Cite as 2010 Ark. 35

SUPREME COURT OF ARKANSAS

IN RE ARKANSAS RULES OF CIVIL PROCEDURE, RULES OF THE SUPREME COURT AND COURT OF APPEALS, AND RULES OF APPELLATE PROCEDURE–CIVIL	**Opinion Delivered** January 21, 2010

PER CURIAM

The Arkansas Supreme Court Committee on Civil Practice has submitted its annual proposals and recommendations for changes in rules of procedure affecting civil practice. We have reviewed the Committee's work, and now publish the suggested amendments for comment from the bench and bar. The Notes explain the changes, and the proposed changes are set out in "line-in, line-out" fashion (new material is underlined; deleted material is lined through).

We express our gratitude to the Chair of the Committee, Constance G. Clark, its Reporter, Judge D.P. Marshall Jr., and all the Committee members for their faithful and helpful work with respect to the Rules.

Comments on the suggested rules changes should be made in writing before March 31, 2010 to: Leslie W. Steen, Clerk, Supreme Court of Arkansas, Attn.: Civil Procedure Rules, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

A. ARKANSAS RULES OF CIVIL PROCEDURE

Rule 4. Summons.

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(g) *Proof of Service.* The person effecting service shall make proof thereof to the clerk within the time during which the person served must respond to the summons. Failure to make proof of service, however, shall not affect the validity of service. If service is made by a sheriff or his deputy, proof may be made by executing a certificate of service or return contained in the same document as the summons. If service is made by a person other than a sheriff or his deputy, the person shall make affidavit thereof, and if service has been by mail or commercial delivery company, shall attach to the affidavit a return receipt, envelope, affidavit or other writing required by Rule 4(d)(8). Proof of service in a foreign country, if effected pursuant to the provisions of a treaty or convention as provided in Rule 4(e)(4), shall be made in accordance with the applicable treaty or convention.

. . . .

(k) *Substantial Compliance.* When ruling on a motion to dismiss under 12(b)(4) or (5), the circuit court shall consider whether the plaintiff substantially complied with the service requirements of Rule 4. If the defendant had actual notice of the complaint and filed a timely answer or timely Rule 12(b) motion in response to it, then the circuit court may deny the motion to dismiss despite a technical defect in the service or the process.

Addition to Reporter's Notes, 2010 Amendment: Rule 4(g) has been amended by restoring a sentence from the original Rule reciting the familiar legal principle that a failure to make proof of service does not affect the validity of the service. The sentence was removed more than twenty-five years ago without explanation. Addition to Reporter's Notes, 1983 Amendment. Since then, the Supreme Court and Court of Appeals have repeatedly reaffirmed and applied this principle. *E.g.*, *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 562, 785 S.W.2d 220, 222 (1990); *Renfro v. Air Flo Co.*, 91 Ark. App. 99, 101, 208 S.W.3d 807, 809 (2005). This amendment makes the Rule reflect settled law.

New subdivision (k) reestablishes a substantial-compliance standard for service and process under Rule 4 in situations where no default has occurred. Recent cases have held that a defendant's actual notice of a lawsuit does not validate defective service or defective process. *E.g.*, *Trusclair v. McGowan Working Partners,* 2009 Ark. 203, at 3–4, 203 S.W.3d 428, 430; *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 374–75, 921 S.W.2d 944, 944–45 (1996); *Connally v. Connally*, 95 Ark. App. 42, 47, 233 S.W.3d 168, 172 (2006). Though it does not make actual notice determinative, this amendment gives the circuit court discretion to deny motions for dismissal under Rule 12(b)(4) and 12(b)(5) when the

defendant knew about the complaint and filed a timely answer or timely motion responding to it.

This change accords with older Arkansas authority holding the plaintiff to a substantial-compliance standard, both as to the summons and service, in nondefault cases. *Ford Life Ins. Co. v. Parker*, 277 Ark. 516, 517-18, 644 S.W.2d 239, 240 (1982). The strict-compliance standard grows out of default situations. *E.g., Wilburn v. Keenan Cos.*, 298 Ark. 461, 463, 768 S.W.2d 531, 532 (1989); *Edmonson v. Farris*, 263 Ark. 505, 508, 565 S.W.2d 617, 618 (1978); *Halliman v. Stiles*, 250 Ark. 249, 254, 464 S.W.2d 573, 576-77 (1971). Despite amendment of Arkansas Rule of Civil Procedure 55 to echo Federal Rule 55, it remains notoriously difficult to get an Arkansas default judgment set aside. *E.g., McGraw v. Jones*, 367 Ark. 138, 140–44, 238 S.W.3d 15, 17–20 (2006). The precedent's insistence on strict-compliance is a helpful shield in the default situation. But the strict standard should not be a sword when a defendant had actual notice of the complaint, filed a timely answer or timely Rule 12(b) motion, and the defect in service or process was minor.

It is an often-stated rule that service requirements, being in derogation of common-law rights, must be strictly construed and complied with exactly. *E.g., Trusclair,* 2009 Ark. 203, at 3, 203 S.W.3d at 430; *Carruth*, 324 Ark. at 374-75, 921 S.W.2d at 945. This rule arose, however, in the context of service on out-of-state defendants where "personal jurisdiction over a defendant may be founded on something less than actual notice." *Halliman*, 250 Ark. at 254, 464 S.W.2d at 577; *see generally Kerr v. Greenstein*, 213 Ark. 447, 212 S.W.2d 1 (1948) (first construing the statute allowing service on nonresident motorists by serving the Secretary of State). Where a defendant has actual notice of the complaint and does not default, the due-process concerns animating the strict compliance rule are much weaker. And the reason behind the rule should limit its applicability.

The strict-compliance cases in nondefault situations are at odds with the guiding principal of Rule 4—ensuring due process by giving the defendant adequate notice of the suit and an opportunity to respond before a judgment is entered. This amendment maintains the strict-compliance standard in default situations, while reviving the substantial-compliance standard in cases where the defendant has actual notice of a complaint and files a timely answer or Rule 12(b) motion. In the latter instance, due process is satisfied even if marginal defects in the service or the summons exist.

Rule 5. Service and filing of pleadings and other papers.

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(b) *Service: How Made.*

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(2) Except as provided in paragraph (3) of this subdivision, service upon the attorney or upon the party shall be made by delivering a copy to him or by sending it to him by regular mail or commercial delivery company at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy for purposes of this paragraph means handing it to the attorney or to the party; by leaving it at his office with his clerk or other person in charge thereof; or, if the office is closed or the person has no office, leaving it at his dwelling house or usual place of abode with some person residing therein who is at least 14 years of age. Service by mail is presumptively complete upon mailing, and service by commercial delivery company is presumptively complete upon depositing the papers with the company. When service is permitted upon an attorney, such service may be effected by electronic transmission, <u>including e-mail</u>, provided that the attorney being served has facilities within his <u>or her</u> office to receive and reproduce verbatim electronic transmissions. <u>Service is complete upon transmission but is not effective if it does not reach the person to be served</u>. Service by a commercial delivery company shall not be valid unless the company; (A) maintains permanent records of actual delivery, and (B) has been approved by the circuit court in which the action is filed or in the county where service is to be made.

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<u>**Addition to Reporter's Notes, 2009 Amendment:** Subdivision (b)(2) has been amended to clarify that service upon an attorney by "electronic transmission" includes service by e-mail. The amendment also provides that although service by electronic transmission is complete upon transmission, it is not effective if it does not reach the person to be served. As with other means of service, a claim that service by electronic transmission was not actually received may be raised by the person upon whom service was attempted. A corresponding amendment to Rule 6(d) adds the three-day additional response time allowed for service by mail or commercial delivery company to the time permitted for response to service by electronic transmission.</u>

Rule 6. Time.

. . . .

(d) *Additional Time After Service by Mail or Commercial Delivery Company*. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, commercial delivery company, or electronic transmission, including e-mail pursuant to Rule 5(b)(2), three (3) days shall be added to the prescribed period. Provided, however, that this subdivision shall not extend the time in which the defendant must file an answer or preanswer motion when service of the summons and complaint is by mail or commercial delivery company in accordance with Rule 4.

Addition to Reporter's Notes, 2010 Amendment: Subdivision (d) has been amended to add the three-day additional response time allowed for service by mail or commercial delivery company to the time permitted for response to service by electronic transmission, including by e-mail, under Rule 5(b)(2).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

. . . .

(c) *Persons Not Parties*. This rule does not preclude an independent action against a person not a party for ~~production of documents and things and~~ permission to enter upon land. As provided in Rule 45(b), a person not a party may be compelled to produce documents or tangible things.

Addition to Reporter's Notes, 2010 Amendment: Subdivision (c) has been amended to reflect the 2010 amendment to Rule 45(b), which allows subpoenas for the production of books, papers, documents, or tangible things without a related appearance at a deposition, hearing, or trial.

Rule 45. Subpoena.

. . . .

(b) *For Production of Documentary Evidence*. (1) ~~A~~ Any subpoena issued pursuant to ~~subdivision (d), (e), or (f) of~~ this rule may ~~also~~ command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein~~;~~. The subpoena need not be joined with a subpoena to appear for a deposition, hearing, or trial. If a subpoena does not command an appearance, then it must be served by e-mail, facsimile, or hand delivery on all other parties at least three (3) business days before the subpoena is served on the person to whom it is directed. The party issuing a subpoena that does not

command an appearance must promptly provide a copy to all other parties of all material produced in response to the subpoena.

(2) ~~but the~~ The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may ~~(1)~~ (i) quash or modify the subpoena if it is unreasonable or oppressive or ~~(2)~~ (ii) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

Addition to Reporter's Notes, 2010 Amendment*:* Subdivision (b) has been divided into two numbered paragraphs and amended to allow subpoenas solely for the production of books, papers, documents, or things. The official form and notice have been revised to accommodate subpoenas of this type, and a corresponding change has been made in Rule 34.

The amendment eliminates the long-standing requirement under Arkansas law that a subpoena duces tecum had to be joined with a subpoena for a witness to appear at a deposition, trial, or hearing. This requirement did not reflect actual discovery practice, for lawyers routinely cancelled depositions of non-parties who produced requested documents before the deposition date.

In addition, the amendment aligns Rule 45 with its federal counter- part. *See* Fed. R. Civ. P. 45(a)(1)(C). Unlike the federal rule, however, this Rule does not permit a stand-alone subpoena to permit entry on and inspection of land. In that situation, an independent action must be brought against the non-party to accomplish this discovery. *See* Ark. R. Civ. P. 34(c).

Revised Rule 45(b) also includes greater protections for other parties than the Federal Rules. A party who subpoenas only documents or things must serve the subpoena on all other parties at least three business days before serving the subpoena on the person in possession of the materials. This requirement will insure pre-production notice to, and an opportunity to object by, all other parties in the case. Moreover, the requesting party must provide a copy to all other parties of all materials—books, papers, documents, or tangible things—produced in response to the subpoena.

Subpoena Form

Issued by the
_____ COURT
_____ County, Arkansas
_____

. . . .

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the taking of a deposition in the above case.

Place of Deposition
Date and Time

YOU ARE COMMANDED, at the time of the trial, hearing or deposition described above, to produce and permit inspection and copying of the following documents or objects (list documents or objects):

YOU ARE COMMANDED, no more than five (5) business days after receiving this subpoena, to produce and permit inspection and copying of the following documents or objects (list documents or objects):

. . . .

NOTICE TO PERSONS SUBJECT TO SUBPOENAS

. . . .

A subpoena may command the person to whom it is directed to produce for inspection any books, papers, documents, or tangible things designated in the subpoena. The person subpoenaed may ask the court to quash or modify the subpoena if it is unreasonable or oppressive or to require that the person on whose behalf the subpoena is issued pay the reasonable cost of such production. Rule 45(b), Ark. R. Civ. P. ~~If the subpoena is issued in connection with a deposition,~~ ~~t~~The person subpoenaed may also object in writing to inspection or copying of any or all of the designated materials or seek a protective order from the court. If a written objection is made within ten days of service of the subpoena or on or before the time specified for compliance if such time is less than ten days, the party causing the subpoena to be issued is not entitled to inspect the materials unless the court so orders. Rule 45(~~d~~ e), Ark. R. Civ. P.

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Reporter's Notes Regarding Subpoena Form

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On the other hand, modification of the form in such a way that distorts the controlling law or misleads the recipient is impermissible. ~~Under Rule 45(b), for example, a subpoena duces tecum directed to a non-party is permissible only in connection with a deposition, hearing, or trial. Consequently, adding to the form a box to be checked and an accompanying statement to the effect that the recipient is commanded to permit inspection of specified documents at counsel's office on a given date, is not permissible. By contrast, the federal form offers this option, which is available under the federal rules. See Rules 34(c) & 45(a)(1)(C), Fed. R. Civ. P.~~

B. ARKANSAS RULES OF THE SUPREME COURT AND COURT OF APPEALS

Rule 2-1. Motions~~, general rules~~.

~~(a) *Writing Required*. All motions must be in writing.~~

~~(b) *Number of Copies*. In cases pending before the Supreme Court, eight (8) clearly legible copies must be filed on 8 ½ " x 11" paper. In cases pending before the Court of Appeals, fourteen (14) clearly legible copies must be filed on 8 ½ " x 11" paper.~~

~~(c) *Service*. Evidence of service of motions upon opposing counsel must be furnished at time of filing.~~

~~(d) *Response*. A response may be filed within 10 calendar days of the filing of a motion. Evidence of service is required.~~

~~(e) *Memorandum of authorities*. With any motion, application for temporary relief, or other action of the Court that is sought before the regular submission of the case, the moving party shall file and serve upon opposing counsel or an unrepresented party a short citation of statutes, rules of court, and other authorities upon which the movant relies. Any party responding to any such motion or application shall likewise file a memorandum of authorities.~~

(a) *In general*. Any request for an action by the court before the regular submission of the case shall be made by motion in writing. The motion shall state with particularity the grounds for seeking the order and relief sought.

(b) *Responses and replies*. Any nonmoving party may file a response to a motion within ten calendar days after the motion is filed. Any moving party may file a reply to a response within seven calendar days after the response is filed. A reply shall not present matters that do not relate to the response.

(c) *Briefs*. Except as specified in this subdivision, every motion, response, and reply shall be accompanied by a brief in support. The brief may be incorporated in the motion, response, or reply. The brief shall cite and discuss the precedent, statutes, court rules, and other authorities on which the party relies in arguing for or against the motion. No brief is required in support of or opposition to the following motions: to extend time; to substitute counsel; for attorney's fees; to appoint counsel; to supplement the record or for a writ of certiorari to complete the record; or to stay briefing while the record is completed. When no brief is required, applicable authorities shall be cited in the motion.

(d) *Record references and addenda*. When any motion, response, reply, or related brief refers to any matter in the record, the supporting page of the record shall be cited. When pleadings, motions, orders, the notice(s) of appeal, or papers in the record are essential to understand and resolve the issues argued in any motion, response, reply, or related brief, then copies of those needed record documents shall be attached in an addendum.

(e) *Service, form, and number of copies*. Every motion, response, reply, and supporting brief shall: be served promptly on all other parties and reflect proof of service; contain the complete style of the case; contain a title stating concisely the nature of the paper; and be securely bound on 8½ x 11 paper. An original and eight legible copies shall be filed in any case pending in the supreme court. An original and fourteen legible copies shall be filed in any case pending in the court of appeals.

(f) *Compliance with Administrative Order 19 required*. Every motion, response, similar paper, memorandum of authorities, and any document attached to any of those papers, must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal.

(g) *Motions for reconsideration*. Any motion to reconsider the appellate court's order deciding any motion or petition must be filed no later than eighteen calendar days after the date of the order.

Explanatory Note, 2010 Amendment: The Rule has been substantially rewritten. The changes draw on the prior Rule as well as the rules for handling motions in the circuit courts, the U.S. District Courts, and the U.S. Courts of Appeal. This comprehensive

amendment aims to clarify, simplify, and improve motion practice in Arkansas's appellate courts.

The amended Rule specifically allows replies, on which the prior Rule was silent. It requires citations to specific pages of the record. It also requires the attachment of copies of pleadings, orders, and other papers from the record in an addendum when those materials are needed for a complete understanding of the issues presented. This new addendum requirement reflects the need for each member of our multi-member appellate courts to have ready access to key record materials in deciding motions. For example, in considering a motion to dismiss based on an alleged timing error, each member of the court needs a copy of the judgment, any post-trial motion, any order on a post-trial motion, and the notice(s) of appeal.

As amended, the Rule also clarifies that not every motion needs briefing. Instead, the applicable rule or other authority should be cited, and the material facts specified, in the motion itself. The former Rule's somewhat confusing reference to a "memorandum of authorities"—which some lawyers took to be a brief and others a list—has been eliminated. Finally, to simplify motion practice on appeal, the revised Rule allows the merger of a motion, a response, or a reply with the supporting brief.

New subdivision (g) codifies the Supreme Court's recent decision in *Gray v. State*, 2009 Ark. 419 (*per curiam*). "Eighteen days has proven to provide ample opportunity for a petition for rehearing . . ." after a decision on the merits of a case; and the same time period "will likewise allow a reasonable opportunity. . ." for any party to assert any ground for reconsideration of the decision on any motion or petition. *Id.* at 3.

Rule 2-4. Petitions for review.

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(e) *Clerk's notification; request for oral argument*. When the Supreme Court grants a petition for review, the Clerk shall promptly notify all counsel and parties appearing pro se. Within two weeks of the notification, ~~fourteen~~ eighteen additional copies of the briefs previously submitted to the Court of Appeals shall be filed with the Clerk. Any party may request oral argument by filing, contemporaneously with that party's filing of the additional copies of the briefs, a letter, separate from the brief, stating the request with a copy to all parties. The decision to grant the request for oral argument and other aspects of oral argument are governed by Rule 5-1.

Explanatory Note, 2010 Amendment: Rule 2-4(e) has been amended to increase the number of briefs due from each party after the Supreme Court grants review. The Clerk needs eighteen copies for the members of the Court and their clerks, the Court's archive, and to have available for the public.

Rule 4-1. Style of briefs.

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(d) *Compliance with Administrative Order 19 required*. All parts of all briefs, including the abstract and any document attached to any brief in the addendum, must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal. If the record contains confidential information that is neither necessary nor relevant for the appellate court's consideration of the case, then the party shall omit that information throughout the brief, including the abstract and addendum. If confidential information is integrated with necessary information, then the party should redact the confidential information in the abstract and addendum. In this situation, the party need not file an unredacted version of the brief. If the confidential information is necessary and relevant to a decision on appeal, pursuant to Rule 4-4, the party must file ~~8~~ 9 redacted copies and 9 unredacted copies of the brief for a total of ~~17~~ 18 copies. The unredacted copies shall be filed under seal. The cover of each brief shall indicate clearly whether it is REDACTED or UNREDACTED.

(e) *Brief covers—mandatory colors*. All briefs shall contain a cover of one of the following colors:

Appellant's Brief - Blue
Appellee's Brief - Red
Any Reply Brief - Gray
Amicus Brief - Green
Any Unredacted Brief Filed Under Seal - Yellow
Any Other Brief - Tan

If a party files a combined brief in a case involving an appeal and a cross-appeal, then the cover shall be the color prescribed for the first brief in the combined filing. In any case where a party files redacted and unredacted briefs, the cover of every unredacted brief of any kind shall be yellow.

(~~e~~f) *Non-compliance*. Briefs not in compliance with this rule shall not be accepted by the Clerk. When a party submits a brief on time that substantially complies with the rules, the Clerk may mark the brief "tendered," grant the party a seven-day compliance extension and return the brief to the party for correction. If the party resubmits a compliant brief within seven (7) calendar days, then the Clerk shall accept that brief for filing on the date it is received.

Explanatory Note, 2010 Amendment: Rule 4-1(d) has been amended. To have an adequate number of copies of each brief, the number of redacted copies required has been increased by one. This in turn increased the total number of copies to eighteen.

New subdivision (e) mandates the color of the cover for each kind of brief. The mandate was prompted primarily by the need to better identify in some obvious way any unredacted brief filed under seal containing confidential information. The required yellow cover for all these briefs—whether an opening brief, a responsive brief, or a reply brief—will help prevent the inadvertent disclosure of this information. The rest of the new mandatory color scheme echoes the familiar requirements of Federal Rule of Appellate Procedure 32(a)(2) for the covers of briefs filed in the U.S. Court of Appeals for the Eighth Circuit and other federal appellate courts. The amended rule sacrifices diversity in the color of brief covers, but gains efficiency for parties and appellate courts in handling briefs. Former subdivision (e) is now subdivision (f).

Rule 4-4. Filing and service of briefs in civil cases.

(a) *Appellant's brief.* In all civil cases the appellant shall, within 40 days of lodging the record, file ~~17~~ 18 copies of the appellant's brief with the Clerk and furnish evidence of service upon opposing counsel and the circuit court. Each copy of the appellant's brief shall contain every item required by Rule 4-2. Unemployment compensation cases appealed from the Arkansas Board of Review may be submitted to the Court of Appeals for decision as soon as the transcript is filed, unless the petition for review shows it is filed by an attorney, or notice of intent to file a brief for the appellant is filed with the Clerk prior to the filing of the transcript.

When a party has determined that confidential information is necessary and relevant to the appellate court's consideration of the case, redaction shall be done pursuant to Rule 4-1(d), and the party shall file ~~8~~ 9 redacted copies and 9 unredacted copies of the appellant's brief. The unredacted copies shall be filed under seal. The cover of each brief shall indicate clearly whether it is REDACTED or UNREDACTED.

(b) *Appellee's brief—Cross-appellant's brief.* The appellee shall file ~~17~~ 18 copies of the appellee's brief, and of any further abstract or Addendum thought necessary, within 30 days after the appellant's brief is filed, and furnish evidence of service upon opposing counsel and the circuit court. If the appellee's brief has a supplemental abstract or Addendum, it shall be compiled in accordance with Rule 4-2 and included in or with each copy of the brief. This Rule shall apply to cross-appellants. If the cross-appellant is also the appellee, the two separate arguments may be contained in one brief, but each argument is limited to 30 pages.

When a party has determined that confidential information is necessary and relevant to the appellate court's consideration of the case, redaction shall be done pursuant to Rule 4-1(d), and the party shall file ~~8~~ 9 redacted copies and 9 unredacted copies of the appellant's brief or cross-appellant_s brief. The unredacted copies shall be filed under seal. The cover of each brief shall indicate clearly whether it is REDACTED or UNREDACTED.

(c) *Reply brief—Cross-appellant's reply brief.* The appellant may file ~~17~~ 18 copies of a reply brief within 15 days after the appellee's brief is filed and shall furnish evidence of service upon opposing counsel and the circuit court. This Rule shall apply to the cross-appellant's reply brief except it must be filed within 15 days after the cross-appellee's brief is filed.

When a party has determined that confidential information is necessary and relevant to the appellate court's consideration of the case, redaction shall be done pursuant to Rule 4-1(d), and the party shall file ~~8~~ 9 redacted copies and 9 unredacted copies of the reply brief or cross-appellant_s reply brief. The unredacted copies shall be filed under seal. The cover of each brief shall indicate clearly whether it is REDACTED or UNREDACTED.

Explanatory Note, 2010 Amendment: Rule 4-4(a), (b) & (c) have been amended to increase the required number of redacted copies of any brief from eight to nine and the total number of copies of all briefs from seventeen to eighteen. These changes echo the 2010 amendments to Rule 4-1.

Rule 5-1. Oral Arguments.

(a) *Written request required.* Any party may request oral argument by filing, contemporaneously with that party's brief, a letter, separate from the brief, stating the request with a copy to all parties. The request for oral argument may be filed contemporaneously with either the party's initial brief or reply brief. Oral argument will be allowed upon request unless it is determined that

(1) the appeal is frivolous;

(2) the dispositive issue or set of issues has been decided authoritatively; or

(3) the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the decision-making process.

~~Within 15 calendar days of the mailing of the letter notifying the Clerk and the other party or parties of the request for oral argument, counsel and the parties may submit to the Clerk, in writing, dates when they will be unavailable for argument. In addition to the reasons listed above, if it appears that attempts to schedule oral argument may result in undue delay, the Court may decide any case without oral argument.~~

The ~~c~~Court may at its discretion and on its own motion select any case for oral argument when it appears to the ~~c~~Court that the matters presented for consideration are such that oral arguments are appropriate for a full presentation of the issues.

(b) *Argument date fixed.* The Clerk will notify counsel or the parties of the date oral argument is to be held or that the case will be submitted on briefs only. Thereafter, the date

for argument may be changed only upon written motion to the Court and upon a showing of good cause. If attempts to schedule oral argument may result in undue delay, the Court may decide the case without oral argument. Counsel who have not requested oral argument are not required to appear at the argument but must, at least five days before the date the argument is to be heard, notify the Clerk in writing that they do not intend to appear. If counsel fails to provide notification and makes no appearance, he or she shall be subject to sanctions under Rule 11 of the Rules of Appellate Procedure—Civil.

Explanatory Note, 2010 Amendment: Requests for oral argument, especially in the Court of Appeals, are increasing. The conflict-dates option of the former Rule, however, made scheduling oral argument increasingly difficult. Sometimes counsel were overzealous in suggesting conflicts, resulting in delayed dispositions. In other instances, by the time that the appellate court could submit the case for decision, the conflict dates submitted had passed. The amendment eliminates the conflict-dates option. The appellate court will schedule oral argument on a date that best achieves the efficient administration of justice across all cases. The court may reschedule oral argument on motion for good cause. More than one motion to reschedule, however, will likely lead to submission of the case without oral argument so that the case may be decided without undue delay.

Rule 6-1. Extraordinary writs, expedited consideration, and temporary relief.

. . . .

(e) *Page limitation*. Absent leave of court for good cause shown, no petition or response shall exceed fifteen pages excluding any addendum.

(~~e~~f) *Time for filing briefs*. If the proceedings in the circuit court have been stayed, or the time before a hearing or trial will allow a briefing schedule, briefs are required as in other cases, the parties' brief time under Rule 4-4 for filing a brief to be calculated from the date on which the petition is filed. The mere filing of a petition for relief under this section does not automatically entitle the petitioner to file briefs and stay the proceedings in the circuit court.

Explanatory Note, 2010 Amendment: The amendment creates new subdivision (e), which establishes a fifteen-page limit for petitions for extraordinary writs and responses to those petitions. Record materials in any addendum to a petition or a response do not count against the page limit. Petitions and responses have varied widely in length; no rule prescribed any standard. The fifteen-page limit may be extended by motion showing good cause. Former subdivision (e) is now subdivision (f).

Rule 6-9. Rule for appeals in dependency-neglect cases.

. . . .

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

. . . .

(g) *Extensions*. The Clerk of the Supreme Court shall have the authority to grant one (1) seven-day extension for completion of the record and one (1) seven-day extension to any party to the appeal to file the petition or the response to the petition. The extension shall be computed from the date the petition or response was originally due. Absent extraordinary circumstances, n~~N~~o other extensions shall be granted.

Explanatory Note, 2010 Amendment: Rule 6-9 creates an expedited appellate process in dependency-neglect cases by compressing time periods and curtailing extensions. *Ratliff v. Ark. Dep't of Health & Human Services*, 371 Ark. 534, 535, 268 S.W.3d 322, 323 (2007) (*per curiam*). Experience has revealed the need in a few extraordinary situations, however, for the appellate court to extend the time for preparing the record or the time for filing a petition or a response beyond one seven-day extension. The amended Rule creates an extraordinary-circumstances exception to the Rule's accelerated-record and accelerated-briefing deadlines. This exception should be rarely invoked by litigants and even more rarely allowed by appellate courts. Otherwise, Rule 6-9's salutary purpose of expediting these appeals will be compromised.

C. ARKANSAS RULES OF APPELLATE PROCEDURE —CIVIL

Rule 2. Appealable matters; priority.

(a) An appeal may be taken from a circuit court to the Arkansas Supreme Court from:

. . . .

(11) . . .; ~~and~~

(12) . . .; and

(13). A civil or criminal contempt order, which imposes a sanction and constitutes the final disposition of the contempt matter.

Addition to Reporter's Notes, 2010 Amendment: New subdivision (a)(13) has been added to reflect the common-law rule that some contempt orders are final and appealable. *Young v. Young*, 316 Ark. 456, 460, 872 S.W.2d 856, 858 (1994). For more than a century, Arkansas appellate courts reviewed these issues through certiorari because the statutes did not provide for the appeal of a contempt order. In 1985, the Supreme Court recognized that "[o]ur cases have gradually reached the point at which in contempt cases there is no difference except in name between review by certiorari and review by appeal." *Frolic Footwear, Inc. v. State*, 284 Ark. 487, 489–90, 683 S.W.2d 611, 612 (1985). The Court therefore announced that henceforth it would review contempt orders by way of appeal rather than by writ. 284 Ark. at 490, 683 S.W.2d at 612.

Not all contempt orders, however, are final and thus appealable. For a contempt order to be final, it must completely dispose of the contempt matter between the appellant and the court. *Taylor v. Taylor*, 26 Ark. App. 31, 33, 759 S.W.2d 222, 223 (1988). A final contempt order also imposes sanctions. *Ibid.* Where an order does not impose any sanctions, the contempt has been remitted and no basis for appellate relief exists. *Ibid.* For example, an order indefinitely suspending contempt sanctions amounts to a complete remission of the contempt. *Warren v. Robinson*, 288 Ark. 249, 253, 704 S.W.2d 614, 616–17 (1986); *Stewart v. State*, 221 Ark. 496, 503, 254 S.W.2d 55, 59 (1953). When a contempt sanction is only partially suspended, however, the portion that was suspended is remitted, but the remaining portion of the contempt still exists and may be appealed. *Henry v. Eberhard*, 309 Ark. 336, 342, 832 S.W.2d 467, 470 (1992). Further, when a contempt sanction is suspended conditionally for a specific period of time, our supreme court has concluded that the suspension amounts to a postponement of the contempt rather than a remission. *Ibid.* An order with postponed sanctions is appealable. *Ibid.*

Rule 3. Appeal—How taken.

. . . .

(e) *Content of notice of appeal or cross-appeal.*

A notice of appeal or cross-appeal shall:

(i) specify the party or parties taking the appeal;

(ii) designate the judgment, decree, order or part thereof appealed from;

(iii) designate the contents of the record on appeal;

(iv) state that the appellant has ordered the transcript, or specific portions thereof, if oral testimony or proceedings are designated, and has made any financial arrangements required by the court reporter pursuant to Ark. Code Ann. § 16-13-510 (c);

(v) state whether the appeal is to the Court of Appeals or to the Supreme Court; and if to the Supreme Court, the appellant shall designate the applicable subdivision of Arkansas Supreme Court and Court of Appeals Rule 1-2(a) which gives the Supreme Court jurisdiction. This declaration shall be for the purpose of placing the case with one court or the other for preliminary administration. It shall not preclude the appellant from filing his or her brief pursuant to Arkansas Supreme Court and Court of Appeals Rules 4-3 and 4-4 in the alternative court if that is later determined by the appellant to be appropriate; and

(vi) state that the appealing party abandons any pending but unresolved claim. This abandonment shall operate as a dismissal with prejudice effective on the date that the otherwise final order or judgment appealed from was entered. An appealing party shall not be obligated to make this statement if the party is appealing an interlocutory order under Arkansas Rule of Appellate Procedure—Civil 2(a)(2)–(a)(13), Arkansas Rule of Appellate Procedure—Civil 2(c), or Arkansas Supreme Court and Court of Appeals Rule 6-9(a), or is appealing a partial judgment certified as final pursuant to Arkansas Rule of Civil Procedure 54(b).

Addition to Reporter's Notes, 2010 Amendment. Subdivision (e) has been reformatted into subparts, creating a check list to help parties in preparing their notices of appeal and cross appeal. With one exception, no substantive change from the former Rule has been made.

Subdivision (e) has been amended to require one new statement in every notice of appeal and notice of cross appeal from a final order or judgment. Pursuant to new subpart (vi), the appealing party must state that the party is abandoning any pending but unresolved claim. This abandonment operates as a dismissal with prejudice of these stray claims.

This amendment will cure a recurring finality problem. Too often—after the parties have paid for the record, filed it, and filed all their briefs on appeal—the appellate court will discover that what appears to be a final order or judgment is not final because a pleaded claim, counterclaim, or cross-claim remains unadjudicated. This kind of stray claim destroys finality and renders an otherwise final order or judgment unappealable. *E.g.*, *Ramsey v. Beverly Enterprises, Inc.*, 375 Ark. 424, 291 S.W.3d 185 (2009); *Rigsby v. Rigsby*,

340 Ark. 544, 11 S.W.3d 551 (2000); *Brasfield v. Murray*, 96 Ark. App. 207, 239 S.W.3d 551 (2006). These stray claims often appear to have been forgotten by the parties or abandoned even though no order resolved them. It wastes parties' and courts' scarce resources to have two appeals in these situations.

A party taking an interlocutory appeal or cross appeal authorized by the Arkansas Rules of Appellate Procedure, the Rules of the Supreme Court and Court of Appeals, or precedent, should not make this statement in the parties' notice. Nor is this statement required in a notice of appeal or cross appeal from a judgment certified by the circuit court as final under Rule of Civil Procedure 54(b). In all these situations, which are in essence interlocutory appeals, some claims remain pending and viable in the circuit court during the appeal.

Rule 5. Record —Time for filing.

. . . .

(d) *Untimely Record*. A party's failure to file the record on time shall not deprive the appellate court of jurisdiction. The clerk shall file an untimely record and docket the appeal when the record is accompanied by a verified statement from the attorney or pro se litigant explaining why the party missed the record-filing deadline. The appeal will proceed on the merits, and the appellate court will consider the verified statement and impose whatever sanction is just and reasonable considering all the circumstances. The appellate court may, in its discretion, refer counsel to the Committee on Professional Conduct.

Addition to Reporter's Note, 2010 Amendment: New subdivision (d) changes Arkansas law about filing the record in civil appeals. It embodies the better-reasoned view that filing a timely notice of appeal is the only jurisdictional requirement for pursuing an appeal. *Smith v. Boone*, 284 Ark. 183, 184, 680 S.W.2d 709, 710 (1984); *West v. Smith*, 224 Ark. 651, 658, 278 S.W.2d 126, 131 (1955) (George Rose Smith, J., dissenting); *see generally* 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3949.6 (2d ed. 1996). This new provision harmonizes this Rule with Arkansas Rule of Appellate Procedure–Civil 3(b), which recognizes that, after filing a timely notice of appeal, "[f]ailure 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."

New subdivision (d) overrules in part cases such as *Morris v. Stroud*, 317 Ark. 628, 883 S.W.2d 1 (1994) and *Jordan v. White River Medical Center*, 301 Ark. 292, 783 S.W.2d 836 (1990). Those decisions describe the timely filing of the record as a jurisdictional requirement. It is not. An appealing party must file a record with the clerk of the Supreme Court and Court of Appeals so that the appellate court's jurisdiction may attach

and the court may act. *Barclay v. Farm Credit Services*, 340 Ark. 65, 68, 8 S.W.3d 517, 519 (2000). But the timeliness of the record is a matter of judicial administration, not jurisdiction. The cases allowing a tardy record in civil cases in extraordinary circumstances implicitly recognize this principle because a defect in appellate jurisdiction cannot be waived. *E.g., Thomas v. Committee "A," Arkansas State Plant Board*, 254 Ark. 997-A, 497 S.W.2d 9 (1973). Under the amended Rule, filing an untimely record with the appellate court's clerk "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." Ark. R. App. P.–Civil 3(b).

New subdivision (d) does not change the important duty of litigants and their lawyers to file an appeal record promptly. The duty has been part of our law since soon after statehood. *Hathaway v. Smith*, 3 Ark. 248 (1841). Rule 5s record-filing deadlines remain in full force. Ark. R. App. P.–Civil 5(a). Achieving finality in litigation as soon as possible is important for litigants and our courts. Subdivision (d) does not alter litigants' option to dismiss any appeal by joint stipulation in the circuit court before a record is filed with the appellate court. Ark. R. App. P.–Civil 3(b). Nor does the new provision alter the right of any party to file a partial record and seek dismissal of the appeal on any basis allowed by law. Ark. R. App. P.–Civil 5(c).

Subdivision (d)'s requirement of a verified statement by counsel or the pro se litigant explaining the delay will enable our appellate courts to address late-record cases efficiently and fairly. The court can inform its discretion with material considerations, such as the reason for the late filing, the length of the delay, and any prejudice to opposing parties. As is routinely done in criminal appeals now, the court may refer counsel to the Committee on Professional Conduct. Pursuant to Rule 3, moreover, the appellate court may dismiss an appeal in egregious circumstances. Except in those circumstances, however, any penalty for a late record will be borne by counsel rather than by the litigant through loss of the party's appeal rights.