

APPENDIX
Rules Adopted
or Amended by
Per Curiam Orders

IN RE: AMENDMENTS TO THE ARKANSAS RULES
OF CIVIL PROCEDURE, THE ARKANSAS RULES OF
APPELLATE PROCEDURE, THE ARKANSAS
SUPREME COURT ADMINISTRATIVE ORDERS, THE
RULES OF THE ARKANSAS SUPREME COURT AND
COURT OF APPEALS, AND THE INFERIOR COURT
RULES

776 S.W.2d 363

Supreme Court of Arkansas
Delivered October 2, 1989

PER CURIAM. By per curiam order of May 15, 1989, we published changes of court rules necessary to implement a system of appeals using appendices rather than abstracts of record. The order also provided for a change to a uniform 8 $\frac{1}{2}$ " by 11" paper size to be used in all courts. The order provided that the changes with respect to paper size would come into effect January 1, 1990. The other changes having to do with using appendices rather than abstracts of record on appeal went into effect on May 15, 1989, but permitted an appellant to choose to follow the rules in effect until that date for cases in which the appellant's brief was submitted or became due between May 15, 1989, and December 31, 1989.

We have reviewed the appeals now ready for submission and those which will be ready prior to December 31, 1989. Most appellants have chosen to follow the old rules. We have concluded we will not be able to decide the relative merits of the two methods by the end of this year because we will have had too little experience with appendices. The trial period is, therefore, extended until July 15, 1990. Any case in which the appellant's brief is submitted or becomes due prior to July 15, 1990, may be presented in accordance with the rules in effect up until May 15, 1989.

The paper size changes are not affected by this order. All courts will begin using 8 $\frac{1}{2}$ " by 11" paper no later than January 1, 1990.

IN RE: SUPREME COURT COMMITTEE ON
PROFESSIONAL CONDUCT

777 S.W.2d LIV

Supreme Court of Arkansas
Delivered October 23, 1989

PER CURIAM. James A. Neal, the executive secretary of the Committee on Professional Conduct, is authorized to submit data concerning the Committee's disciplinary actions to the National Center for Professional Responsibility of the American Bar Association. This order supersedes prior orders on this subject.

IN THE MATTER OF CHANGES TO THE
ARKANSAS RULES OF CIVIL PROCEDURE

780 S.W.2d 334

Supreme Court of Arkansas
Delivered November 20, 1989

PER CURIAM. The Arkansas Supreme Court Committee on Rules of Pleading, Practice, and Procedure (Civil) has submitted its annual suggestions for changes in the rules. We adopt the suggested changes which follow. They will become effective January 1, 1990. We also adopt the suggestion of the committee that its name be changed to "Arkansas Supreme Court Committee on Civil Practice."

Comments and suggestions with respect to the rules are welcome and may be made directly to this court. They may also be made by letter to the committee reporter at the following address:

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

This court continues to appreciate the hard work and dedication of the committee and expresses its thanks to the

chairman, Judge Henry Wilkinson, the reporter, Professor John J. Watkins, and the members of the committee who give of their time and talent to keep our procedural rules current.

Rule 4, Ark. R. Civ. P.

Rule 4(c), Arkansas Rules of Civil Procedure, is amended by deleting subdivision (3) and by redesignating subdivision (4) as subdivision (3).

The following amendment to the Reporter's Note accompanying Rule 4 is adopted:

Addition to Reporter's Note, 1989 Amendment: Rule 4(c) is amended by deleting a provision that permitted service of process by any person not less than eighteen years of age who is not a party. The change was made to assure adequate judicial control over persons who serve process.

Rule 5, Ark. R. Civ. P.

Rule 5(b), Arkansas Rules of Civil Procedure, is amended by adding at the end thereof the following sentence:

Where service is permitted upon an attorney under this rule, such service may be effected by electronic transmission, provided that the attorney being served has facilities within his office to receive and reproduce verbatim electronic transmissions, or such service may be made by a commercial delivery service which maintains permanent records of actual delivery.

The following amendment to the Reporter's Note accompanying Rule 5 is adopted:

Addition to Reporter's Note, 1989 Amendment: Rule 5(b) is amended to make clear that service upon an attorney under the rule is permitted by "fax" machine or by commercial delivery service, as well as by mail. This recognition of "new technology" is consistent with Act 58 of 1989, which permits a court clerk to accept pleadings filed via fax machine.

Rule 28, Ark. R. Civ. P.

Rule 28(c), Arkansas Rules of Civil Procedure, is amended by deleting the words "States or" in the introductory phrase that serves as a title; deleting the words "another state or" in the first sentence and inserting in lieu thereof the word "a"; and deleting the words "commission or" in the first sentence.

The following amendment to the Reporter's Note accompanying Rule 28 is adopted:

Addition to Reporter's Note, 1989 Amendment: Rule 28(c) is amended to apply only to the taking of depositions for use in judicial proceedings in foreign countries. Rule 45(f), as amended in 1989, now governs the taking of depositions for use in proceedings in other states.

Rule 32, Ark. R. Civ. P.

Rule 32(a)(4), Arkansas Rules of Civil Procedure, is amended by deleting the words "and filed" from the second paragraph and by adding the following sentence at the end of the second paragraph:

a deposition previously taken may also be used as permitted by the Arkansas Rules of Evidence.

The following amendment to the Reporter's Note accompanying Rule 32 is adopted:

Addition to Reporter's Note, 1989 Amendment: As initially adopted, the second paragraph of Rule 32(a)(4) provided that a prior action must have been dismissed before depositions taken for use in it could be used in a subsequent action. The 1989 amendment permits the use of a deposition from a prior action to the extent allowed by the Rules of Evidence. The corresponding federal rule was so amended in 1980. In addition, the 1989 amendment eliminates the requirement that a deposition taken in a prior action must have been filed in order for it to be used in a subsequent action. This change is consistent with Rule 5(c), which, as amended in 1984, does not require that depositions be filed as a matter of course.

Rule 45, Ark. R. Civ. P.

Rule 45, Arkansas Rules of Civil Procedure, is amended as follows:

1. By deleting subdivision (a) of the rule and replacing it with the following:

(a) *Form and Issuance.* Every subpoena shall be issued by the clerk under seal of court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to appear and give testimony at the time and place therein specified.

2. By deleting the word "properly" in subdivision (b) of the rule and replacing it with the word "promptly."

3. By deleting the word "and" appearing between the words "unreasonable" and "oppressive" in subdivision (b)(1) of the rule and replacing it with the word "or."

4. By deleting subdivision (c) of the rule and replacing it with the following:

(c) *Service.* A subpoena for a trial or hearing or for a deposition may be served at any place within this State in the manner prescribed in this subdivision. A subpoena for a trial or hearing or for a deposition may be served by the sheriff of the county in which it is to be served, by his deputy, or by any other person who is not a party and is not less than eighteen (18) years of age. Service shall be made by delivering a copy of the subpoena to the person named therein; provided, however, that a subpoena for a trial or hearing may be served by telephone by a sheriff or his deputy when the trial or hearing is to be held in the county of the witness' residence. A subpoena for a trial or hearing or for a deposition may also be served by an attorney of record for a party by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or agent of the addressee.

5. By deleting subdivision (d) of the rule and replacing it with the following:

(d) *Subpoena for Trial or Hearing.* At the request of

any party the clerk of the court before which the action is pending shall issue a subpoena for a trial or hearing, or a subpoena for the production at a trial or hearing of documentary evidence, signed and sealed, but otherwise in blank, to the party requesting it, who shall fill it in before service. A witness, regardless of his county of residence, shall be obligated to attend for examination on trial or hearing in a civil action anywhere in this State when properly served with a subpoena at least two (2) days prior to the trial or hearing. The court may grant leave for a subpoena to be issued within two (2) days of the trial or hearing. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the trial or hearing. In the event of telephone service of a subpoena by a sheriff or his deputy, the party who caused the witness to be subpoenaed shall tender the fee prior to or at the time of the witness' appearance at the trial or hearing. If a continuance is granted and if the witness is provided adequate notice thereof, re-service of the subpoena shall not be necessary. Any person subpoenaed for examination at the trial or hearing shall remain in attendance until excused by the party causing him to be subpoenaed or, after giving testimony, by the court.

6. By deleting subdivision (e) of the rule and replacing it with the following:

(e) *Subpoena for Taking Depositions: Place of Examination.* Upon the filing of a notice of deposition upon oral examination pursuant to Rule 30(b), the clerk of the court in which the action is pending shall, upon the request of the party giving notice, issue a subpoena in accordance with the notice. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule. The witness must be properly served at least five (5) business days prior to the date of the deposition, unless the court grants leave

for subpoena to be issued within that period. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the deposition.

The person to whom the subpoena is directed may, within ten (10) days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service, serve upon the attorney causing the subpoena to be issued written objection to inspection or copying of any or all of the designated materials. If objection is made, the party causing the subpoena to be issued shall not be entitled to inspect and copy the materials except pursuant to an order of the court before which the deposition may be used. The party causing the subpoena to be issued may, if objection has been made, move, upon notice to the deponent, for an order at any time before or during the taking of the deposition.

A witness subpoenaed under this subdivision may be required to attend a deposition at any place within 100 miles of where he resides, or is employed, or transacts his business in person, or at such other convenient place as is fixed by an order of court.

7. By deleting subdivision (f) of the rule and replacing it with the following:

(f) Depositions for Use in Out-of-State Proceedings.

Any party to a proceeding pending in a court of record outside this State may take the deposition of any person who may be found within this State. A party who has filed a notice of deposition upon oral examination in an out-of-state proceeding, which complies with Rule 30(b), may file a certified copy thereof with the circuit clerk of the county in which the deposition is to be taken; whereupon, the clerk shall issue a subpoena in accordance with the notice. All provisions of this rule shall apply to such subpoenas. Any objection shall be heard by a circuit or chancery judge of the county in which the deposition is to be taken.

8. By adding the following to the rule as new subdivision (g):

(g) *Contempt*. When a witness fails to attend in obedience to a subpoena or intentionally evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arresting and bringing the witness before the court at a time and place to be fixed in the warrant, to give testimony and answer for contempt.

The following amendment to the Reporter's Note accompanying Rule 45 is adopted:

Addition to Reporter's Note, 1989 Amendment: Rule 45 has undergone several modifications since it became effective in 1979. Because the 1989 amendment rewrites virtually the entire rule, previous Reporter's Notes are superseded and should be consulted only for historical purposes.

1. Subdivision (a) provides the mechanics for the issuance of a subpoena. Subpoenas may now be issued only by the clerk of court. Authority for the issuance of deposition subpoenas by officers before whom depositions may be taken has been eliminated.

2. Subdivision (b) provides for the issuance of a subpoena duces tecum. Except for minor technical corrections, this provision is unchanged.

3. Subdivision (c) governs service of subpoenas and makes clear that any subpoena, for either trial or deposition, may be served anywhere in the state. Moreover, the subdivision expressly provides that service of a subpoena by mail may be made by an attorney of record for either party. Telephone service of subpoenas is limited to sheriffs and their deputies, who may use this method of service with respect to trial subpoenas directed to witnesses who reside in the county where the trial is to be held. In addition, material from former subdivision (c) governing trial subpoenas has been shifted to subdivision (d). Similarly, provisions regarding contempt have been placed under subdivision (g), which specifically addresses that issue.

4. Subdivision (d) applies to subpoenas for trials or hearings. Most of this material appeared in former subdivision (c). However, the revised rule reduces the period required for service of a subpoena prior to trial without

leave of court from five to two days; increases the allowance for witness travel to trial to twenty-five cents per mile; clarifies the authority of the party who subpoenas a witness to excuse the witness prior to testimony by the witness; and eliminates an outdated provision authorizing the taking of depositions of witnesses exempt by law from personal attendance at trial. Pursuant to subdivision (c), a subpoena for a witness to appear at a trial or hearing may be served anywhere in the state.

5. Subdivision (e) governs subpoenas for the taking of depositions, including those for the production of documentary evidence. The 1989 amendment eliminates the authority of an officer authorized to take a deposition to issue subpoenas for depositions. Under the revised procedure, the clerk of court is to issue a subpoena for a deposition upon the request of a party and the filing by that party of a notice of the deposition complying with Rule 30. Consistent with the increase in travel allowance for trial witnesses under subdivision (d), the travel allowance for deposition witnesses is also increased to twenty-five cents per mile. However, although the period of notice to a witness prior to trial has been reduced to two days under subdivision (d), the period of notice to a deposition witness is five business days. In addition, the geographic limits within which a deposition witness is required to attend a deposition have been expanded from the county of the witness' residence to any place within 100 miles of where the witness resides, is employed, or transacts business in person. Pursuant to subdivision (c), a subpoena for a deposition may be served anywhere in the state.

6. Subdivision (f) establishes a procedure for the taking of depositions within the state for use in proceedings pending in other states. In conjunction with the adoption of this provision, Rule 28(c) has been modified to apply only to proceedings pending in foreign countries.

7. Subdivision (g) governs contempt proceedings. It is a condensed version of language that appeared in former subdivision (c), which seemed to apply only to trial subpoenas. This subdivision replaces a more general contempt provision found in former subdivision (f).

Rule 52, Ark. R. Civ. P.

The third sentence of Rule 52(a), Arkansas Rules of Civil Procedure, is amended to read as follows:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The following amendment to the Reporter's Note accompanying Rule 52 is adopted:

Addition to Reporter's Note, 1989 Amendment: Rule 52(a) is amended to make clear that the same standard of appellate review applies regardless of whether a trial court's findings of fact are based on oral or documentary evidence. The corresponding federal rule was so amended in 1985. Prior to that amendment, some federal courts had held that a more searching appellate review was appropriate when the trial court's findings were based solely on documentary evidence.

IN THE MATTER OF ARKANSAS RULES OF
APPELLATE PROCEDURE 3(b)

780 S.W.2d 25

Supreme Court of Arkansas
Delivered December 4, 1989

PER CURIAM. Arkansas Rule of Appellate Procedure 3(b) as published in the 1989 Court Rules volume accompanying the Arkansas Code Annotated is not correctly stated. Rule 3(b) is as follows:

(b) How Taken. An appeal shall be taken by filing a notice of appeal with the clerk of the court which entered the judgment, decree, or order from which the appeal is taken. Failure of the appellant or cross-appellant to take

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

IN THE MATTER OF THE CLIENT SECURITY
FUND

782 S.W.2d 357

Supreme Court of Arkansas
Opinion delivered December 11, 1989

PER CURIAM. The per curiam order of April 30, 1973, 254 Ark. 1075, 493 S.W.2d 422, creating the Client Security Fund, and the July 3, 1989, amendment thereto, both provide in paragraph three (3) that, "No claim shall be allowed for an amount in excess of \$5,000.00." That sentence is amended to provide: "No claims shall be allowed for an amount in excess of \$10,000.00."

Further, one sentence in paragraph 9 of the April 30, 1973 per curiam provides: "Beginning with the year 1974, \$2.00 of the annual license fee paid by each attorney to the Clerk of the Court shall be credited to the Client Security Fund until further order of this Court." That sentence is amended to read: "Beginning with the year 1990, \$4.00 of the annual license fee paid by each attorney to the Clerk of this Court shall be credited to the Client Security Fund until further order of this Court."



**Appointments to
Committees**

IN THE MATTER OF THE BOARD OF LAW
EXAMINERS

776 S.W.2d 363

Supreme Court of Arkansas
Delivered October 9, 1989

PER CURIAM. James H. Pilkinton, Jr., Hope, Arkansas, and Martin G. Gilbert, Pine Bluff, Arkansas, are hereby reappointed as members of the State Board of Law Examiners for a term of three years ending September 30, 1992.

The Court expresses its gratitude for their faithful service and for accepting reappointment.

IN THE MATTER OF THE CLIENT SECURITY
FUND

776 S.W.2d 363

Supreme Court of Arkansas
Delivered October 2, 1989

PER CURIAM. Richard A. Jarboe of Walnut Ridge, Arkansas, is hereby appointed to the Client Security Fund Committee for a five year term expiring June 30, 1994, replacing James V. King of Pocahontas, Arkansas.

The Court expresses its gratitude to James V. King for his faithful service to the Committee.

IN RE: ARKANSAS SUPREME COURT BOARD OF
CERTIFIED COURT REPORTER EXAMINERS

777 S.W.2d 219

Supreme Court of Arkansas
Delivered October 9, 1989

PER CURIAM. The Honorable Tom L. Hilburn of Walnut Ridge, Arkansas, and Fern Nicholson of Harrison, Arkansas, are appointed to the Arkansas Supreme Court Board of Certified Court Reporter Examiners replacing the Honorable Jack Lessenberry and Maude Parkman of Little Rock, Arkansas. Each appointment is for a three-year term expiring July 1, 1992.

The Court expresses its gratitude to the Honorable Jack Lessenberry and Maude Parkman for their faithful service on the Board.

IN THE MATTER OF THE BOARD OF LAW
EXAMINERS

777 S.W.2d 224

Supreme Court of Arkansas
Delivered October 9, 1989

PER CURIAM. James H. Pilkinton, Jr., Hope, Arkansas, and Martin G. Gilbert, Pine Bluff, Arkansas, are hereby reappointed as members of the State Board of Law Examiners for a term of three years ending September 30, 1992.

The Court expresses its gratitude for their faithful service and for accepting reappointment.

IN THE MATTER OF THE SUPREME COURT
COMMITTEE ON RULES OF PLEADINGS,
PRACTICE AND PROCEDURE IN CRIMINAL CASES

777 S.W.2d 224

Supreme Court of Arkansas
Delivered October 9, 1989

PER CURIAM. The Honorable Thomas Scott Hunter, Jonesboro, Arkansas, is hereby appointed to the Supreme Court Committee on Rules of Pleadings, Practice and Procedure in Criminal Cases, replacing Samuel A. Perroni, Esq., Little Rock, Arkansas, and the Honorable Ronald G. Fields, Fort Smith, Arkansas, is appointed to replace Robert H. Williams, Esq. of Russellville, Arkansas. In addition, David H. Williams, Esq. and Arthur Allen, Esq., Little Rock, Arkansas, are appointed to the Board. Each appointee is to serve at the pleasure of the Court.

Frank Newell, a present member of this Committee, is designated as its Reporter.

The Court expresses its gratitude to Samuel A. Perroni, Esq. and Robert H. Williams for their faithful service to the Committee.

IN RE: ARKANSAS CONTINUING LEGAL
EDUCATION BOARD

778 S.W.2d 952

Supreme Court of Arkansas
Delivered November 6, 1989

PER CURIAM. Harry Truman Moore, Esq., First District (Northeast); John Stroud, Esq., Fourth District (Southwest); and the Honorable Robin Mays (At Large) are reappointed to the Arkansas Continuing Legal Education Board for a three year term expiring December 3, 1992.

The Court expresses its gratitude to the parties for their faithful service to the Board and for accepting reappointment.