APPENDIX
Rules Adopted or Amended by Per Curiam Orders

IN THE MATTER OF CHANGES TO THE ARKANSAS RULES OF CIVIL PROCEDURE, THE ARKANSAS INFERIOR COURT RULES, AND THE ADMINISTRATIVE ORDERS OF THE ARKANSAS SUPREME COURT

Supreme Court of Arkansas
Delivered December 10, 1990

PER CURIAM. The Arkansas Supreme Court Committee on Civil Practice has submitted its annual suggestions for rule changes. With some minor alterations in the wording of the rule changes and reporter's notes, we adopt the suggested changes which follow. They will become effective in the form published herewith on February 1, 1991, unless amended or withdrawn prior to that date.

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 to the members of the committee who give of their time and talent to keep our procedural rules current.

Rule 5, Ark. R. Civ. P.

Rule 5, Arkansas Rules of Civil Procedure, is amended by adding the following sentence at the end of the first paragraph of subdivision (a):

> Any pleading asserting new or additional claims for relief against any party who has appeared shall be served in accordance with subdivision (b) of this rule.

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

Addition to Reporter's Note, 1990 Amendment: Subdivision (a) of Rule 5 requires that "pleadings asserting new or additional claims for relief against [parties in default for failure to appear] shall be served in the manner provided for service of summons in Rule 4." This provision implies that a pleading asserting a new or additional claim for relief against a party who has appeared in the action need only be served on the party's attorney, as set forth in Rule 5(b). Some federal courts have so construed the virtually identical federal rule. *E.g., Dysart* v. *Marriot Corp.*, 103 F.R.D. 15 (E.D. Pa. 1984). However, Arkansas cases predating adoption of the Rules of Civil Procedure indicate that service by summons on a party already before the court is required in some circumstances. *E.g., Nance* v. *Flaugh*, 221 Ark. 352, 253 S.W.2d 207 (1953); *Arbaugh* v. *West*, 127 Ark. 98, 192 S.W. 171 (1917). *See also Howard* v. *County Court*, 278 Ark. 117, 644 S.W.2d 256 (1983) (citing *Arbaugh* with approval but not discussing Rule 5).

To clarify Arkansas procedure, subdivision (a) of Rule 5 has been amended to provide that any pleading stating a new or additional claim for relief against a party who has appeared in the action may be served in the manner prescribed by subdivision (b). Consequently, such a pleading — *e.g.*, a counterclaim, cross claim, or amended complaint stating a new claim for relief — may be served by mail on the party's attorney, and the methods for service of process set out in Rule 4 need not be employed. Service on the attorney in this context is consistent with the basic theory of Rule 5 that service of papers on the attorney, rather than the party, will expedite adjudication of the case and constitute sufficient notice to the party to comply with the requirements of due process. *See Adam* v. *Saenger*, 303 U.S. 59 (1938). If a party has not appeared, however, Rule 5(a) specifically provides that service must be made under Rule 4. Similarly, if the pleading seeks to add a new party — *e.g.*, an answer asserting a counterclaim against the plaintiff and a third person over whom the court has not previously acquired jurisdiction — the pleading must be served on the new party as provided by Rule 4. Because the plaintiff in that situation is already before the court, the pleading may be served on his attorney.

Rule 6, Ark. R. Civ. P.

Rule 6, Arkansas Rule of Civil Procedure, is amended by deleting subdivision (b) and replacing it with the following:

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

The following amendment to the Reporter's Note accompanying Rule 6 is adopted:

> *Addition to Reporter's Note, 1990 Amendment*: Rule 6(b) is amended to correspond to the changes made in Rule 55 regarding default judgments. Under revised subdivision (b)(2), the court may, upon motion, extend the time for filing an answer (or for other action) after the relevant period has expired if the failure was the result of "mistake, inadvertance, surprise, excusable neglect, or other just cause." This standard, which mirrors that employed in Rule 55(c)(1) with respect to the setting aside of a default judgment, is intended to liberalize Arkansas practice. Under former Rule 6(b), an extension of time was permissible only where the failure to act was the result of "excusable neglect, unavoidable casualty or other just cause."

Rule 55, Ark. R. Civ. P.

Rule 55, Arkansas Rules of Civil Procedure, is amended as follows:

1. By deleting the word "shall" in subdivision (a) and replacing it with the word "may."

2. By deleting subdivision (c) and replacing it with the following:

> (c) *Setting Aside Default Judgments*. The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action; however, if the judgment is void, no other defense to the action need be shown.

3. By adding the following as new subdivision (f):

> (f) *Remand from Federal Court*. Whenever a case has been removed to a United States court and thereafter remanded, no judgment by default shall be entered prior to the expiration of ten (10) days after service of notice upon defendants that the order remanding such case has been filed. Within such time the defendants may move or plead as they might have done had the case not been removed.

The following amendment to the Reporter's Note accompanying Rule 55 is adopted:

> *Addition to Reporter's Note, 1990 Amendment*. Rule 55 has been substantially amended to liberalize Arkansas practice regarding default judgments. The revised rule, which reflects a clear preference for deciding cases on the merits rather than on technicalities, is intended to avoid the harsh results that often flowed from the previous version. Because the rule represents a significant break from prior practice, many cases decided under the old rule and the statute from which it was derived will no longer be of precedential value.
>
> Under revised Rule 55(a), the entry of a default judgment is discretionary rather than mandatory. In deciding whether to enter a default judgment, the court should take into account the factors utilized by the federal courts, including: whether the default is largely technical and the defendant is now ready to defend; whether the plaintiff has been prejudiced by the defendant's delay in

responding; and whether the court would later set aside the default judgment under Rule 55(c).

The standard in amended Rule 55(c) for setting aside a default is taken from Federal Rule of Civil Procedure 60(b), which is made applicable in the default judgment context by Federal Rule 55(c), and should be interpreted in accordance with federal case law. Under former Rule 55(c), a default judgment could be set aside only upon a showing of "excusable neglect, unavoidable casualty, or other just cause." The amended rule, however, adopts a more liberal standard. Under subdivision (c)(1), for example, a default judgment may be set aside on the basis of "mistake, inadvertence, surprise, or excusable neglect." In addition, subdivision (c)(4) permits the court to set aside a default judgment "for any other reason justifying relief from the operation of the judgment." The amended rule also makes plain that a defendant seeking to set aside a default judgment must show a meritorious defense, unless the judgment is void. This requirement is consistent with federal practice, *see* C. Wright & A. Miller, *supra* § 2697, and with Arkansas case law. *E.g., Wilburn* v. *Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989). It should also be noted that Rule 55(c) is the exclusive basis for setting aside a default judgment. As amended in 1990, Rule 60 does not apply to default judgments.

New subdivision (f) provides a "grace period" after a case that has been removed to federal court is remanded to the state court. During this period, a default judgment cannot be entered and the defendants "may move or plead as they might have done had the case not been removed."

Rule 60, Ark. R. Civ. P.

Rule 60(c), Arkansas Rules of Civil Procedure, is amended as follows:

1. By amending the opening language to read as follows:

(c) Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days. The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the

expiration of ninety (90) days after the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order.

2. By deleting subdivision (c)(7) and by redesignating subdivision (c)(8) as subdivision (c)(7).

The following amendment to the Reporter's Note accompanying Rule 60 is adopted:

Addition to Reporter's Note, 1990 Amendment. Rule 60 has been amended to eliminate any overlap with Rule 55. Under former subdivision (c)(7) of Rule 60, a trial court could set aside a judgment "[f]or unavoidable casualty or misfortune preventing the party from appearing or defending." The 1990 amendment deletes this provision, which has been cited in default judgment cases. *E.g., McGee* v. *Wilson*, 275 Ark. 466, 631 S.W.2d 292 (1982). Moreover, the new opening language of paragraph (c) specifically states that Rule 60 does not apply to default judgments, "which may be set aside in accordance with Rule 55(c)."

Rule 13, Ark. R. Civ. P.

Rule 13, Arkansas Rules of Civil Procedure, is amended by deleting the last sentence of subdivision (c).

The following amendment to the Reporter's Note accompanying Rule 13 is adopted:

Addition to Reporter's Note, 1990 Amendment: The amendment deletes the last sentence of subdivision (c), which provided that "[i]n the event the amount asserted in the counterclaim exceeds the monetary jurisdiction of the court in which it is filed, the matter shall be transferred to a court of competent jurisdiction to hear the full extent of the claim and counterclaim." This provision created confusion, since the state courts of general jurisdiction do not have monetary jurisdictional limits. While inferior courts have such limits, counterclaims in those courts are governed by Rule 7 of the Inferior Court Rules.

Rule 23, Ark. R. Civ. P.

Rule 23, Arkansas Rules of Civil Procedure, is amended as follows:

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

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

2. By deleting subdivision (c) and replacing it with the following:

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

3. By deleting subdivision (d) and replacing it with the following:

> (d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class

or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended from time to time as may be desirable.

4. By adding the following as new subdivision (e):

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court. In cases where the court has entered an order that an action shall be maintained as a class action, notice of such proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The following amendment to the Reporter's Note accompanying Rule 23 is adopted:

Addition to Reporter's Note, 1990 Amendment:
Subdivision (a) has been completely rewritten to set out the requirements for numerosity, commonality, typicality, and adequate representation. As revised, subdivision (a) is identical to the corresponding federal rule. Former subdivision (c) has been modified slightly and redesignated as subdivision (e). Under the revised version, which is based on the corresponding federal rule, notice of a proposed dismissal or compromise is mandatory rather than discretionary. New subdivision (c) requires that the best practicable notice of the pendency of class actions seeking monetary relief, whether legal or equitable, be given to all class members. Among other things, the notice must advise class members of their right to participate in or be excluded from the litigation. When monetary relief is sought, class members must, as a matter of due process, be given such

notice and afforded the opportunity to "opt out" of the class action. *See Phillips Petroleum* v. *Shutts*, 472 U.S. 797 (1985). It is not clear from *Shutts* whether due process requires such notice when the class action involves only injunctive or declaratory relief. *Id.* at 811, n.3. Subdivision (c) does not impose such a requirement in such circumstances, but the trial court may, pursuant to subdivision (d), order that notice be given. The last sentence of subdivision (c) makes clear that the class representatives must initially bear the cost of the notice, though such cost may ultimately be shifted to the opposing parties. This practice is followed in the federal courts. *See Eisen* v. *Carlisle and Jacquelin*, 417 U.S.156 (1974). Subdivision (d) has been revised to take into account the foregoing changes and to spell out in further detail the trial court's discretion in the management of a class action. It is virtually identical to the corresponding federal rule.

Rule 50, Ark. R. Civ. P.

Rule 50, Arkansas Rules of Civil Procedure, is amended by deleting the phrase "or to move for judgment notwithstanding the verdict," as well as the commas that precede and follow it, from subdivision (e).

The following addition to the Reporter's Note accompanying Rule 50 is adopted:

Addition to Reporter's Note, 1990 Amendment:
Subdivision (e) of the rule has been amended to eliminate a potential conflict with subdivision (b). Under the latter, a party may not move for judgment n.o.v. unless he has made a motion for directed verdict at the close of all evidence. However, subdivision (e) provided that a party's failure "to move for a directed verdict at the conclusion of all the evidence, or to move for judgment notwithstanding the verdict" precluded challenging the sufficiency of the evidence on appeal. The use of the disjunctive suggested, contrary to subdivision (b), that a party could preserve a challenge to the sufficiency of the evidence by moving for a judgment n.o.v. even if he had not previously moved for a directed verdict at the close of all the evidence. Accordingly, subdivision (e) has been amended to delete the phrase "or to move for judgment notwithstanding the

verdict."

Rule 58, Ark. R. Civ. P.

Rule 58, Arkansas Rules of Civil Procedure, is amended by deleting the phrase "Rule 79(a)" from the second paragraph and replacing it with "Administrative Order No. 2."

The following amendment to the Reporter's Note accompanying Rule 58 is adopted:

> *Addition to Reporter's Note, 1990 Amendment*: This housekeeping amendment replaced the reference to Rule 79(a) in the second paragraph with a reference to Administrative Order No. 2, which appears in the appendix to the Rules of Civil Procedure. Rule 79 was abolished in 1987 when the administrative order was adopted.

Administrative Order

The following administrative order is adopted:

ADMINISTRATIVE ORDER NO. 3 —TRIAL COURT RECORD

It shall be the duty of a court of record to require that a verbatim record be made of all proceedings pertaining to any matter before it.

IN THE MATTER OF PROPOSED CHANGES TO THE ARKANSAS RULES OF CIVIL PROCEDURE AND THE ARKANSAS RULES OF EVIDENCE

799 S.W.2d 811

Supreme Court of Arkansas
Delivered December 10, 1990

PER CURIAM. The Arkansas Supreme Court Committee on Civil Practice had proposed changes to A.R.C.P. 35 and A.R.E. 503. The proposals are published herewith. Before deciding whether to adopt the proposals the court would appreciate receiving the comments of members of the bench and bar.

Comments 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

Rule 35, Ark. R. Civ. P.

Rule 35, Arkansas Rule of Civil Procedure, is amended by adding the following new subdivision (c):

> (c) *Medical Records.* Where a party relies upon his physical, mental or emotional condition as an element of his claim or defense, he shall, upon the request of any other party, execute an authorization to allow such other party to obtain copies of his medical records; provided, however, a party shall not be required, by order of court or otherwise, to authorize any communication with his physician or psychoptherapist other than (1) the furnishing of medical records, (2) communications in the context of formal discovery procedures, or (3) informal conference in the presence of the party's attorney. The term "medical record" means any writing, document or electronically stored information pertaining to or created as a result of treatment, diagnosis or examination of a patient.

The following amendment to the Reporter's Note accompanying Rule 35 is adopted:

> *Addition to Reporter's Note, 1990 Amendment*: New subdivision (c) of this rule sets out the circumstances under which a party must authorize release of his medical records to another party. It also makes plain that a party may not be required to allow an adversary to communicate with the party's physician or psychotherapist outside the formal discovery process or out of the presence of the party's attorney. This safeguard is deemed necessary to protect the confidential relationship between a party and his physician or psychotherapist.

Rule 503, Ark. R. Evid.

Rule 503, Arkansas Rule of Evidence, is amended as follows:

1. By adding the following as new paragraph (5) to subdivision (a) of the rule:

> (5) A "medical record" is any writing, document or electronically stored information pertaining to or created as a result of treatment, diagnosis or examination of a patient.

2. By amending subdivision (b) of the rule by adding the phrase "his medical records or" after the word "disclosing" and before the word "confidential."

3. By deleting paragraph (3) of subdivision (d) of the rule and replacing it with the following:

> (3) Condition an element of claim or defense. 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 relies upon the condition as an element of his 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 claim or defense; provided, however, a patient shall not be required, by order of court or otherwise, to authorize any communication with any physician or psychotherapist other than (A) the furnishing of medical records, (B) communications in the context of formal discovery procedures, or (C) informal conference in the presence of the party's attorney.

IN RE: BAR OF ARKANSAS MEMBERSHIP DUES

Supreme Court of Arkansas
Delivered January 28, 1991

PER CURIAM. By a per curiam delivered November 23, 1987, we stated that effective January 1, 1988, the annual dues for membership in the Bar of Arkansas would be $50.00. We noted

that the increase in dues was to finance the hiring of an administrator, whose job, in part, would be the supervision of the Continuing Legal Education Program on behalf of this Court.

We failed to formally note, which we now rectify, that all trial and appellate judges, both state and federal, are subject to payment of the annual dues for membership in the Bar of Arkansas.

IN THE MATTER OF THE CHANGES TO ADMINISTRATIVE ORDERS OF THE ARKANSAS SUPREME COURT

Supreme Court of Arkansas
Delivered January 28, 1991

PER CURIAM. By per curiam order of December 10, 1990, styled "IN THE MATTER OF CHANGES TO THE ARKANSAS RULES OF CIVIL PROCEDURE, THE ARKANSAS INFERIOR COURT RULES, and THE ADMINISTRATIVE ORDERS OF THE ARKANSAS SUPREME COURT," various rules changes were promulgated to "become effective . . . on February 1, 1991, unless . . . withdrawn prior to that date."

Among the changes was an addition to the administrative orders of the court to be styled, "ADMINISTRATIVE ORDER NO. 3. — TRIAL COURT RECORD," which provided: "It shall be the duty of a court of record to require that a verbatim record be made of all proceedings pertaining to any matter before it." The style was erroneous, as an Administrative Order No. 3. had already been promulgated by per curiam order of November 19, 1990.

The administrative order promulgated in our order of December 10, 1990, is hereby withdrawn and referred to the Arkansas Supreme Court Committee on Civil Practice for reconsideration. We ask the committee to consider particularly whether the proposed order should apply only to contested proceedings and whether the record requirement should apply to

arguments of counsel to the court solely on matters of law.

IN RE: ARKANSAS BAR ASSOCIATION COMMITTEE TO STUDY AND RECOMMEND SOLUTIONS IN THE DISPOSITION OF THE SUPREME COURT AND COURT OF APPEALS APPELLATE CASE LOAD

Supreme Court of Arkansas
Delivered February 18, 1991

PER CURIAM. On November 19, 1990, we issued a per curiam order requesting that Charles Roscopf, President of the Arkansas Bar Association, reinstate the 1984 special committee, which previously studied the state's appellate caseload, and recharge the Committee to conduct a study that should include, but not be limited to: 1) whether or not additional appellate judges should be added to the present court of appeals, 2) evaluation of Ark. Sup. Ct. R. 29 and make recommendations for changes or adjustments which should be considered in that Rule, and 3) whether certiorari review should be established in the supreme court.

On January 30, 1991, the Committee, composed of:

Dennis L. Shackleford, Chair, El Dorado
Honorable John A. Fogleman, Little Rock
Honorable Ernie E. Wright, Harrison
David Solomon, Helena
W. H. Sutton, Little Rock
James M. Moody, Little Rock
J. D. Gingerich, Conway

submitted this report to the court with the following recommendations:

(a) There should be six additional judges added to the present Court of Appeals. A purpose of the study of this committee is to determine the extent of the growth of the case load and whether case terminations are maintaining an appropriate pace with that growth. We reach the conclusion that the number of terminations will not keep

up with the projected case load growth. The time for termination will lengthen as this progression continues. To retain the timely termination of cases, the only solution is to increase the number of judges on the Court of Appeals.

(b) The distribution of the caseload between the Arkansas Supreme Court and the Court of Appeals should be adjusted. However, there should be sufficient time allowed for the case load to stabilize after the six judges are added before making adjustments.

(c) There should be divisions of the enlarged court, composed of no less than three (3) judges, with a required procedure for rotation of judges among divisions. The decision of a division should be unanimous. Consideration should be given to the designation of a division or divisions for criminal cases, and other special classes of filings that require priority handling.

(d) At the present time our study does not reveal a need to limit case review in the Arkansas Supreme Court to petition for writ of certiorari. Nor do we find any facts that persuade us to reach the conclusion that discretionary appellate review is a solution. Every unsuccessful litigant is entitled to at least one review by a multi-judge court.

A complete copy of the Committee's findings and report is on file with the Supreme Court Clerk and available for inspection.

We accept the report as filed and extend our sincere appreciation for the work performed by the Committee and its membership, particularly in light of the severe time constraints within which they performed their work.

Appointments to Committees

IN THE MATTER OF THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Delivered December 21, 1990

PER CURIAM. Kenneth Reeves, Esq. of Harrison, Arkansas, is appointed to the Supreme Court Committee on Professional Conduct for a term of seven years, expiring December 31, 1998. Mr. Reeves is appointed as a member from the Third Congressional District, replacing Gary Isbell, Esq. of Mountain Home, Arkansas.

The Court expresses its gratitude to Gary Isbell for his dedicated and faithful service to the Committee.