted only if they are certified by a court reporter who holds a valid certificate under this Rule." Such a result would be at odds with Rule 30(b), which contemplates depositions taken by nonstenographic means only. Accordingly, a new second sentence has been added to Rule 32(c) making plain that the transcript must be prepared by a certified court reporter from the audio or video tape recording of the deposition, thereby ensuring that the transcript accurately reflects what is on the tape offered at trial.

4. **Rule 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS** is amended to read as follows:

(c) Medical Records. (1) A party who relies upon his or her physical, mental or emotional condition as an element of his or her claim or defense shall, within 30 days after the request of any other party, execute an authorization to allow such other party to obtain copies of his or her medical records. The term "medical records" means any writing, document or electronically stored information pertaining to or created as a result of treatment, diagnosis or examination of a patient.

(2) Any informal, ex parte contact or communication between a party or his or her attorney and the physician or psychotherapist of any other party is prohibited, unless the party treated, diagnosed, or examined by the physician or psychotherapist expressly consents. A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures.

The Reporter's Notes accompanying Rule 35 are amended by adding the following:

Addition to Reporter's Notes, 1998 Amendment: Subdivision (c) has been divided into numbered paragraphs and

reorganized. It has been also amended to address an issue on which the Arkansas federal courts have disagreed. *Compare Harlan v. Lewis*, 141 F.R.D. 107 (E.D. Ark. 1992), *aff'd*, 982 F.2d 1255 (8th Cir. 1993), with *King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992). Consistent with the result reached in *Harlan*, the first sentence of paragraph (2) provides that a party or his or her attorney cannot interview or otherwise informally contact another party's treating physician or psychotherapist without that party's consent. This new provision reflects the intent of the original version of the rule, *i.e.*, to limit communications with a party's physician or psychotherapist to the formal discovery process. A corresponding change has been made in Rule 503(d)(3), Ark. R. Evid.

5. Paragraph (e) of **Rule 50. MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING** is amended to read as follows:

(e) ***Appellate Review.*** When there has been a trial by jury, the failure of a party to move for a directed verdict at the conclusion of all the evidence, because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. If for any reason the motion is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

The Reporter's Notes accompanying Rule 50 are amended by adding the following:

Addition to Reporter's Notes, 1998 Amendment: A new sentence has been added to subdivision (e) of the rule to make clear that a party's failure to obtain a ruling on his or her motion for directed verdict at the close of all the evidence is not a waiver of the issue of the sufficiency of the evidence for purposes of appellate review. *Compare Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996) (sufficiency of evidence issue was not preserved for appeal in a criminal case where there was no ruling on the defendant's motion for directed verdict at the close of all the evidence). The new sentence provides that the motion is deemed denied if for any reason it is not ruled upon.

Rules of Evidence

Paragraph (d)(3) of **Rule 503** is amended to read as follows:

(d) (3) **Condition an element of claim or defense.** (A) There is no privilege under this rule as to medical records or communications relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he or she relies upon the condition as an element of his or her claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his or her claim or defense. (B) Any informal, ex parte contact or communication with the patient's physician or psychotherapist is prohibited, unless the patient expressly consents. The patient shall not be required, by order of court or otherwise, to authorize any communication with any physician or psychotherapist other than (i) the furnishing of medical records, and (ii) communications in the context of formal discovery procedures.

Administrative Orders

Paragraph (b) of **ADMINISTRATIVE ORDER NUMBER 2 — DOCKETS AND OTHER RECORDS** is amended to read as follows:

(b) Judgments and Orders. The clerk shall keep a judgment record book in which shall be kept a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the Court may direct to be kept. The clerk shall denote the date and time that a judgment or order is filed by stamping or otherwise marking it with the date and time and the word "filed."

Rules of Appellate Procedure—Civil

Paragraph (e) of **Rule 4. APPEAL WHEN TAKEN** is amended to read as follows:

(e) When Judgment Is Entered. A judgment, decree or order is entered within the meaning of this rule when it is filed with the clerk of the court in which the claim was tried. A judgment, decree or order is filed when the clerk stamps or otherwise

marks it as "filed" and denotes thereon the date and time of filing.

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

Addition to Reporter's Notes, 1998 Amendment: Subdivision (e) has been amended to reflect case law pertaining to the filing of judgments, decrees, and orders. The second sentence of the revised rule provides that a judgment, order, or decree is filed when the clerk stamps or marks the date and time of filing thereon, along with the word "filed." *See Arkansas Dept. of Human Services v. Hardy*, 316 Ark. 119, 871 S.W.2d 352 (1994); *Schaefer v. McGhee*, 284 Ark. 370, 681 S.W.2d 353 (1984). A corresponding change has been made in Administrative Order No. 2.

(v) he or she did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial ~~judge~~ court had indicated ~~his~~ its concurrence and ~~he~~ the defendant did not affirm ~~his~~ the plea after receiving advice that the ~~judge~~ court had withdrawn ~~his~~ its indicated concurrence and after an opportunity to either affirm or withdraw the plea.

~~(d)~~ (c) The defendant may move to withdraw his or her plea of guilty or nolo contendere to correct a manifest injustice without alleging that he or she is innocent of the charge to which the plea was entered.

~~(e) In the absence of proof that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter or right after it has been accepted by the court. At any time before sentence, the court in its discretion may allow the defendant to withdraw his plea if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of his motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea.~~

Reporter's Notes to 1998 Amendment: Paragraphs (a) and (e) were amended and combined as new paragraph (a). It now provides that prior to acceptance of the plea by the court, the defendant may withdraw his or her plea as a matter of right. After acceptance and before entry of judgment, the court in its discretion may allow a plea withdrawal upon proof that it is necessary to correct a manifest injustice. After entry of the written judgement, the plea may not be withdrawn under this rule. Paragraph (b) was deleted and the remaining paragraphs were redesignated.

These changes were made to clarify when a plea could be withdrawn under this rule [i.e., after acceptance of the plea, after pronouncement of sentence, after entry of judgment, *see Johninson v. State,* 330 Ark. 381 (1997); *Scalco v. City of Russellville*, 318 Ark. 65, 883 S.W.2d 813 (1993)], and under what standard; and also to clarify when a motion to withdraw a plea was proper under this rule as opposed to Rule 37 of these rules. Under Rule 26.1, a motion to withdraw a plea must be filed prior to entry of the written judgment.

IN the MATTER of ADOPTION of a RULE of CRIMINAL PROCEDURE GOVERNING ALTERNATE JURORS in CRIMINAL TRIALS: RULE 32.3

Supreme Court of Arkansas
Opinion delivered January 22, 1998

PER CURIAM. The Arkansas Supreme Court Committee on Criminal Practice recommended the adoption of a new Rule of Criminal Procedure to govern the use of alternate jurors in criminal trials when a regular juror is unable to serve or is disqualified. We previously published the proposed rule for comment.

Based upon comments received and other considerations, the committee and the Court subsequently made revisions to the proposed rule. Because of these changes, we again publish the proposed rule for comment. Comments from the bench and bar on the proposed rule should be filed with the Clerk of the Supreme Court by May 15, 1998. They should be addressed to:

Leslie Steen, Clerk
Arkansas Supreme Court
Justice Building
625 Marshall Street
Little Rock, AR 72201

Rule 32.3. Alternate Jurors.

(a) The court may direct that additional jurors be called and impanelled in addition to the regular jury to sit as alternate jurors. The number of alternate jurors shall be at the discretion of the court, taking into consideration the estimated length and cost of the trial, the number of witnesses, and the ages and health of the regular jurors. Alternate jurors in the order in which they are called shall replace jurors who are discharged by the court for good cause upon being found unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. Each side shall be entitled to one peremptory challenge for each alternate juror to be impanelled. The additional peremptory challenge may be used against an alternate juror only, and all other peremptory challenges allowed by law shall not be used against an alternate juror.

(b) Any alternate juror, who has not replaced a regular juror prior to the time the jury retires to consider its verdict, shall be further instructed by the court in addition to the usual instruction regarding discussion of the case and not permitting any one to discuss the case with him or her, to remain at the courthouse during deliberation. During deliberation should any regular juror die, or upon good cause shown to the court be found unable or disqualified to perform his or her duties, the court may order the juror to be discharged. The court may in its discretion, as an alternative to mistrial, replace such juror with the next alternate. In such event, the court shall instruct the jury to disregard all previous deliberation, and to commence deliberation anew. The trial court in its discretion may seat additional alternate jurors in this manner as needed.

(c) In the case of a capital murder trial or any other bifurcated trial in which the court cannot fix punishment pursuant to Ark. Code Ann. § 5-4-103(b), and in which there are alternate jurors remaining after the jury has returned a verdict of guilty, the next alternate jurors, not to exceed two, shall be placed in the jury box along with the regular jurors. Any alternate jurors in addition to

these two shall be dismissed. The trial will proceed with the penalty phase. When the jury retires to deliberate the penalty, the remaining alternate juror or jurors will again remain at the courthouse during deliberation.

(1) If at any time after a verdict of guilty, but before a verdict fixing punishment, a juror who participated in the guilt phase of a capital murder trial or other trial described above dies, becomes ill, or is otherwise found to be unable or disqualified to perform his or her duties, such juror shall be discharged. The court may in its discretion, as an alternative to mistrial or any other option available by statute or these rules, replace such juror with the next alternate. However, in such event, the court may first give the defendant, with the agreement of the prosecution, the option to waive jury sentencing, in which case the court shall impose sentence, or to accept a verdict by the remaining jurors. If the defendant does not waive jury sentencing, or agree to accept a verdict by the remaining jurors, the trial will continue with the alternate participating in the penalty phase. In such event, the court shall instruct the jury to commence deliberation anew as to the sentencing phase only.

(2) Notwithstanding Ark. Code Ann. § 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the court may in its discretion proceed pursuant to this rule and seat an alternate juror.

Reporter's Notes: In *Johnson v. State*, 328 Ark. 526 (1997), the Supreme Court held that Ark. Code Ann. § 5-4-103(b)(3) authorized the trial court to fix punishment when the twelfth juror became disqualified in the sentencing phase. "[T]he court was authorized to fix punishment when the jury was unable to agree upon the punishment because only eleven jurors remained after one was disqualified."

IN RE: ARKANSAS RULES OF CRIMINAL PROCEDURE, RULE 33.1

Supreme Court of Arkansas
Opinion delivered January 22, 1998

PER CURIAM. The Arkansas Supreme Court Committee on Criminal Practice recommended an amendment to Rule 33.1 of the Rules of Criminal Procedure to address the problem described in our decision in *Danzie v. State,* 326 Ark. 34 (1996). On December 4, 1997, we published the proposal for comment. We thank those who took the time to review and comment on the proposal.

Effective immediately, we now adopt the amendment, and the rule as amended is republished below.

RULE 33.1. Motions for Directed Verdict.

When there has been a trial by jury, the failure of a defendant to move for a directed verdict at the conclusion of the evidence presented by the prosecution and again at the close of the case because of insufficiency of the evidence will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. A motion for a directed verdict based on insufficiency of the evidence must specify the respect in which the evidence is deficient; a motion merely stating that the evidence is insufficient for conviction does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal of a previous motion for a directed verdict at the close of all of the evidence preserves the issue of insufficient evidence for appeal. If for any reason such renewed motion is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

The Reporter's Notes accompanying Rule 33.1 are amended by adding the following:

Addition to Reporter's Notes, 1998 Amendment: A new sentence has been added to the rule to make clear that a party's failure to obtain a ruling on his or her motion for directed verdict at the close of all the evidence is not a waiver of the issue of the sufficiency of the evidence for purposes of appellate review. *Compare Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996) (sufficiency of evidence issue was not preserved for appeal where there was no ruling on the defendant's motion for directed verdict at the close of all the evidence). The new sentence provides that the motion is deemed denied if for any reason it is not ruled upon.

IN RE: SUPREME COURT RULE 4-2

Supreme Court of Arkansas
Opinion delivered January 29, 1998

PER CURIAM. We published for comment on December 11, 1997, proposed changes to Supreme Court Rule 4-2. The proposals were to add a new subsection (a)(8) [requiring an Addendum as part of the brief] and a new subsection (b)(2) [motion to supplement a deficient abstract]. We thank those who reviewed the proposals and submitted comments. In response to the comments received, we are adding to the items to be included in the Addendum the written decision of an administrative law judge. We now adopt the changes, effective for briefs filed after July 1, 1998, and the entire rule is republished below.

RULE 4-2. CONTENTS OF BRIEFS.

(a) *CONTENTS.* The contents of the brief shall be in the following order:

(1) TABLE OF CONTENTS. Each brief must include a table of contents. It should reference the page number for the beginning of each of the major sections identified in Rule 4-2(a)(2)-(8). Within the abstract section of the brief, it should reference the page number for the beginning of each witness' testimony and should note the page at which each pleading and document is abstracted.

(2) INFORMATIONAL STATEMENT AND JURISDICTIONAL STATEMENT. The Informational Statement and Jurisdictional Statement required by Supreme Court Rule 1-2(c).

(3) STATEMENT OF THE CASE. The appellant's brief shall contain a concise statement of the case, without argument. This statement, ordinarily not exceeding two pages in length, shall not exceed five pages without leave of the Court. The statement of the case should be sufficient to enable the Court to read the abstract with an understanding of the nature of the case, the general fact situation, and the action taken by the trial court. The

appellee's brief need not contain a statement of the case unless the appellant's statement is deemed to be controverted or insufficient.

(4) POINTS ON APPEAL. Following the appellant's statement of the case, the appellant shall list and separately number, concisely and without argument, the points relied upon for a reversal of the judgment or decree. The appellee will follow the same sequence and arrangement of points as contained in the appellant's brief and may then state additional points. Either party may insert under any point not more than two citations which either considers to be the principal authorities on that point.

(5) TABLE OF AUTHORITIES. The table of authorities shall be an alphabetical listing of authorities with a designation of the page number of the brief on which the authority appears. The authorities shall be grouped as follows:

(A) Cases

(B) Statutes/rules

(C) Books and treatises

(D) Miscellaneous

(6) ABSTRACT. The appellant's abstract or abridgment of the record should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision. A document included in the Addendum pursuant to Rule 4-2 (a)(8) should not be abstracted. A document, such as a will or contract, may be photocopied and attached as an exhibit to the abstract. However, the document or the necessary portions of the document must be abstracted. Mere notation such as "plaintiff's exhibit no. 4" is not sufficient. On a second or subsequent appeal, the abstract shall include a condensation of all pertinent portions of the record filed on any prior appeal. Not more than two pages of the record shall in any instance be abstracted without a page reference to the record. In the abstracting of testimony, the first person (i.e., "I") rather than the third person (i.e., "He, She") shall be used. The Clerk will refuse to accept a brief if

the testimony is not abstracted in the first person or if the abstract does not contain the required references to the record. In the abstracting of depositions taken on interrogatories, requests for admissions, and the responses thereto, and interrogatories to parties and the responses thereto, the abstract of each answer must immediately follow the abstract of the question. Whenever a map, plat, photograph, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by photography or other process and attach it to the copies of the abstract filed in the Court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the Court upon motion.

(7) ARGUMENT. Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. Citations of decisions of the Court which are officially reported must be from the official reports. All citations of decisions of any court must state the style of the case and the book and page in which the case is found. If the case is also reported by one or more unofficial publishers, these should also be cited, if possible. The number of pages for argument shall comply with Rule 4-1(b).

(8) ADDENDUM. Following the Argument (and after the signature and certificate of service if they are contained in the brief), the brief shall contain an Addendum which shall include photocopies of the order, judgment, decree, ruling, letter opinion, or administrative law judge's opinion, from which the appeal is taken. It should be clear where any item appearing in the Addendum can be found in the record. An item appearing in the Addendum should not also be abstracted. Pursuant to subsection (c) below, the Clerk will refuse to accept an appellant's brief if it does not contain the required Addendum. The appellee's brief shall only contain an Addendum to include an item which the appellant's Addendum fails to include.

(9) COVER FOR BRIEFS. On the cover of every brief there should appear the number and style of the case in the Supreme Court or Court of Appeals, a designation of the court

from which the appeal is taken, and the name of its presiding judge, the title of the brief (e.g., "Abstract and Brief for Appellant"), and the name or names of individual counsel who prepared the brief, including their addresses and telephone numbers.

(b) *INSUFFICIENCY OF APPELLANT'S ABSTRACT.* Motions to dismiss the appeal for insufficiency of the appellant's abstract will not be recognized. Deficiencies in the appellant's abstract will ordinarily come to the Court's attention and be handled as follows:

(1) If the appellee considers the appellant's abstract to be defective, the appellee's brief may call the deficiencies to the Court's attention and may, at the appellee's option, contain a supplemental abstract. When the case is considered on its merits, the Court may impose or withhold costs to compensate either party for the other party's noncompliance with this Rule. In seeking an award of costs under this paragraph, counsel must submit a statement showing the cost of the supplemental abstract and a certificate of counsel showing the amount of time that was devoted to the preparation of the supplemental abstract.

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

(3) Whether or not the appellee has called attention to deficiencies in the appellant's abstract, the Court may treat the question when the case is submitted on its merits. If the Court finds the abstract to be flagrantly deficient, or to cause an unreasonable or unjust delay in the disposition of the appeal, the judgment or decree may be affirmed for noncompliance with the Rule. If the Court considers that action to be unduly harsh, the appellant's attorney may be allowed time to revise the brief, at his or her own expense, to conform to Rule 4-2(a)(6). Mere modifi-

cations of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the Court may direct.

(c) *NON-COMPLIANCE.* Briefs not in compliance with the format required by this Rule shall not be accepted for filing by the Clerk.

COURT'S NOTES *re* Addendum:

The Court is cognizant that the requirement of the Addendum is a significant addition to the brief, and there will be a period of adjustment. Thus, for a reasonable period, the Clerk of the Court should be liberal in granting extensions pursuant to Rules 4-3(k) and 4-4(c) to enable a party to remedy a problem with an Addendum.

IN RE: PROPOSED CHANGES TO THE ARKANSAS RULES OF PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Opinion delivered February 19, 1998

PER CURIAM. The Arkansas Bar Association has submitted proposed changes to the Arkansas Rules of Professional Conduct. We publish the proposed changes for comment. Comments from the bench and bar should be filed with the Clerk of the Supreme Court by April 24, 1998, and should be addressed to: Leslie Steen, Arkansas Supreme Court, Justice Building, Little Rock, AR 72201.

Proposed Changes to the Arkansas Rules of Professional Conduct

RULE 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(d) contains a testimonial or endorsement.

Comment:

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about the results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

RULE 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication.

(b) A copy or recording of an advertisement or communication shall be kept for five years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications permitted by this rule and may pay the usual charges for not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer who is licensed in Arkansas and who is responsible for its content, and shall disclose the geographic location of the office or offices of the attorney or the firm in which the lawyer or lawyers who actually perform the services advertised principally practice law.

(e) Advertisements may include photographs, voices or images of the lawyers who are members of the firm who will actually perform the services. If advertisements utilize actors or other

individuals, those persons shall be clearly and conspicuously identified by name and relationship to the advertising lawyer or law firm and shall not mislead or create an unreasonable expectation about the results the lawyer may be able to obtain. Clients or former clients shall not be used in any manner whatsoever in advertisements. Dramatization in any advertisement is prohibited.

Comment:

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading, overreaching, or unduly intrusive.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone numbers; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

Paragraph (e) of this Rule is designed to ensure that the advertising is not misleading and does not create unreasonable or unrealistic expectations about the results the lawyer may be able to obtain in any particular case, and to encourage a focus on providing useful information to the public about legal rights and needs and the availability and terms of legal services. Thus, the rule allows all lawyer advertisements in which the lawyer personally appears to explain a legal right, the services the lawyer is available to perform, and the lawyer's background and experience. Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner.

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not solicit, by any form of direct contact, in person or otherwise, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) Notwithstanding the prohibitions described in Paragraph (a), a lawyer may solicit professional employment from a prospective client known to be in need of legal services in a particular matter by written communication. Such written communication shall:

(1) Include on the bottom left hand corner of the face of the envelope the word "Advertisement" in red ink, with type twice as large as that used for the name of the addressee;

(2) Only be sent by regular mail;

(3) Not have the appearance of legal pleadings or other official documents;

(4) Plainly state in capital letters **"ADVERTISEMENT"** on each page of the written communication;

(5) Begin with the statement that "If you have already retained a lawyer, please disregard this letter;

(6) Include the following statement in capital letters: **"ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT, C/O CLERK, ARKANSAS SUPREME COURT, 625 MARSHALL STREET, LITTLE ROCK, ARKANSAS 72210"**;

(7) Shall comply with all applicable rules governing lawyer advertising.

(c) In death claims, the written communication permitted by paragraph (b) shall not be sent until 30 days after the accident.

(d) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

(e) Even when otherwise permitted by this rule, a lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence; or

(3) the prospective client is known to the lawyer to be represented in connection with the matter concerning the solicitation by counsel, except where the prospective client has initiated the contact with the lawyer.

(f) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid group legal service plan operated by an organization now owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment:

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written communications which may be mailed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer had a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of rule 7.3(b) are not applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence within the meaning of Rule 7.3(e)(1), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(e)(2) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(e).

Letters of solicitation and their envelopes should be clearly marked "Advertisement." This will avoid the recipient perceiving that he or she needs to open the envelope because it is from a lawyer or law firm, only to find he or she is being solicited for legal services. With the envelope and letter marked "Advertisement," the recipient can choose to read the solicitation, or not to read it, without fear of legal repercussions.

Paragraph (c) allows targeted mail solicitation of potential plaintiffs or claimants in wrongful death causes of action, but only if

mailed at least thirty days after the incident. This restriction is reasonably required by the sensitized state of the potential clients who may be grieving the loss of a family member, and the abuses which experience has shown exist in this type of solicitation.

In addition, the lawyer or law firm should reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the information source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding his or her particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge abut the recipient's matter if the lawyer does not.

Lawyers who use direct mail to solicit employment from accident victims or their survivors normally find the names of these persons, whom they believe may need legal services, in accident reports, newspaper reports, television or radio news, or other publicly available information. Some accident victims later die from their injuries after the preparation of reports and news dissemination. In the event of such a death, an attorney, who relies in good faith upon all the reasonably and publicly available information which creates the appearance the victim is still alive at the time the lawyer sends a letter soliciting employment, is not in violation of the prohibition against sending written communications within thirty days in cases which may be the basis of wrongful death claims.

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

The requirement in Rule 7.3(b) that certain communications be marked "Advertisement" does not apply to communications sent in response to requests of potential clients or their

spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

Paragraph (f) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (f) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(e). See 8.4(a).

Appointments to Committees

IN RE: ARKANSAS CONTINUING LEGAL EDUCATION BOARD

Supreme Court of Arkansas
Opinion delivered January 29, 1998

PER CURIAM. Phillip D. Hout of Newport, Second Court of Appeals District, and Pamela S. Osment of Conway, at-large appointment, are hereby reappointed to the Board of Continuing Legal Education for three year terms to expire on December 5, 2000. Carolyn B. Witherspoon of Little Rock, Sixth Court of Appeals District, is hereby appointed to the Board of Continuing Legal Education for a three-year term to expire on December 5, 2000.

The Court thanks Mr. Hout and Ms. Osment for accepting reappointment and Ms. Witherspoon for accepting appointment to this Board.

The Court Expresses its appreciation to Bob Ross of Little Rock, whose term has expired, for his service as a member and Chairman of this Board.

IN RE: BOARD OF LEGAL SPECIALIZATION

Supreme Court of Arkansas
Opinion delivered January 29, 1998

PER CURIAM. Terry Poynter, Esq., of Mountain Home, Second Court of Appeals District, Bobby L. Odom, Esq., of Fayetteville, Third Court of Appeals District, and Richard N. Moore, Jr., Esq., of Little Rock, Sixth Court of Appeals District, are hereby reappointed to our Board of Legal Specialization. Each term is for three years and expires on December 5, 2000.

The Court expresses its gratitude to these gentlemen for accepting reappointment to this important Board.

IN RE: SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE

Supreme Court of Arkansas
Opinion delivered January 29, 1998

PER CURIAM. The Honorable Gerald Pearson of Jonesboro, and Steven E. Vowell, Esq., of Berryville, are hereby reappointed to the Supreme Court Committee on Criminal Practice for three-year terms to expire on January 31, 2001.

The Court thanks Judge Pearson and Mr. Vowell for accepting reappointment to this most important Committee.

Professional Conduct Matters

IN RE: Carroll P. CHRISTIAN,
Arkansas Bar ID # 79031

958 S.W.2d 256

Supreme Court of Arkansas
Opinion delivered January 8, 1998

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the license of Carroll P. Christian, of Jacksonville, Arkansas, to practice law in the State of Arkansas. Mr. Christian's name shall be removed from the registry of licensed attorneys, and he is permanently barred from engaging in the unlicensed practice of law in this state.

IN RE: Gordon Lee HUMPHREY, JR.,
Arkansas Bar ID # 72059

958 S.W.2d 526

Supreme Court of Arkansas
Opinion delivered January 8, 1998

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

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ARKANSAS APPELLATE REPORTS

Volume 60

CASES DETERMINED
IN THE

Court of Appeals of Arkansas

FROM
December 22, 1997 — February 18, 1998
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

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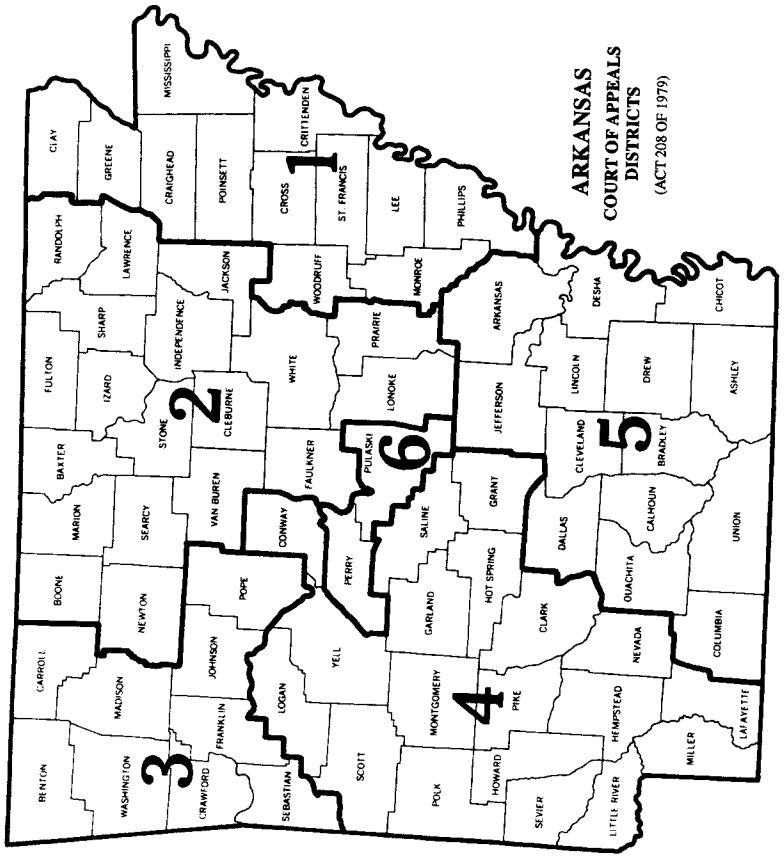
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JUDGES AND OFFICERS
OF THE
COURT OF APPEALS
OF ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(December 22, 1997 — February 18, 1998, inclusive)

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JOHN B. ROBBINS	Chief Judge[1]
JOHN MAUZY PITTMAN	Judge[2]
D. FRANKLIN AREY, III	Judge[3]
JOHN E. JENNINGS	Judge[4]
SAM BIRD	Judge[5]
JUDITH ROGERS	Judge[6]
JOHN F. STROUD, JR.	Judge[7]
OLLY NEAL	Judge[8]
WENDELL L. GRIFFEN	Judge[9]
TERRY CRABTREE	Judge[10]
MARGARET MEADS	Judge[11]
ANDREE LAYTON ROAF	Judge[12]

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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.

Arkansas Forestry Dep't *v.* Nelson, CA 97-819 (Robbins, C.J.), affirmed February 4, 1998.

Arkansas Oklahoma Gas Corp. *v.* Arkansas Pub. Serv. Comm'n, CA 97-1440 (Per Curiam), Appellant's Motion to Consolidate CA97-1079 with this Appeal and for Permission to Rely on Prior Abstracts, denied in part; granted in part February 11, 1998.

Arnold *v.* State, CA CR 97-696 (Stroud, J.), affirmed January 14, 1998.

Baxter County Fire Dep't *v.* Gronert, CA 97-671 (Bird, J.), affirmed January 14, 1998.

Behimer *v.* Newton, CA 96-1528 (Bird, J.), affirmed January 28, 1998. Rehearing denied March 4, 1998.

Bilyeu *v.* State, CA CR 97-505 (Jennings, J.), affirmed February 4, 1998.

Bob Cole Bail Bonds, Inc. *v.* State, CA 97-549 (Crabtree, J.), affirmed December 22, 1997.

Brooks *v.* Potter, CA 97-781 (Roaf, J.), affirmed February 18, 1998

Brown, Donald *v.* State, CA CR 97-300 (Arey, J.), affirmed as modified January 7, 1998.

Brown, Earnest *v.* State, CA CR 97-261 (Pittman, J.), appeal dismissed December 22, 1997.

C & B Constr. *v.* Paulette, CA 97-839 (Arey, J.), reversed and remanded February 11, 1998.

Carvin *v.* Bell, CA 97-526 (Meads, J.), affirmed February 11, 1998.

Chatman *v.* State, CA 97-1269 (Per Curiam), Appellant's Motion for Direction from the Court and to Stay Brief time, remanded to trial court February 18, 1998.

City of Wrightsville *v.* Smith, CA 97-795 (Jennings, J.), affirmed December 22, 1997.

Clifford Family Ltd. Liab. Co. *v.* Cox, CA 97-516 (Neal, J.), affirmed February 11, 1998.

Coca Cola Bottling Co. *v.* Hinson, CA 97-787 (Jennings, J.), affirmed in part; reversed and remanded in part January 28, 1998.

Cockman *v.* State, CA CR 97-954 (Roaf, J.), affirmed February 18, 1998.

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Criner *v.* Noalmark Broadcast Corp., CA 97-548 (Griffen, J.), affirmed January 21, 1998.

Curtright *v.* Curtright, CA 97-84 (Jennings, J.), affirmed January 21, 1998.

Davidson *v.* McKee Foods Corp., CA 97-849 (Stroud, J.), affirmed February 4, 1998.

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Davis *v.* Marion County, CA 97-522 (Rogers, J.), affirmed February 18, 1998.

Dean *v.* State, CA CR 97-412 (Bird, J.), affirmed February 11, 1998.

DeGregory *v.* State, CA CR 97-440 (Pittman, J.), appeal dismissed December 22, 1997.

Dobbins *v.* State, CA CR 97-853 (Neal, J.), affirmed February 18, 1998.

Earth Grains of Little Rock *v.* Bennett, CA 97-745 (Meads, J.), affirmed February 18, 1998.

Evans *v.* Huber, CA 97-567 (Roaf, J.), appeal dismissed January 7, 1998.

Federal Express *v.* Walton, CA 97-820 (Crabtree, J.), affirmed February 11, 1998.

Garmon *v.* First Nat'l Bank, CA 97-717 (Stroud, J.), reversed February 18, 1998.

Garrett *v.* Wal-Mart Stores, Inc., CA 97-733 (Arey, J.), reversed and remanded February 11, 1998.

Granger *v.* State, CA 97-477 (Jennings, J.), reversed February 18, 1998.

Gaylord Container *v.* Turner, CA 97-757 (Meads, J.), affirmed January 14, 1998.

Graham *v.* State, CA CR 97-482 (Jennings, J.), affirmed February 4, 1998.

Hall *v.* Hall, CA 96-1264 (Meads, J.), affirmed in part; reversed and remanded in part December 22, 1997.

Hanna *v.* State, CA CR 97-874 (Crabtree, J.), affirmed February 4, 1998.

Hardnett *v.* State, CA CR 97-686 (Stroud, J.), affirmed February 4, 1998.

Henson *v.* Sales Constr. Co., CA 97-770 (Arey, J.), affirmed February 11, 1998.

Hill *v.* Kinsey, CA 97-470 (Stroud, J.), affirmed December 22, 1997.

Hill *v.* Green Bay Foods, CA 97-678 (Crabtree, J.), affirmed December 22, 1997.

Hills *v.* State, CA CR 97-540 (Robbins, C.J.), affirmed December 22, 1997.

House *v.* State, CA CR 97-680 (Neal, J.), affirmed February 11, 1998.

Hutchins *v.* Hutchins, CA 97-429 (Per Curiam), Appellant's Motion for Reinstatement of Appeal, granted in part and denied in part; Motion for Stay denied December 22, 1997.

In Re: Adoption of Gillilan, CA 97-555 (Meads, J.), affirmed January 14, 1998. Rehearing denied February 11, 1998.

Jacks *v.* State, CA CR 97-490 (Neal, J.), appeal dismissed February 4, 1998.

Jacobs *v.* State, CA CR 97-704 (Rogers, J.), affirmed January 7, 1998.

Jarman *v.* Wolfe, CA 97-188 (Roaf, J.), affirmed February 11, 1998.

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Love *v.* State, CA CR 97-641 (Arey, J.), affirmed February 4, 1998.

Martin *v.* State, CA CR 96-592 (Robbins, C.J.), affirmed January 14, 1998.

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Rheem Mfg. Co. *v.* Gipson, CA 97-892 (Rogers, J.), affirmed February 11, 1998. Rehearing denied March 4, 1998.

River Oaks Commons Property Owners Ass'n, Inc. *v.* Dunn, CA 97-673 (Bird, J.), affirmed February 4, 1998.

Roberts *v.* State, CA CR 97-542 (Crabtree, J.), affirmed February 4, 1998.

Rook *v.* State, CA CR 97-413 (Meads, J.), affirmed February 4, 1998.

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