IN RE: PROPOSED ADMINISTRATIVE ORDER NUMBER 19 — ACCESS TO COURT RECORDS

Supreme Court of Arkansas
Opinion delivered June 29, 2006

PER CURIAM. The Arkansas Supreme Court Committee on Automation and the Committee's Task Force on Public Access and Privacy has submitted to the court a proposed administrative order governing the public's access to court records. This proposal is the product of exhaustive work by the Task Force and others over several years, and the court is greatly appreciative of their efforts.

In 2004, the court invited governmental and non-governmental organizations to designate persons to participate on the Task Force for the purpose of developing a policy on access to court records which balanced the public's right to know with the need to protect individual privacy from threats such as identity theft. The process has included public hearings and solicitation of comments to draft proposals. Participants in the process have included such groups as the Arkansas Freedom of Information Coalition, Arkansas Trial Lawyers Association, Ad Hoc Committee on Public Access to Court Records of the Arkansas Judicial Council, UALR Bowen School of Law, UA School of Law, DIS Office of Information Technology, Attorney General's Office, Arkansas Circuit Clerks Association, Arkansas Public Defender Commission, District Judge's Council, Bureau of Legislative Research, Arkansas Bar Association, Arkansas Press Association, Arkansas Times, The Morning News, Jonesboro Sun, Domestic Violence Coalition, Prosecuting Attorneys Association and the Little Rock Chamber of Commerce. We thank all who have participated to this point in the process.

We are now at the point for the current work product to be published for general review and comment. The proposal is appended hereto, including the commentary, which more fully explains the provisions. It consists of eleven sections, and in submitting it to the court, the Task Force described them as follows: Sections I, II, and IX address the purpose and scope of the Order, and Section III provides definitions. Section IV describes a presumptive right of access to court records, while Sections V through X detail terms of and limitations on access that pertain in

different circumstances, such as remote access, bulk access, and access to court records maintained by third-party vendors.

We publish the proposed Administrative Order on Access to Court Records for comment, and the comment period shall expire October 1, 2006. Comments should be in writing and addressed as follows: Clerk, Arkansas Supreme Court, Attention *ADMINISTRATIVE ORDER — ACCESS TO COURT RECORDS*, Justice Building, 625 Marshall Street, Little Rock, AR 72201.

PROPOSED ADMINISTRATIVE ORDER NUMBER 19 ACCESS TO COURT RECORDS

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Section I. Authority, Scope, and Purpose

A. Pursuant to Ark. Const. Amend. 80 §§ 1, 3, 4; Ark. Code Ann. §§ 16-10-101 (Repl. 1999), 25-19-105(b)(8) (Supp. 2003), and this Court's inherent rule-making authority, the Court adopts and publishes Administrative Order Number 19: Access to Court Records.

This order governs access to, and confidentiality of, court records. Except as otherwise provided by this order, access to court records shall be governed by the Arkansas Freedom of Information Act (Ark. Code Ann. §§ 25-19-101, et seq.).

B. The purposes of this order are to:

(1) promote accessibility to court records;

(2) support the role of the judiciary;

(3) promote governmental accountability;

(4) contribute to public safety;

(5) reduce the risk of injury to individuals;

(6) protect individual privacy rights and interests;

(7) protect proprietary business information;

(8) minimize reluctance to use the court system;

(9) encourage the most effective use of court and clerk of court staff;

(10) provide excellent customer service; and

(11) avoid unduly burdening the ongoing business of the judiciary.

C. This order applies only to court records as defined in this order and does not authorize or prohibit access to information gathered, maintained, or stored by a non-judicial governmental agency or other entity.

D. Disputes arising under this order shall be determined in accordance with this order and, to the extent not inconsistent with this order, by all other rules and orders adopted by this Court.

E. This order applies to all court records; however clerks and courts may, but are not required to, redact or restrict information that was otherwise public in case records and administrative records created before January 1, 2006.

Section II. Who Has Access Under This Order

A. All persons have access to court records as provided in this order, except as provided in section II(B) of this order.

B. The following persons, in accordance with their functions within the judicial system, may have greater access to court records:

(1) employees of the court, court agency, or clerk of court;

(2) private or governmental persons or entities who assist a court in providing court services;

(3) public agencies whose access to court records is defined by other statutes, rules, orders or policies; and

(4) the parties to a case or their lawyers with respect to their own case.

Section III. Definitions

A. For purpose of this order:

(1) "Court Record" means both case records and administrative records, but does not include information gathered, maintained or stored by a non-court agency or other entity even though the court may have access to the information, unless it is adopted by the court as part of the court record.

(2) "Case Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a judicial proceeding.

(3) "Administrative Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency, or clerk of court pertaining to the administration of the judicial branch of government.

(4) "Court" means the Arkansas Supreme Court, Arkansas Court of Appeals, and all Circuit, District, or City Courts.

(5) "Clerk of Court" means the Clerk of the Arkansas Supreme Court, the Arkansas Court of Appeals, and the Clerk of

a Circuit, District, or City Court including staff. "Clerk of Court" also means the County Clerk, when acting as the Ex-Officio Circuit Clerk for the Probate Division of Circuit Court.

(6) "Public access" means that any person may inspect and obtain a copy of the information.

(7) "Remote access" means the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained.

(8) "In electronic form" means information that exists as electronic representations of text or graphic documents; an electronic image, including a video image of a document, exhibit or other thing; data in the fields or files of an electronic database; or an audio or video recording (analog or digital) of an event or notes in an electronic file from which a transcript of an event can be prepared.

(9) "Bulk Distribution" means the distribution of all, or a significant subset of, the information in court records, as is, and without modification or compilation.

(10) "Compiled Information" means information that is derived from the selection, aggregation or reformulation of information from more than one court record.

(11) "Confidential" means that the contents of a court record may not be disclosed unless otherwise permitted by this order, or by law. When and to the extent provided by this order or by law, "confidential" shall mean also that the existence of a court record may not be disclosed.

(12) "Sealed" means that the contents of a court record may not be disclosed unless otherwise permitted by this order, or by law. When and to the extent provided by this order or by law, "sealed" shall mean also that the existence of a court record may not be disclosed.

(13) "Protective order" means that as defined by the Arkansas Rules of Civil Procedure.

(14) "Expunged" means that the record or records in question shall be sequestered, sealed, and treated as confidential, and neither the contents, nor the existence of, the court record may be disclosed unless otherwise permitted by this order, or by law. Unless otherwise provided by this order or by law, "expunged" shall not mean the physical destruction of any records.

(15) "Court Agency" means the Administrative Office of the Courts, the Office of Professional Programs, the Office of the Arkansas Supreme Court Committee on Professional Conduct, the Judicial Discipline and Disability Commission, and any other office or agency now in existence or hereinafter created, which is under the authority and control of the Arkansas Supreme Court.

(16) "Custodian" with respect to any court record, means the person having administrative control of that record and does not mean a person who holds court records solely for the purposes of storage, safekeeping, or data processing for others.

Section IV. General Access Rule

A. Public access shall be granted to court records subject to the limitations of sections V through X of this order.

B. This order applies to all court records, regardless of the manner of creation, method of collection, form of storage, or the form in which the records are maintained.

C. If a court record, or part thereof, is rendered confidential by protective order, by this order, or otherwise by law, the confidential content shall be redacted, but there shall be a publicly accessible indication of the fact of redaction. This subsection (C) does not apply to court records that are rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record.

D. Public access to trial exhibits shall be granted at the discretion of the court.

Section V. Remote Access

A. Courts should endeavor to make at least the following information, when available in electronic form, remotely accessible to the public, unless public access is restricted pursuant to section VII:

(1) litigant/party/attorney indexes to cases filed with the court;

(2) listings of case filings, including the names of the parties;

(3) the register of actions or docket sheets;

(4) calendars or dockets of court proceedings, including case numbers and captions, date and time of hearings, and location of hearings;

(5) judgments, orders, or decrees.

B. Information beyond this list is left to the discretion of the court.

Section VI. Bulk Distribution and Compiled Information

A. Requests for bulk distribution or compiled information shall be made in writing to the Director of the Administrative Office of the Courts or other designee of the Arkansas Supreme Court. Requests will be acted upon or responded to within a reasonable period of time.

B. Bulk distribution or compiled information that is not excluded by section VII of this order shall be provided according to the terms of this section VI(B).

1) Bulk distribution or compiled information that is not excluded by section VII of this order shall be provided when the following conditions are met:

(a) The requester must declare under penalty of perjury that the request is made for a scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose, and that the identification of specific individuals is ancillary to the purpose of the inquiry.

(b) The requester must declare under penalty of perjury that information obtained pursuant to this section VI(B) will not be used directly or indirectly to sell a product or service to any individual, group of individuals, or the general public. A request for records supporting the news dissemination function of the requester shall not be considered a request that is for commercial use.

(c) The information is requested in a medium in which the information is readily available, and in a format to

which the information is readily convertible with the court or court agency's existing software. At its discretion, the court or court agency may agree to summarize, compile, or tailor electronic data in a particular manner or medium in which the data is not readily available, or in a format to which the data is not readily convertible.

(d) Information that is excluded from section VII of this order can reasonably be segregated from non-excluded information and withheld from disclosure. The amount of information deleted shall be indicated on the released portion of the record, and, if technically feasible, at the place in the record where the deletion was made.

(2) The grant of a request under this section VI(B) may be made contingent upon the requester paying the actual costs of reproduction, including the costs of the medium of reproduction, supplies, equipment, and maintenance, and including the actual costs of mailing or transmitting the record by facsimile or other electronic means, but not including existing personnel time associated with searching for, retrieving, reviewing, or copying information.

(a) If the estimated costs exceed twenty-five dollars ($25.00), the requester may be required to pay that fee in advance.

(b) Information may be furnished without charge or at a reduced charge if it is determined that a waiver or reduction of the fee is in the public interest.

(c) Notwithstanding the other provisions of this section VI(B)(2), if a discretionary request is agreed to under section VI(B)(1)(c), the requester may be charged the actual, verifiable costs of personnel time exceeding two (2) hours associated with the tasks, in addition to the actual costs of reproduction. The charge for personnel time shall not exceed the salary of the lowest paid employee or contractor who, in the discretion of the court or court agency providing the records, has the necessary skill and training to respond to the request.

(d) The requester is entitled to an itemized breakdown of charges under this section VI(B)(2).

C. Bulk distribution or compiled information that does or does not include information excluded from public access pursuant to section VII of this order may be provided according to the terms of this section VI(C).

(1) The request must:

(a) fully identify the requester and describe the requester's interest and purpose of the inquiry;

(b) identify what information is sought;

(c) explain how the information will benefit the public interest or public education;

(d) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited;

(e) explain procedures for accurately distinguishing the records for individuals according to multiple personal identifiers.

(2) Upon receiving a request pursuant to this subsection (C), the Director of the Administrative Office of the Courts, or the court or court agency having jurisdiction over the records is the Administrative Office of the Courts is unable to provide the requested records, may permit objections by persons affected by the release of information, unless individual notice as required under section VI(3)(e) below is waived by the Director or court or court agency having jurisdiction over the records.

(3) The request may be granted only upon determination by the Director of the Administrative Office of the Courts, or by the court or court agency having jurisdiction over the records if the Administrative Office of the Courts is not able to provide the requested records, that the information sought is consistent with the purposes of this order, that resources are available to prepare the information, and that fulfilling the request is an appropriate use of public resources, and further upon finding by clear and convincing evidence that the requester satisfies the requirements of subsection (C), and that

the purposes for which the information is sought substantially outweighs the privacy interests protected by this order. An order granting a request under this subsection may, at the discretion of the Director or the court or court agency having jurisdiction over the records, specify particular conditions or requirements for the use of the information, including without limitation:

(a) The confidential information will not be sold or otherwise distributed, directly or indirectly, to third parties.

(b) The confidential information will not be used directly or indirectly to sell a product or service to an individual, group of individuals, or the general public.

(c) The confidential information will not be copied or duplicated other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.

(d) The requester must pay reasonable costs of responding to the request, as determined by the court.

(e) The requester must provide for individual notice to all persons affected by the release of information.

(4) When the request includes release of social security numbers, driver's license or equivalent state identification card numbers, dates of birth, or addresses, the information provided shall include only the last four digits of social security numbers, only the last four digits of driver's license or equivalent state identification card numbers, only the year of birth, or only the ZIP code of addresses. Account numbers and personal identification numbers (PINs) of specific assets, liabilities, accounts, and credit cards may not be released. The restrictions may be waived only upon a petition to the responding Director, court or court agency.

Section VII. Court Records Excluded From Public Access

A. Case records. The following information in case records is excluded from public access and is confidential absent a court order to the contrary:

(1) information that is excluded from public access pursuant to federal law;

(2) information that is excluded from public access pursuant to the Arkansas Code Annotated;

(3) information that is excluded from public access by order or rule of court;

(4) Social Security numbers;

(5) account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINs);

(6) information about cases expunged or sealed pursuant to Ark. Code Ann. §§ 16-90-901, *et seq.*;

(7) notes, communications, and deliberative materials regarding decisions of judges, jurors, court staff, and judicial agencies;

(8) litigant addresses and phone numbers.

B. Administrative Records. The following information in administrative records is excluded from public access and is confidential absent a court order to the contrary:

(1) information that is excluded from public access pursuant to Arkansas Code Annotated or other court rule;

(2) information protected from disclosure by order or rule of court.

Section VIII. Obtaining Access to Information Excluded from Public Access

A. Any requester, as defined by the Arkansas Freedom of Information Act, may make a verified written request to obtain access to information in a case or administrative record to which public access is prohibited under this order to the court having jurisdiction over the record. The request shall demonstrate that:

(1) reasonable circumstances exist that require deviation from the general provisions of this order;

(2) the public interest in disclosure outweighs the harm in disclosure; or

(3) the information should not be excluded from public access under section VII of this order.

The person seeking access has the burden of providing notice to the parties and such other persons as the court may direct, providing proof of notice to the court or the reason why notice could not or should not be given, demonstrating to the court the requester's reasons for prohibiting access to the information.

B. The court shall hold a hearing on the request, unless waived, within *a reasonable time, not to exceed thirty (30)* days of receipt of the request. The court shall grant a request to allow access following a hearing if the requestor demonstrates by a preponderance of the evidence that any one or more of the requirements of VIII.A.(1) through VIII.A.(3) have been satisfied.

C. A court shall consider the public access and the privacy interests served by this order and the grounds demonstrated by the requestor. In its order, the court shall state its reasons for granting or denying the request. When a request is made for access to information excluded from public access, the information will remain confidential while the court rules on the request.

D. A court may place restrictions on the use or dissemination of the information to preserve confidentiality.

Section IX. When Court Records May Be Accessed

A. Court records that are publicly accessible will be available for public access in the courthouse during regular business hours established by the court. Court records in electronic form to which the court allows remote access under this policy will be available for access during hours established by the court, subject to unexpected technical failures or normal system maintenance announced in advance.

B. Upon receiving a request pursuant to section VI(C), or VIII of this order, a court will respond within a reasonable period of time.

Section X. Contracts With Vendors Providing Information Technology Services Regarding Court Records

A. If a court, court agency, or other private or governmental entity contracts with a vendor to provide information technology support to

gather, store, or make accessible court records, the contract will require the vendor to comply with the intent and provisions of this access policy. For purposes of this section, the term "vendor" also includes a non-judicial branch state, county or local governmental agency that provides information technology services to a court.

B. Each contract shall require the vendor to assist the court in its role of educating litigants and the public about this order. The vendor shall also be responsible for training its employees and subcontractors about the provisions of this order.

C. Each contract shall prohibit vendors from disseminating bulk or compiled information, without first obtaining approval as required by this order.

D. Each contract shall require the vendor to acknowledge that court records remain the property of the court and are subject to the directions and orders of the court with respect to the handling and access to the court records, as well as the provisions of this order.

E. These requirements are in addition to those otherwise imposed by law.

Section XI. Violation of Order Not Basis for Liability

Violation of this order by the disclosure of confidential or erroneous court records by a court, court agency, or clerk of court employee, official, or an employee or officer of a contractor or subcontractor of a court, court agency, or clerk of court shall not be the basis for establishing civil or criminal liability for violation of this order. This does not preclude a court from using its inherent contempt powers to enforce this order.

APPENDIX I. COMMENTARY

Section I. Commentary

The objective of this order is to promote public accessibility to court records, taking into account public policy interests that are not always fully compatible with unrestricted access. The public policy interests listed above are in no particular order. This order attempts to balance competing interests and recognizes that unrestricted access to certain information in court records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses. This order recognizes there are strong societal reasons for allowing public access to court records, and

denial of access could compromise the judiciary's role in society, inhibit accountability, and endanger public safety. Open access allows the public to monitor the performance of the judiciary, furthers the goal of providing public education about the results in cases, and, if properly implemented, reduces court staff time needed to provide public access.

This order starts from the presumption of open public access to court records. In some circumstances; however, there may be sound reasons for restricting access to these records. This order recognizes that there are times when access to information may lead to, or increase the risk of, harm to individuals. However, given the societal interests in access to court records, this order also reflects the view that any restriction to access must be implemented in a manner tailored to serve the interests in open access. It is also important to remember that, generally, at least some of the parties in a court case are not in court voluntarily, but rather have been brought into court by plaintiffs or by the government. A person who is not a party to the action may also be mentioned in the court record. Care should be taken that the privacy rights and interests of such involuntary parties or 'third' persons are not unduly compromised.

Subsection (C) is intended to assure that public access provided under this order does not apply to information gathered, maintained, or stored by other agencies or entities that is not necessary to, or is not part of the basis of, a court's decision or the judicial process. Access to this information is governed by the law and the access policy of the agency collecting and maintaining such information. The ability of a computer in a court or clerk's office to access the information, because the computer uses shared software and databases, does not, by itself, make the information subject to this order.

Existing laws, rules and policies regarding court records have been carefully reviewed during the development of this access policy.

The Administrative Office of the Courts may provide advisory information to individuals or entities about the provisions, restrictions, and limitations of this order.

Section II. Commentary

Section II(A) provides the general rule that all persons, including members of the general public, the media, and commercial and noncommercial entities, are entitled to the same basic level of access to court records. Generally, access to court records is not determined by who is seeking access or the purpose for seeking access; however, some users, such as court employees or the parties to a particular case, may have greater access to those particular records than is afforded the general public.

Section II(B) provides the exception to the general rule and specifies the entities and persons for whom courts may provide greater access. This greater level of access is a result of the need for effective management of the judicial system and the protection of the right to a fair trial.

Sections II(B)(1) through (4) identify groups whose authority to access court records is different from that of the public.

Subsection (1): Employees of the court, court agency, and clerk of court need greater access than the public in order to do their work and therefore work under different access rules.

Subsection (2): Employees and subcontractors of entities who provide services to the court or clerk of court or court agency, that is, court services that have been "outsourced," may also need greater access to information to do their jobs and therefore operate under a different access policy. Section X provides the requirements under this order for contracts with vendors concerning court records.

Subsection (3): This subsection is intended to cover personnel in other governmental agencies who have a need for information in court records in order to do their work. An example of this would be an integrated justice system operated on behalf of several justice system agencies where access is governed by internal policies or statutes or rules applicable to all users of the integrated system.

Subsection (4): This subsection continues nearly unrestricted access by litigants and their lawyers to information in their own cases but no higher level of access to information in other cases. As to cases in which they are not the attorney of record, attorneys would have the same access as any other member of the public.

Section III. Commentary

Sections III(A)(1)-(3) explain which records in a court are covered by this order.

Section III(A)(1) excludes from the definition of "court record" information gathered, maintained, or stored by other agencies or entities that is not necessary to, or is not part of the basis of a court's decision or the judicial process. Access to this information is governed by the laws and access policy of the agency collecting and maintaining such information. The ability of a computer in a court or clerk's office to access the information, because the computer uses shared software and databases, does not, by itself, make the court records access policy applicable to the information. An example of this is information stored in an integrated criminal justice information system

where all data is shared by law enforcement, the prosecutor, the court, defense counsel, and probation and corrections departments. The use of a shared system can blur the distinctions between agency records and court records. Under this section, if the information is provided to the court as part of a case or judicial proceeding, the court's access rules then apply, regardless of where the information came from or the access rules of that agency. Conversely, if the information is not made part of the court record, the access policy applicable to the agency collecting the data still applies even if the information is stored in a shared database.

Section III(A)(2), "Case Record," is meant to be all inclusive of information that is provided to, or made available to, the court that relates to a judicial proceeding. The term "judicial proceeding" is used because there may not be a court case in every situation. The definition is not limited to information "filed" with the court or "made part of the court record" because some types of information the court needs to make a fully informed decision might not be "filed" or technically part of the court record. The language is, therefore, written to include information delivered to, or "lodged" with, the court, even if it is not "filed." An example is a complaint accompanying a motion to waive the filing fee based on indigence. The definition is also intended to include exhibits offered in hearings or trials, even if not admitted into evidence; however, exhibits are excluded from public access under section VII(A)(7), and public access to them are governed by section VIII.

The definition includes all information used by a court to make its decision, even if an appellate court subsequently rules that the information should not have been considered or was not relevant to the judicial decision made.

The language is intended to include within its scope materials that are submitted to the court, but upon which a court did not act because the matter was withdrawn or the case was resolved. Once relevant material has been submitted to the court, it does not become inaccessible because the court did not, in the end, act on the information in the materials because the parties resolved the issue without a court decision.

The definition is written to cover any information that relates to a judicial proceeding generated by the court itself, whether through the court administrator's personnel or the clerk's office personnel. This definition applies to proceedings conducted by temporary judges or referees hearing cases in an official capacity. This includes two categories of information. One category includes documents, such as notices, minutes, orders, and judgments, which become part of the court record. The second category includes information that is gathered, generated, or kept for the purpose of managing the court's cases. This information might never be in a document; it might

only exist as information in a field of a database such as a case management system, an automated register of actions, or an index of cases or parties.

Another set of items included within the definition is the official record of the proceedings, whether it is notes and transcripts generated by a court reporter of what transpired at a hearing, or an audio or video recording (analog or digital) of the proceeding.

Section III(A)(3) defines "Administrative Record." The definition of "court record" includes some information and records maintained by the court and clerk of court that is related to the management and administration of the court or the clerk's office. Examples of this category of information include: internal court policies, memoranda and correspondence, court budget and fiscal records, and other routinely produced administrative records, memos and reports, and meeting minutes.

This subsection makes it clear that the order applies only to information related to the judicial branch. Some information maintained by clerks of court is not a court record, nor is the court responsible for its collection, maintenance, or accessibility. Land records and voter records are examples of information that do not pertain to the administration of the judicial branch of government.

An administrative record might or might not be related to a particular case. That is to say, an administrative record may relate to a particular case and therefore be a case record also. For example, the application of a judicial official for reimbursement for expenses incurred in the course of administering justice in a particular case is both an administrative record and a case record. A record with such dual character may be subject to public disclosure in either capacity; inversely, the record is excluded from public access only if it qualifies for exclusion in both capacities. For this reason, a judicial official who creates administrative records should take care to avoid including the sort of information that may be excluded from public access to case records and that is not essential to the administrative purpose of the record.

Section III(A)(6) defines "public access" very broadly. The language implies that access is not conditioned on the reason access is requested or on prior permission being granted by the court. Access is defined to include the ability to obtain a copy of the information, not just inspect it. The section does not address the form of the copy, as there are numerous forms the copy could take, and more will probably become possible as technology continues to evolve.

A minimum inspection of the court record can be done at the courthouse where the record is maintained. It can also be done in any other manner determined by the court that serves the principles and interests

specified in section I of this order. The inspection can be of the physical record or an electronic version of the court record. Access may be over the counter, by fax, by regular mail, by e-mail or by courier. The section does not preclude the court from making inspection possible via electronic means at other sites, or remotely. It also permits a court to satisfy the request to inspect by providing a printed report, computer disk, tape or other storage medium containing the information requested from the court record.

The section implies an equality of the ability to "inspect and obtain a copy" across the public. Implementing this equality will require the court to address several sources of inequality of access. Some people have physical impairments that prevent them from using the form of access available to most of the public. Another problem has to do with the existence of a 'digital divide' regarding access to information in electronic form. The court should provide equivalent access to those who do not have the necessary electronic equipment to obtain access. Finally, there is the issue of the format of electronic information and whether it is equally accessible to all computer platforms and operating systems. The court should make electronic information equally available, regardless of the computer used to access the information (in other words, in a manner that is hardware and software independent).

Another aspect of access is the need to redact restricted information in documents before allowing access to the balance of the document. In some circumstances this may be a quite costly. Lack of, or insufficient, resources may present the court with an awkward choice of deciding between funding normal operations and funding activities related to access to court records. As technology improves it is becoming easier to develop software that allows redaction of pieces of information in documents in electronic form based on "tags" (such as XML tags) accompanying the information. When software to include such tags in documents becomes available, and court systems acquire the capability to use the tags, redaction will become more feasible, allowing the balance of a document to be accessible with little effort on the part of the court.

The objective of section III(A)(7) defining "remote access" is to describe a means of access that is technology neutral that is used to distinguish means of access for different types of information. The term is used in section V regarding information that should be remotely accessible. The key elements are that: 1) the access is electronic, 2) the electronic form of the access allows searching of records, as well as viewing and making an electronic copy of the information, 3) a person is not required to visit the courthouse to access the record, and 4) no assistance of court or clerk of court staff is needed to gain access (other than staff maintaining the information technology systems).

This definition is independent of any particular technology or means of access. Remote access may be accomplished electronically by any one or more of a number of existing technologies, including dedicated terminal, kiosk, dial-in service, or Internet site. Attaching electronic copies of information to e-mails, and mailing or faxing copies of documents in response to a letter or phone request for information would not constitute remote access under this definition.

In section III(A)(8), the breadth of the definition of "in electronic form" makes clear that this order applies to information that is available in any type of electronic form. The point of this section is to define what "in electronic form" means, not to define whether electronic information can be accessed or how it is accessed. This subsection refers to electronic versions of textual documents (for example documents produced on a word processor, or stored in some other text format such as PDF format), and pictures, charts, or other graphical representations of information (for example, graphics files, spreadsheet files, etc.).

A document might be electronically available as an image of a paper document produced by scanning, or another imaging technique (but not filming or microfilming). This document can be viewed on a screen and it appears as a readable document, but it is not searchable without the aid of OCR (optical character recognition) applications that translate the image into a searchable text format.

An electronic image may also be one produced of a document or other object through the use of a digital camera, for example in a courtroom as part of an evidence presentation system.

Courts are increasingly using case management systems, data warehouses or similar tools to maintain data about cases and court activities. This order applies equally to this information even though it is not produced or available in paper format unless a report containing the information is generated. This section also covers files created for, and transmitted through, an electronic filing system for court documents.

Evidence can be in the form of audio or videotapes of testimony or events. In addition audio and video recording (ER - electronic recording) and computer-aided transcription systems (CAT) using court reporters are increasingly being used to capture the verbatim record of court hearings and trials. In the future real-time video streaming of trials or other proceedings is a possibility. Because this information is in electronic form, it would fall within this definition.

Section III(A)(10) recognizes that compiled information is different from case-by-case access because it involves information from more than one case. Compiled information is different from bulk access in that it involves

only some of the information from some cases and the information has been reformulated or aggregated; it is not just a copy of all the information in the court's records. Compiled information involves the creation of a new court record. In order to provide compiled information, a court generally must write a computer program to select the specific cases or information sought in the request, or otherwise use court resources to identify, gather, and copy the information.

Generating compiled data may require court resources and generating the compiled information may compete with the normal operations of the court for resources, which may be a reason for the court not to compile the information. It may be less costly for the court and less of an impact on the court to, instead, provide bulk distribution of the requested information, and let the requestor, rather than the court, compile the information.

The interchangeable definitions of "confidential" and "sealed" in section III(A)(11)-(14) recognize that in some circumstances the court is prohibited from disclosing the contents of a court record, and in some circumstances the court is prohibited from disclosing the very existence of a court record. For purposes of this order, the definition of "protective order," has the same meaning as found in the Arkansas Rules of Civil Procedure, i.e., the usual means by which a court designates a court record or parts of a record as confidential or sealed, for example, to protect a trade secret that includes information necessary to adjudication, but which would be harmful to the litigant if disclosed to the public. Also, this order itself provides that certain information in court records is "confidential," such as a litigant's personal bank account number, section VII(A)(5). The definitions of "confidential" and "sealed" recognize, however, that this order and other laws may provide limited access to confidential information. For example, consistently with section II, attorneys typically may access un-redacted records in cases on which they are attorneys of record.

Redactions from a publicly disclosed court record to protect sealed content are ordinarily indicated in the disclosure. However, the definitions of "confidential" and "sealed" recognize that in some instances, as provided by court order or by law, the court is prohibited from disclosing even the existence of a court record. For example, when a court record is "expunged," as defined in section III(A)(14) and pursuant to Ark. Code Ann. §§ 16-90-901, et seq. neither the existence of nor the contents of the records may be disclosed. In some cases, expunge also means the physical destruction of court records in juvenile cases pursuant to Ark. Code Ann. § 9-27-309. In such cases, because physical destruction of the records in electronic form would be impractical, such records should be redacted to eliminate the ability to identify the juvenile while preserving sufficient information regarding the court's actions for statistical and historic purposes.

The Court recognizes that for public policy reasons, such as to assist first-time offenders to remain productive members of society, it is sometimes necessary to conceal not only the contents of court records, but also the very existence of them from the general public. Expungement is not the only means by which a record may be sealed and made confidential as against disclosure of its very existence; for example, such confidentiality is afforded to adoption records by Ark. Code Ann. §§ 9-9-201, et seq. However, this order should not be construed to authorize the suppression of court records absent authorization by duly promulgated judicial rule or by duly enacted legislation. Cf. section IV(C).

The definition of "custodian" in section III(A)(16) recognizes that technology decreases the relevance of the physical location of records in electronic form. Court records might be stored remotely from the court in order to increase access, to provide greater security, to prevent loss in case of disaster, or to share resources with other agencies. However, that the records in electronic form are not physically located within a structure housing the court neither reduces the responsibility of the court and clerk for the content of the records, nor gives to the person holding the records for the purposes of storage, safekeeping, or data processing for the court the authority to disseminate the records.

Section IV. Commentary

The objective of this section is to make clear that this order applies to information in the court record regardless of the manner in which the information was created, collected or submitted to the court. Application of this order is not affected by the means of storage, manner of presentation or the form in which information is maintained. To support the general principle of open access, the application of the rule is independent of the technology or the format of the information.

Subsection (A) states the general premise that information in the court record will be publicly accessible unless access is specifically prohibited. The provision does not require any particular level of access, nor does it require a court to provide access in any particular form, for example, publishing court records in electronic form on a web site or dial-in database.

Subsection (C) provides a way for the public to know that information exists even though public access to the information itself is prohibited. This allows a member of the public to request access to the restricted record under section IX, which they would not know to do if the existence of the restricted information was not known.

However, the Court recognizes that for public policy reasons, such as to assist first-time offenders to remain productive members of society, it is sometimes necessary to conceal not only the contents of court records, but also

the very existence of them from the general public. For example, Ark. Code Ann. § 16-90-903 limits the disclosure of the existence of certain expunged records. Section IV(C) accommodates this necessity, but should not be construed to authorize the suppression of court records absent authorization by duly promulgated judicial rule or by duly enacted legislation.

Subsection (D) is intended to retain the common-law framework with respect to access to trial exhibits and is not intended to enhance, extend, or diminish the discretion of the court.

Section V. Commentary

This order does not impose an affirmative obligation to preserve information or data, or to transform information or data received into a format or medium that is not otherwise routinely maintained by the court. While this section encourages courts to make the designated information available to the public through remote access, this is not required, even if the information already exists in an electronic format.

Several types of information in court records have traditionally been given wider public distribution than merely making them publicly accessible at the courthouse. Typical examples are listed in this section. Often this information is regularly published in newspapers, particularly legal papers. Many of the first automated case management systems included a capability to make this information available electronically, at least on computer terminals in the courthouse, or through dial-up connections. Similarly, courts have long prepared registers of actions that indicate for each case what documents or other materials have been filed in the case. Again, early case management systems often automated this function. The summary or general nature of the information is such that there is little risk of harm to an individual through unwarranted invasion of privacy or proprietary business interests. This section acknowledges and encourages this public distribution practice by making these records presumptively accessible remotely, particularly if they are in electronic form. When a court begins to make information available remotely, they are encouraged to start with the categories of information identified in this list.

While not every court, or every automated system, is capable of providing this type of access, courts are encouraged to develop the capability to do so. The listing of information that should be made remotely available in no way is intended to imply that other information should not be made remotely available. Some court automated systems may also make more information available remotely to litigants and their lawyers than is available to the public.

Making certain types of information remotely accessible allows the court to make cost effective use of public resources provided for its operation.

If the information is not available, someone requesting the information will have to call the court or come down to the courthouse and request the information. Public resources will be consumed with court staff locating case files containing the record or information, providing it to the requester, and returning the case file to the shelf. If the requestor can obtain the information remotely, without involvement of court staff, there will be less use of court resources.

In implementing this section a court should be mindful about what specific pieces of information are appropriately remotely accessible. Care should be taken that the release of information is consistent with all provisions of the access policy, especially regarding personal identification information. For example, the information remotely accessible should not include information presumptively excluded from public access pursuant to section VII, or prohibited from public access by court order. An example of calendar information that may not by accessible by law is that relating to juvenile cases, adoptions, and mental health cases.

Subsection (5): One role of the judiciary, in resolving disputes, is to state the respective rights, obligations and interests of the parties to the dispute. This declaration of rights, obligations and interests usually is in the form of a judgment or other type of final order. Judgments or final orders have often had greater public accessibility by court rule or statutory requirement that they be recorded in a "judgment book." One reason this is done is to simplify public access by placing all such information in one place, rather than making someone step through numerous individual case files to find them. Recognizing such practices, this order specifically encourages this information to be remotely accessible if in electronic form.

There are circumstances where information about charges and convictions in criminal cases can change over time, which could mean copies of such listings derived from court records can become inaccurate unless updated. For example, a defendant may be charged with a felony, but the charge may be dismissed, or modified or reduced to a misdemeanor when the case is concluded. In other circumstances a felony conviction may be reduced to a misdemeanor conviction if the defendant successfully completes probation. These types of circumstances suggest that there be a disclaimer associated with such information, and that education about these possibilities be provided to litigants and the public.

Section VI. Commentary

In the past, court information other than that required to be reported to the Administrative Office of the Courts, was available only directly from the courts. In 2001, the Arkansas Court Automation Project began, with its

long-term goal to provide a centralized case management system for all courts in the State of Arkansas. This project is the foundation to provide state-wide electronic filing and document imaging for the courts. As courts go online with the new system, the public will have a more convenient central location from which to request court records.

Subsection (A) of this rule requires that requests for bulk distribution or compiled information be submitted to the Director of the Administrative Office of the Courts or other designee of the Court. If the information requested is contained in the data required to be reported to the Director, then the request will be considered by the Director according to this section. If the information requested is not contained in the data required to be reported to the Director, and either the Administrative Office does not hold the court records or the Administrative Office does hold the court records but does not have permission from the custodian of the court records to disclose the requested records pursuant to this order, then the Director's response will inform the requester which requested records are available only from the court or court agency having jurisdiction over the records.

This section creates a two-track system for access to bulk distribution and compiled information. The first track, described in subsection (B), pertains only to information that is not excluded from disclosure by section VII of this order. The provision of bulk distribution and compiled information is required when certain conditions are met. The use must be one among specified non-commercial purposes, the court must be able to comply with the request without unreasonably excessive effort to meet the requester's format and medium demands, and information made confidential by this order must be reasonably segregable from the public information requested. The latter two requirements, as well as the "actual costs" principle of subsection (B)(2), are modeled on the Arkansas Freedom of Information Act. Like under the FOIA, custodians and requesters under subsection (B) may reach agreements as to the provision of bulk distribution or compiled information when meeting the request would exceed the reasonableness scope of the medium-format compatibility provision.

In allowing bulk or compiled data requests, courts must limit bulk data to court records, even if those requesting this information are seeking other information which is governed by other agencies' policies.

The second track, described in subsection (C), pertains to information requests regardless of whether the information is excluded from disclosure by section VII of this order. Although the second track therefore potentially allows access to more information than the first track, including confidential information, provision of the information is discretionary, and requirements upon requesters are more onerous. Subsection (C) contemplates that the

Director of the Administrative Office of the Courts, or the court or court agency having jurisdiction over the records if the Administrative Office of the Courts is unable to provide the records, will balance competing concerns, including the public interests in both privacy and disclosure, the interests of the requester, and the interests of efficient judicial administration. Generating compiled data may require resources, and generating the compiled information may compete with the normal operations of the court or court agency for resources, which may be reasons not to compile the information. However, it may be less demanding on resources to instead provide bulk distribution of requested information and let the requester compile the information.

In addition to the requirements of subsection (C)(1) pertaining to requests, the Director of the Administrative Office of the Courts, or the court or court agency having jurisdiction over the records if the Administrative Office of the Courts is unable to provide the records, may impose any number of additional restrictions upon requesters concerning the terms by which the requested information is disclosed. The enumerated terms are illustrative and not exhaustive. Indeed, information may be released to a requester who intends to engage in commercial uses, making a limitation on commercial use inappropriate in one case, while in another case, the use may be constrained to the requester's stated governmental purpose. It is anticipated that the Administrative Office of the Courts will develop pattern licensing arrangements for common classes of requests.

Subsection (C)(1)(e) concerns the avoidance of error in the use of personally identifying information. For example, if a requester obtains only the names of persons involved in a certain class of litigation, and not other personally identifying information about the persons involved, there might occur confusion between those persons and others with the same names. Thus it might be appropriate for a requester to obtain more personally identifying information rather than less, so that, for example, names might be cross-referenced and distinguished by year of birth. A requester should use at least two identifiers when individual identity will be retained in bulk distribution or compiled information. Guidelines of the National Crime Information Center on this point may be consulted.

At the same time, these measures to avoid mistaken identity operate in careful balance with subsection (C)(4), which limits the disclosure of personally identifying information excluded from public disclosure under section VII to partial but useful data components, such as only the last four digits of a driver's license number. More complete identifying information should be provided only in extraordinary circumstances.

Section VII. Commentary

Subsection (A)(1) Federal Law: There are several types of information that are commonly but possibly incorrectly, considered to be protected from public disclosure by federal law. Although there may be restrictions on federal agencies disclosing Social Security numbers, they may not apply to state or local agencies such as courts or clerks of courts. While federal law prohibits disclosure of tax returns by federal agencies or employees, this prohibition may not extend to disclosure by others. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and regulations adopted pursuant to it limits disclosure of certain health related information. Whether the limitation extends to state court records is not clear. There are also federal restrictions regarding information in alcohol and drug abuse patient records and requiring confidentiality of information acquired by drug court programs. This order does not supersede any federal law or regulation requiring privacy or non-disclosure of information.

In addition to deliberative material excluded under this order, a court may exclude from public access materials generated or created by a court reporter with the exception of the official transcript.

This Court recognizes that "[a] trial court has the inherent authority to protect the integrity of the court in actions pending before it and may issue appropriate protective orders that would provide FOIA exemption under Section 25-19-105(b)(8)." See City of Fayetteville v. Edmark, 304 Ark. 179, 191 (1990). Rule 26(c) of the Arkansas Rules of Civil Procedure further recognizes that "the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

Subsection (A)(2) clarifies that this order does not supersede any Arkansas law requiring privacy or non-disclosure of information in court records. The following is a non-exhaustive list of Arkansas Code Annotated sections regarding confidentiality of records whose confidentiality may extend to the records even if they become court records:

(a) adoption records as provided in the Revised Uniform Adoption Act, as amended, Ark. Code Ann. §§ 9-9-201, et seq.;

(b) records relating to Human Immunodeficiency Virus or Acquired Immune Deficiency Syndrome, pursuant to Ark. Code Ann. §§ 16-82-101 et. seq.;

(c) records relating to child abuse not admitted into evidence as part of a public proceeding, pursuant to Ark. Code Ann. §§ 12-12-501, et seq.;

(d) records relating to drug tests conducted pursuant to Ark. Code Ann. § 11-14-101, et seq. except as provided by Ark. Code Ann. § 11-14-109;

(e) records of grand jury minutes, pursuant to Ark. Code Ann. § 25-19-105(b)(4);

(f) records of juvenile proceedings, pursuant to Ark. Code § 9-27-309;

(g) the master list of jurors' names and addresses, pursuant to Ark. Code Ann. § 16-32-103;

(h) addresses and phone numbers of prospective jurors, pursuant to Ark. Code Ann. § 16-33-101;

(I) indictment against any person not in actual confinement, pursuant to Ark. Code Ann. § 16-85-408;

(j) home or business address of petitioner for domestic order of protection if omitted by petitioner, pursuant to Ark. Code Ann. § 9-15-203;

(k) records or writings made at dispute resolution proceedings, pursuant to Ark. Code Ann. § 16-7-206;

(l) information related to defendant's attendance, attitude, participation, and results of drug screens when participating in a pre- or post-trial treatment program for drug abuse pursuant to Ark. Code Ann. § 16-98-201, even though defendant may have executed a consent for a limited release of confidential information regarding treatment permitting the judge, the prosecutor, and the defense attorney access to the information.

Subsection (B) presumes that administrative records will be governed by the Arkansas Freedom of Information Act, but recognizes that some public record exclusions are codified outside of the Act and that courts have inherent authority to restrict access to court records.

Freedom of Information Act exemptions are only exemptions to the enclosing act. The reference to the Arkansas Code Annotated should not be construed as applying FOIA exemptions to the courts. They may provide guidance upon a motion for a protective order, but should not be construed to be general exemptions beyond their context.

Section VIII. Commentary

This section is intended to address those extraordinary circumstances in which confidential information or information which is otherwise excluded from public access is to be included in a release of information. In some circumstances, the nature of the information contained in a record and the restrictions placed on the accessibility of the information contained in that record may be governed by federal or state law. This section is not intended to modify or overrule any federal or state law governing such records or the process for releasing information.

Information excluded from public access that is sought in a request for bulk or compiled records is governed by section VI of this order.

Section IX. Commentary

This section does not preclude or require "after hours" access to court records in electronic form. Courts are encouraged to provide access to records in electronic form beyond the hours access is available at the courthouse, however, it is not the intent of this order to compel such additional access.

Section X. Commentary

This section is intended to apply when information technology services are provided to a court by an agency outside the judicial branch, or by outsourcing of court information technology services to non-governmental entities. Implicit in this order is the concept that all court records are under the authority of the judiciary, and that the judiciary has the responsibility to ensure public access to court records and to restrict access where appropriate. This applies as well to court records maintained in systems operated by any non-judicial governmental department or agency.

Section XI. Commentary

The Supreme Court recognizes that it is not within its constitutional authority to either establish or provide immunity for civil or criminal liability based on violations of this order. The intent of this section is to make clear that absent a statutory or common-law basis for civil or criminal liability, violation of this order alone is insufficient to establish or deny liability for violating the order. Neither does this section preclude the possibility that violation of this order may be used as evidence of negligence or misconduct that resulted in a statutory or common law claim for civil or criminal liability.

IN RE: PROPOSED AMENDMENT OT RULE 1.15, ARKANSAS RULES of PROFESSIONAL CONDUCT, and ENABLING POWERS FOR THE ARKANSAS IOLTA FOUNDATION, INC.

06-625

Supreme Court of Arkansas
Opinion delivered June 29, 2006

PER CURIAM. The Arkansas IOLTA Foundation, Inc., has filed a petition with the court proposing to revise Rule 1.15 of the Arkansas Rules of Professional Conduct and seeking certain powers for the IOLTA Board of Directors. The objectives of the proposed amendments are summarized in Paragraph III of the Petition:

> The changes proposed in this Petition relate primarily to a wider variety of new banking products . . . to the types of financial institutions that may hold IOLTA accounts, and to certain banking practices . . . that negatively impact attorney IOLTA revenue. In addition, the Petition seeks enabling powers for the Foundations's Board.

With respect to the Board's powers, the proposal seeks to "delineate the Board's authority to monitor and enforce the Rule." (Paragraph IX)

> These powers would include determining what are low interest rates, what are unreasonable charges, and the authority to decertify banks that pay low interest rates or charge unreasonable fees or do not apply a standard of comparability to IOLTA account and non-IOLTA accounts. These powers would also include evaluating and approving new banking product for IOLTA accounts as they become available. Finally, these powers would include analyzing banking practices and prohibiting those that significantly diminish IOLTA revenue when these practices are not applied to non-IOLTA accounts with similar balances.

(Paragraph IX)

The petition and proposed rule (with changes noted) are reproduced below, and the Petitioner's position is more fully explained therein.

We publish them for comment from the bench and bar. The comment period shall expire October 1, 2006.

Comments should be in writing and addressed as follows: Clerk, Arkansas Supreme Court, Attention *IOLTA — Rule 1.15*, Justice Building, 625 Marshall Street, Little Rock, AR 72201.

IN THE SUPREME COURT OF ARKANSAS

ARKANSAS IOLTA FOUNDATION, INC.
PETITIONER

IN RE: MODEL RULE OF PROFESSIONAL CONDUCT 1.15 AND ENABLING POWERS FOR THE FOUNDATION

PETITION TO REVISE RULE 1.15

The Arkansas IOLTA Foundation, Inc., acting through its Board President, Mr. Larry E. Kircher, and its Board Chair of the Long-Range Planning Committee, Mr. Frank Sewall, and Board and Committee Member, Mr. Nate Coulter, with specific direction by vote of its Board of Directors, and in an effort to assist the Court in discharging its responsibility under Amendment 28 to the Constitution of the State of Arkansas to regulate the practice of law, petitions the Supreme Court of Arkansas to revise Arkansas Rule 1.15 of Professional Conduct by replacing it with the proposed revision which is attached as Exhibit A.

I.

In 1984 the Arkansas Supreme Court approved a petition brought by the Arkansas Bar Association to establish a voluntary IOLTA program in Arkansas. Subsequently the Court has amended the Rule from time to time.

II.

In 1994 the Arkansas IOLTA Foundation, Inc. petitioned the Court to modify Rule 1.15 to change participation in the Arkansas Interest-on-Lawyers'-Trust Accounts program from vol-

untary to comprehensive. The change was sought to increase revenue for the Foundation's mission:

- For legal aid to the poor;
- For student loans and scholarships;
- For improvement of the administration of justice; and
- For such other purposes as the Court may from time to time approve and as meet the qualifications of the Court's Order.

The Arkansas Supreme Court approved this petition on October 17, 1994 to be effective on January 1, 1995.

III.

The changes proposed in this Petition relate primarily to a wider variety of new banking products (such as sweep and money market accounts), to the types of financial institutions that may hold IOLTA accounts, and to certain banking practices—such as negative netting—that negatively impact attorney IOLTA revenue. In addition, the Petition seeks enabling powers for the Foundation's Board.

IV.

The current version of the Rule reflects products promoted by banks during the eighties and nineties. This Petition seeks to make technical changes that reflect current banking products and practices that offer attorneys a wider variety of investment choices and that may increase attorney IOLTA revenue. For example, under the current Rule attorneys may use only NOW or Super-NOW checking accounts for their IOLTA accounts at banks, savings and loan associations, or credit unions. These checking accounts are among the lowest-interest-paying bank products now on the market. In addition to these checking accounts, the proposed changes would permit money market funds, sweep accounts, and overnight repurchase agreements as choices that attorneys may select for their IOLTA accounts. While these banking products are subject to credit risks, the risks are commonly accepted by banks themselves when investing their own funds for higher return rates. Additionally, attorneys would have the option of working with investment companies as well as banks, credit unions, and savings and loan associations.

V.

The current rule also reflects banking practices common in the eighties and nineties, when banks served primarily the county in which they maintained their head offices. Practices have changed with the advent of statewide and regional banking. Some regional banks have a practice of negative netting, i.e., fees or charges in excess of the interest earned on one account are taken from the interest earned on other IOLTA accounts at that bank. This diminishes attorney IOLTA revenue.

Another problematic area concerns the current Rule's use of language that requires interest paid on IOLTA accounts to be the same as that paid to non-lawyer customers "on accounts of the same class within the same institution." Some banks have designated IOLTA accounts as a separate class of accounts and assigned an interest rate to them as a class within the bank. Proposed replacement language focuses on comparability: the highest interest rate paid to non-IOLTA account holders must also be paid by the institution to its IOLTA account-holders when IOLTA account balances meet or exceed the same minimum balance as the non-IOLTA account. An example of comparability is this: an Arkansas attorney has an IOLTA account with an average daily collected balance of more than $250,000. A NOW checking account earns interest of 0.08%. No doubt there is a non-IOLTA account at the same bank with the same average daily collected balance but earning more than 0.08% interest because the account is held in a different investment vehicle negotiated between the banker and the non-IOLTA account holder when the account was opened.

VI.

Several states have implemented rule changes consistent with those being proposed in Exhibit A. These states—Alabama, Florida, Michigan, and Texas—have reported increased attorney IOLTA revenue, although the reports are tempered by the fact that interest rates have also increased slightly and it is difficult to pinpoint precise results tied to the rule changes. These states also report that attorneys have reacted favorably to the increased range of bank products available to them for their IOLTA accounts.

VII.

The Arkansas IOLTA Foundation, Inc. determined to study these rule changes and evaluate their appropriateness for the

Arkansas program. Mr. Larry E. Kircher, President of the Board, appointed a special subcommittee to assist the Long-Range Planning Committee in evaluating and discussing these proposed changes. The Board felt that significant banking representation should be included to assist with new banking processes and product information. The following people worked to evaluate and recommend these rule changes: Mr. Frank B. Sewall, attorney and Chair of the Board's Long-Range Planning Committee; Mr. Earnest E. Brown, Jr., attorney and Board member; Mr. Nate Coulter, attorney and Board member; Mr. James D. Gingerich, attorney and liaison from the Administrative Office of the Courts; Mr. Don Hollingsworth, attorney and liaison and Executive Director, Arkansas Bar Association; Mr. Larry E. Kircher, Board President and President, Citizens State Bank, Bald Knob; Mr. John Monroe, Metropolitan National Bank; Mr. Robert Plummer, Pulaski Trust & Raymond James; Mr. Steven C. Wade, Simmons First National Bank; and Ms. Susie Pointer, the Foundation's Executive Director.

These committee members reviewed rule changes in Alabama, Florida, Michigan and Texas. The committee members and the Foundation Board believe that the proposed changes now before the Court will result in a wider range of financial services and products for the convenience of attorneys and bankers and may result in increased revenue for the Arkansas IOLTA program.

VIII.

A redlined version of Rule 1.15, showing how the current Rule would be changed if the Court adopts the proposed recommendations is attached as Exhibit A.

IX.

Because of the ongoing relationship of the IOLTA Foundation with banks and attorneys established by Rule 1.15, the Board of the Foundation requests that the Court delineate the Board's authority to monitor and enforce the Rule. For example, if a bank fails to comply with the comparability interest rate requirement or charges what the Board believes to be an unreasonable fee, the Board is uncertain that it has the authority to decertify that bank from participation in the IOLTA program. Similarly, with regard to the language mentioned earlier—"on accounts of the same class within the same institution"—it is not clear whether the Board has the authority to direct the bank to discontinue the practice or end

its participation in the IOLTA program. In its Per Curiam Order of September 17, 1984, at Finding 6, the Court created a new nonprofit corporation with a Board of Directors to receive the interest from IOLTA accounts and to distribute the income according to the four categories set out on page 2 of this Petition. The Board of the Foundation petitions the Court to amend its original Per Curiam Order to give specific enabling powers to the Foundation's Board to perform work necessary to monitor and enforce compliance with Rule 1.15. These powers would include determining what are low interest rates, what are unreasonable charges, and the authority to decertify banks that pay low interest rates or charge unreasonable fees or do not apply a standard of comparability to IOLTA accounts and non-IOLTA accounts. These powers would also include evaluating and approving new banking products for IOLTA accounts as they become available. Finally, these powers would include analyzing banking practices and prohibiting those that significantly diminish IOLTA revenue when these practices are not applied to non-IOLTA accounts with similar balances.

X.

The Arkansas IOLTA Foundation, Inc., through its Board of Directors, now requests:

1. The Court provide an opportunity for input from the public and the profession on the proposed changes to Rule 1.15.

2. The Court review and evaluate the proposed changes to Rule 1.15, the comments received from the profession and the public, and review any other information that the Court deems useful.

3. Substitute the proposed Rule 1.15 for the current Rule 1.15.

4. The Court amend its original Per Curiam Order to grant such enabling powers as it deems fit to the Board of the Foundation to perform work necessary to monitor and enforce compliance with Rule 1.15.

XI.

The Arkansas IOLTA Foundation, Inc. petitions the Court for adoption of this Petition.

Respectfully submitted:

Larry E. Kircher, President, Arkansas IOLTA Foundation, Inc.
President, Citizens State Bank, Bald Knob

Frank B. Sewall, Attorney and Chair,
Long-Range Planning Committee

Nate Coulter, Attorney and Board and LRP Committee Member

Language to be removed is struck through; new language is underlined.

EXHIBIT A

RULE 1.15. SAFEKEEPING PROPERTY AND TRUST ACCOUNTS

DEFINITIONS. As used in this rule, the terms below shall have the following meaning:

"IOLTA account" means an interest- or dividend-bearing trust account benefitting the Arkansas IOLTA Foundation, Inc. established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons, which may be withdrawn upon request as soon as permitted by law.

"Eligible institution" for IOLTA accounts means a depository bank or savings and loan association or credit union authorized by federal or state laws to do business in Arkansas, whose deposits are insured by an agency of the federal government, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Arkansas. In addition, an eligible institution must either (1) maintain a physical office in the state of Arkansas or (2) be owned by a bank holding company regulated by the Federal Reserve System, of which a subsidiary federally-insured depository bank or savings and loan

association or credit union maintains a physical office in the state of Arkansas. Eligible institutions must meet the requirements set out in section (b) below.

"Interest- or dividend-bearing trust account" means a federally insured checking account or an investment product, including a sweep product and a daily (overnight) financial-institution repurchase agreement or an open-end money market fund. A daily financial-institution repurchase agreement must be fully collatralized by U.S. Government Securities; an open-end money-market fund must invest primarily in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities. A daily financial-institution repurchase agreement may be established only with an eligible institution that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must hold itself out as a money-market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940 and, at the time of investment, have total managed assets of at least $250,000,000. The funds covered by this rule shall be subject to withdrawal upon request and without delay.

"Allowable reasonable fees" means: (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balance, (4) federal deposit insurance fees, (5) sweep fees, 12b-1 fees, and subaccounting fees, and (6) a reasonable IOLTA account administrative fee.

"U.S. Treasury securities" means direct obligations of the federal government of the United States.

"Repurchase agreements" means transactions in which a fund buys a security from a dealer or bank and agrees to sell the security back at a mutually agreed-upon time and price. The repurchase price exceeds the sale price, reflecting the fund's return on the transaction. This return is unrelated to the interest rate on the underlying security. Repurchase agreements are subject to credit risks.

(a) **Safekeeping property.**

(1) A lawyer shall hold property of clients or third persons, including prospective clients, that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

(2) Property, other than funds of clients or third persons, shall be identified as such and appropriately safeguarded.

(3) Complete records of trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the termination of the representation or the last contact with a prospective client.

(4) A lawyer shall maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any record keeping rules established by law, rule, or court order.

(5) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person in writing. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full written accounting regarding such property to the client or third persons.

(6) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(b) **Trust Accounts: IOLTA trust accounts and non-IOLTA trust accounts.**

(1) Funds of a client shall be deposited and maintained in one or more separate, clearly identifiable trust accounts in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

(2) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(3) A lawyer may deposit funds belonging to the lawyer or the law firm in a client trust account for the sole purposes of

paying bank services charges on that account, or to comply with the minimum balance required for the waiver of bank charges, but only in the amount necessary for those purposes, but not to exceed $500.00 in any case. Such funds belonging to the lawyer or law firm shall be clearly identified as such in the account records.

(4) Each trust account referred to in section (b)(1) shall be an IOLTA account held at an eligible institution.

~~(4) Each trust account referred to in section (b) (1) shall be an interest-bearing trust account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company, and the institution shall be insured by an agency of the federal government.~~

(5) Each such trust account shall provide overdraft notification to the Executive Director of the Office of Professional Conduct for the purpose of reporting whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The financial institution shall report simultaneously with its notice to the lawyer the following information:

(i) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(ii) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(6) A lawyer who receives client funds which, in the judgment of the lawyer, are nominal in amount, or are expected to be held for such a short period of time that it is not practical to earn and account for income on individual deposits, shall create and maintain an interest-bearing, multi-client trust

account ("IOLTA" account) for such funds. The account shall be maintained in compliance with the following requirements:

(i) The trust account shall be maintained in compliance with sections (b)(1)-(b)(5) of this Rule and the funds shall be subject to withdrawal upon request and without delay;

(ii) No earnings from the account shall be made available to the lawyer or law firm; and,

(iii) The interest accruing on this account, net of allowable reasonable fees, shall be paid to the Arkansas IOLTA Foundation, Inc. All other fees and transaction costs shall be paid by the lawyer or law firm.

~~(iii) The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include any items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to the Arkansas IOLTA Foundation, Inc. All other fees and transaction costs shall be paid by the lawyer or law firm.~~

(7) Participation in the IOLTA program is voluntary for banks, savings and loan associations, and investment companies. Any eligible institution that elects to provide and maintain IOLTA accounts shall do so according to the following terms:

(i) Determination of Interest Rates and Dividends. Eligible institutions that maintain IOLTA accounts that are, or are invested in, interest-bearing deposits or daily financial-institution repurchase agreements shall pay no less than the highest rate and dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. In determining the highest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the balance in the IOLTA account, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discrimi-

nate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include the fact that the account is an IOLTA account. The eligible institution may offer, and the lawyer may accept, a sweep account that provides a mechanism for the overnight investment of balances in the IOLTA account into a daily financial institution repurchase agreement or a money-market fund. However, this Rule shall not require any eligible institution to offer or otherwise make available sweep accounts for IOLTA accounts.

(ii) Written Agreements. There shall be a written agreement between the lawyer and the eligible institution, designating interest on the IOLTA account be remitted to the Arkansas IOLTA Foundation, Inc. on a monthly basis.

(iii) Interest Rates and Dividends. Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any.

(iv) Reasonable Fees. Reasonable fees means (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balances, (4) federal deposit insurance fees, (5) sweep fees, 12b-1 fees, and subaccounting fees, and (6) a reasonable IOLTA account administrative fee. Reasonable fees are the only service charges or fees permitted to be deducted from interest earned on IOLTA accounts. Reasonable fees may be deducted from interest on an IOLTA account only at such rates and under such circumstances as is the eligible institution's customary practice for all of its customers with interest-bearing accounts. All other fees and charges shall not be assessed against the accrued interest on the IOLTA account but rather shall be the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account.

(v) Negative Netting Prohibited. Fees or charges in excess of the interest earned on the account for any month shall not be taken from interest earned on other IOLTA accounts or from the principal of the account.

(vi) Reporting Requirements. A statement should be transmitted monthly to the Arkansas IOLTA Foundation, Inc. with each remittance showing the period for which the remittance is made, the name of the lawyer or law firm from whose IOLTA account the remittance is being sent, the IOLTA account number, the average daily rate applied, the gross interest or dividend earned during the period, the amount and description of any service charges or fees assessed during the remittance period, and the net amount of interest or dividend remitted for the period. The Foundation supplies a monthly remittance form tailored to each bank listing the required information; however, should the bank elect to generate its own report, the requirements in this section must be addressed.

(8) All client funds shall be deposited in the account specified in section (b)(6), unless they are deposited in a separate interest-bearing account ("non-IOLTA" account) for a specific and individual matter for a particular client. There shall be a separate account opened for each such particular client matter. Interest so earned must be held in trust as property of each client in the same manner as is provided in this Rule.

~~(8) The interest paid on the account shall not be less than, nor the fees and charges assessed greater than, the rate paid or fees and charges assessed, to any non-lawyer customers on accounts of the same class within the same institution.~~

(9) The decision whether to use an "IOLTA" account specified in section (b)(6) or a "non-IOLTA" account specified in section (b)(8) is within the discretion of the lawyer. In making this determination, consideration should be given to the following:

(i) The amount of interest which the funds would earn during the period they are expected to be deposited; and,

(ii) The cost of establishing and administering the account, including the cost of the lawyer's or law firm's services.

(10) ~~All lawyers who maintain accounts provided for in this Rule, must convert their client trust account(s) to interest-~~

~~bearing account(s) with the interest to be paid to the Arkansas IOLTA Foundation, Inc. no later than six months from the date of the order adopting this Rule, unless the account falls within subsection (b)(8).~~ Every lawyer practicing or admitted to practice in this State shall, as a condition thereof, be conclusively deemed to have consented to the reporting requirements mandated by this rule. All lawyers shall certify annually that they, their law firm or professional corporation is in compliance with all sections and subsections of this Rule.

(11) A lawyer shall certify, in connection with the annual renewal of the lawyer's license, that the lawyer is complying with all provisions of this rule. Certification shall be made on a form provided by and in a manner designated by the Clerk of the Supreme Court.

(12) A lawyer or a law firm may be exempt from the requirements of this rule if the Arkansas IOLTA Foundation's Board of Directors, on its own motion, has exempted the lawyer or law firm from participation in the Program for a period of no more than two years when service charges on the lawyer's or law firm's trust account equal or exceed any interest generated.

COMMENT:

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the trust account funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fee owed. However, a lawyer

may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed of the funds shall be promptly distributed.

[4] Paragraph (a)(6) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third party claim is not frivolous under applicable law, the lawyer must refuse to surrender property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

IN RE: PUBLICATION of THE ARKANSAS REPORTS

Supreme Court of Arkansas
Opinion delivered June 29, 2006

PER CURIAM. In 2003, a *per curiam* order discussed the issues confronting the court with the continued publication of the *Arkansas Reports*. *See In Re Publication of the Arkansas Reports*, 352 Ark. Appx. 581 (2003). At that time, we noted judges and attorneys have come to rely increasingly on the electronic version of the law reports and that Internet use has had a major impact on the research methods of attorneys and the practice of law in Arkansas. In response to our *per curiam* order, some attorneys expressed their attachment to the *Arkansas Reports* and others indicated a preference for the electronic medium.

We also pointed out that there were budget concerns related to publishing the *Arkansas Reports*. Three years later, the monetary issue has become paramount. Currently, there are less than 100 subscribers to the *Arkansas Reports*, and there is great expense to the state in publishing and distributing it. By statute, a great number of volumes must be furnished by the court to a variety of governmental entities, and with the modest number of subscribers, there is less revenue to offset the expense. *See* Ark Code Ann. § 25-18-210, *et seq*. Consequently, to continue current practice , there will need to be a substantial increase in the state appropriation, which may not be prudent in light of the small market for the publication.

A number of states have discontinued publication of official state reports. *See* Mersky & Dunn, *Fundamentals of Legal Research* 775 (8th ed. 2002). Our research indicates that these states typically designate a legal publisher as the official reporter, or the appellate court releases an electronic version as the official report. These options may be popular with the Arkansas legal community in light of the number of lawyers already using the Internet for legal research, as well as the availability of the *Southwestern Reporter*. These options, when combined with the financial concerns, suggest possible solutions to this problem if the General Assembly is not persuaded that this expense to the state continues to be justified.

More study needs to be made as to the best alternative for Arkansas, but we wanted to take this opportunity to update the bench and bar of Arkansas concerning this situation. The court will continue to weigh the options and keep the legal community informed, but all should be on notice that some change may be in the offing.

IN RE: FILING FEE FOR THE ARKANSAS SUPREME COURT and COURT of APPEALS

Supreme Court of Arkansas
Opinion delivered October 26, 2006

PER CURIAM. Currently, the filing fee for an appeal to the Arkansas Supreme Court or Court of Appeals in all civil actions and misdemeanors is $100.00, which amount has been in place since 1981. The revenues generated from the filing fees are exclusively dedicated to the maintenance and improvement of the Arkansas Supreme Court Library. *See* Ark. Code Ann. § 21-6-401.

For most of the history of the library, the revenues from the filing fee and other miscellaneous sources were sufficient to support the library's operation. In recent years, however, a shortfall has developed and more and more state funds appropriated to the Supreme Court and Court of Appeals for other purposes have had to be re-directed in order to continue a basic level of services. The Director and staff of the Arkansas Supreme Court Library have worked hard to streamline operations, reduce hardbound publications in this electronic age, and generally run a tight ship. In light of the persistent shortfall, we are now at a point where the current funding structure is no longer sustainable and additional revenue is required. The issue is whether we should increase filing fees, and if so, how much.

We have asked the Arkansas Bar Association to examine this situation and provide the court with its assessment. Likewise, we ask all members of the bar to consider the problem and provide us

with their ideas. Any comments should be directed to Les Steen, Supreme Court Clerk, Attention: Filing Fee, Justice Building, 625 Marshall St., Little Rock, AR 72201, and should be submitted in writing no later than December 1, 2006.

IN RE: REPORT of THE LEGISLATIVE TASK FORCE ON DISTRICT COURTS

Supreme Court of Arkansas
Opinion delivered October 26, 2006

PER CURIAM. Act 1849 of 2005 created the Legislative Task Force on District Courts, and it was charged with conducting a comprehensive study of the transition of district court judges to state employee status and the funding and role of district courts. The Task Force has completed its work and filed its report on September 1, 2006. The report can be found at the Arkansas Judiciary website: http://courts.state.ar.us/courts/district.html.

The report was transmitted to the Supreme Court by Senator Womack, Co-chair of the Task Force, and a copy of his letter of transmittal is appended to this order. The Task Force recommends that the Supreme Court adopt an administrative order, initially limited to the judges participating in a pilot program, which permits these district court judges to preside over matters pending in the circuit court. The Task Force has prepared a draft of the proposed administrative order, and makes this observation: "this proposed administrative order, which is based on local rule 72 of the Federal District Court, would be the most effective way of addressing an issue upon which no agreement has been reached previously."

Senator Womack's letter concludes with these comments: "It is anticipated that legislation will be introduced in the 2007 session which will seek to implement the remaining recommendations of the task force. Admittedly, the enactment of such legislation precedes the need for the court to adopt the proposed order. However, the task force requests the court to begin deliberations on the proposal."

With this request in mind and with the legislative session fast approaching, in the interest of time, we are publishing the proposed administrative order as it was presented to us for general comment while we study it ourselves. Comments should be in writing and addressed to: Les Steen, Supreme Court Clerk, Attention Administrative Order District Courts, Justice Building, 625 Marshall , Little Rock, R 72201. The comments should be submitted no later than December 15, 2006.

Administrative Order Number _____

Full Time District Judges

1. *Definition.*

a. For purposes of this Administrative Order, the term "District Judge" means a state funded full time district court judge who is prohibited from practicing law.

b. A district judge may perform such duties with respect to cases pending in circuit court as set forth below.

2. *Reference.* With the concurrence of a majority of the circuit judges of a judicial circuit, the administrative judge of a judicial circuit may refer matters pending in the circuit court to a district judge serving within the judicial circuit, with the judge's consent, which shall not be unreasonably withheld.

a. *Reference of Non-Dispositive Matters.* When designated by the administrative judge of a judicial circuit, a district judge may hear and determine any non-dispositive pretrial matters pending before the circuit court, including those duties set out in Rule 1.8 (b) of the Arkansas Rules of Criminal Procedure. A decision of a district judge is final and binding and is subject only to a right of appeal to the circuit judge to whom the case has been assigned. A party may appeal the decision of a district judge by filing a motion within ten (10) days of the decision. Copies shall be served on all other parties and the district judge from whom the appeal is taken. The motion shall specifically state the rulings excepted to and the basis for the exceptions. The circuit judge may reconsider any matter *sua sponte*. The circuit judge shall affirm the findings of the district judge unless they are found to be clearly erroneous or contrary to law.

b. *Reference of Dispositive Matters.*

A. *General.* The administrative judge may designate a district judge to conduct hearings, including evidentiary hearings, and to submit proposed findings of fact and recommendations for the resolution of any dispositive matters, including, but not limited to, the following:

i. Motions by the defendant to dismiss or quash an indictment or information;

ii. Motions to suppress evidence;

iii. Applications to revoke probation, including the conduct of the "final" probation revocation hearing;

iv. Motions for temporary restraining orders and preliminary injunctions;

v. Motions to dismiss for failure to state a claim upon which relief may be granted;

vi. Motions to dismiss an action and to review default judgment;

vii. Motions to dismiss or to permit the maintenance of a class-action; and

viii. Motions for judgment on the pleadings or for summary judgment.

B. *Prisoner Petitions.* A district judge may review prisoner correspondence and petitions; enter orders with regard to *in forma pauperis* petitions; and conduct proceedings in Rule 37 petitions.

C. *Objection.* When a district judge files proposed findings or recommendations with the circuit judge, a copy shall be mailed to all parties. Within ten (10) days after being served with a copy, any party may serve and file written objections to such proposed findings, recommendations or order. The circuit judge must make a de novo determination of any matters which have been specifically objected to by the litigants, but this does not necessarily require the circuit judge to conduct a hearing on contested issues. In some instances, it may be necessary for the circuit judge to modify or reject the findings of the district judge, to take additional evidence, recall witnesses, or recommit the matter to the district judge for further proceedings.

D. *Statement of Necessity.* A party objecting to the proposed findings and recommendations of a district judge, who desires to submit new, different, or additional evidence and to have a hearing for this purpose before the circuit judge shall file a "statement of necessity" at the time of filing of the written objections, and which shall state:

i. Why the record made before the district judge is inadequate;

ii. Why the evidence to be proffered (if such a hearing is granted) was not offered at the hearing before the district judge; and

iii. The details of any testimony desired to be introduced in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced.

From this submission, the circuit judge shall determine the necessity for an additional evidentiary hearing, either before the district judge or before the circuit judge.

c. *Master References.* When designated by the administrative judge, a district judge may serve as a special master in accordance with the provisions of Rule 53 of the Arkansas Rules of Civil Procedure.

3. *Domestic Relations Cases and Protective Orders.*

a. A district judge may be specially designated by the administrative judge of the judicial circuit to conduct any or all proceedings in domestic relations cases. The final judgment, although ordered by the district judge, is deemed a final judgment of the circuit court and will be entered by the clerk under Rule 58 of the Arkansas Rules of Civil Procedure. Any appeal shall be taken to the Arkansas Supreme Court or Court of Appeals in the same manner as an appeal from any other judgment of the circuit court.

b. A district judge may be specially designated by the administrative judge of the judicial circuit to conduct proceedings in applications for protective orders.

4. *Assignment.* A district judge serving within a judicial circuit may be assigned to replace a circuit judge of the judicial circuit pursuant to Amendment 80, Section 13 (C, D) and Administrative Order Number 16. A district judge so assigned shall serve without additional compensation.

5. *Civil Consent Jurisdiction.* A district judge may be specially designated by the administrative judge of the judicial circuit to conduct any or all proceedings in jury or non-jury civil matters upon the consent of the parties.

a. *Notice.* The clerk shall give the plaintiff notice of the consent jurisdiction of a district judge when a civil suit is filed. The clerk shall also attach the same notice to the summons for service on the defendant.

b. *Consent.* Any party may obtain a "Consent to District Judge Jurisdiction" form from the Clerk's Office, which shall provide that any appeal in the case shall be taken directly to the Arkansas Supreme Court or Court of Appeals.

c. *Transfer.* Once the completed forms have been returned to the clerk, the clerk shall then assign the case to a district judge and forward the consent forms for final approval to the circuit judge to whom the case was originally assigned. When the circuit judge has approved the transfer and returned the consent forms to the clerk's office for filing, the clerk shall forward a copy of the consent forms to the district judge to whom the case is reassigned. The clerk shall also indicate on the file that the case has been reassigned to the district judge.

d. *Appeal.* The final judgment, although ordered by a district judge, is deemed a final judgment of the circuit court and will be entered by the clerk under Rule 58 of the Arkansas Rules of Civil Procedure. Any appeal shall be taken to the Arkansas Supreme Court or Court of Appeals in the same manner as an appeal from any other judgment of the circuit court.

6. *Effective Date and Application.* Nothing in this rule shall impair or render ineffectual any proceeding or procedural matters which occurred before the effective date of this rule.

7. *Supreme Court.* A district judge, when performing duties with respect to cases pending in circuit court as set forth in this administrative order, shall be subject at all times to the superintending control of the circuit judges of the judicial circuit. However, in the event there is an extraordinary issue involving this administrative order upon which the judges are unable to reach an agreement, a district judge or a circuit judge may bring the matter to the attention of the Chief Justice of the Arkansas Supreme Court by setting out in writing the nature of the problem. Upon receipt of a complaint, the Supreme Court may cause an investigation to be undertaken by appropriate personnel and will take other action as may be necessary to insure the efficient operation of the courts and the expeditious dispatch of litigation in the judicial circuit.

SHAWN WOMACK
SENATE MINORITY LEADER

SENATOR
1ST DISTRICT
OFFICE: 870-424-5000

POST OFFICE BOX 332
MOUNTAIN HOME, ARKANSAS 72654-0332

THE SENATE
STATE OF ARKANSAS

MEMBER:
JOINT BUDGET
LEGISLATIVE AUDIT
LEGISLATIVE COUNCIL
CITY, COUNTY, LOCAL AFFAIRS
JOINT ENERGY
JOINT RETIREMENT & SOCIAL SECURITY
PUBLIC HEALTH, WELFARE & LABOR

October 04, 2006

The Honorable Jim Hannah
Chief Justice
Supreme Court of Arkansas
625 Marshall Street
Little Rock, Arkansas 72201

Re: Report of the Legislative Task Force on District Courts

Dear Chief Justice Hannah:

As Co-chair of the Legislative Task Force on District Courts, I am transmitting a report of the actions taken by the Task Force and requesting the court to take under consideration one of the recommendations.

Since the passage of Amendment 80, the Supreme Court and the General Assembly have taken steps with respect to district courts to implement the amendment. In 2002, the court issued a per curiam order which announced the court's vision for the district courts. See *In Re: Amended Supreme Court Statement on Limited Jurisdiction Courts Under Amendment 80*, 351 Ark. Appx. (2002). In that opinion it was stated that:

"[T]he responsibility for implementation ... is shared between the Supreme Court and the General Assembly. ... These policy statements ... are offered as a guide to insure consistency in the measures adopted by the judicial and legislative branches...." 351 Ark. Appx.

The General Assembly charged the Task Force with conducting a comprehensive study of the transition of district judges to state employee status and the funding and role of district courts. Included among the issues the study considered was the effectiveness of utilization of additional district judges or expanding the jurisdiction of existing district judges as an alternative to the creation of additional circuit judgeships.

The recommendation of the task force, on this issue, to the Senate Interim Committee on Judiciary and the House Interim Committee on Judiciary was that the Supreme Court should adopt an administrative rule dealing with the subject matter jurisdiction of district courts, specifically limiting the new order to the judges participating in the pilot program and making reference to district judges rather than magistrates. A draft copy of a proposed Full-time District Judges Administrative Order as recommended by the task force is attached.

As stated by the court in 2005:

"Changes in the civil subject matter jurisdiction of district courts have been considered by the Amendment 80 Committee and the Supreme Court, but the Supreme Court has concluded that no changes will be made at this time although jurisdictional monetary limits and the types of cases heard will continue to be studied, as stated in Administrative Order 18." IN RE: SUPREME COURT AMENDMENT 80 COMMITTEE'S RECOMMENDATIONS FOR LIMITED JURISDICTION COURTS, 360 Ark. Appx. (fn2) (2005)

The task force felt that this proposed administrative order, which is based on local rule 72 of the Federal District Court, would be the most effective way of addressing an issue upon which no agreement has been reached previously.

It is anticipated that legislation will be introduced in the 2007 session which will seek to implement the remaining recommendations of the task force. Admittedly, the enactment of such legislation precedes the need for the court to adopt the proposed order. However, the task force requests the court to begin deliberations on the proposal.

Thank you for your consideration.

Respectfully,

Shawn Womack (PB)

Senator Shawn A. Womack
District 1

SW/PBB/mw

IN RE: SUPREME COURT BOARD of CERTIFIED COURT REPORTER EXAMINERS

Supreme Court of Arkansas
Opinion delivered June 29, 2006

PER CURIAM. Honorable J. Michael Fitzhugh of Fort Smith, Circuit Judge, 12th Judicial Circuit, Honorable Mackie Pierce of Little Rock, Circuit Judge, 6th Judicial Circuit, and Ms. Alice Cook of Cabot, Certified Court Reporter, are reappointed to our Board of Certified Court Reporter Examiners for three-year terms expiring on July 31, 2009.

The court expresses its gratitude to these members for their willingness to continue their service.

IN RE: CLIENT SECURITY FUND COMMITTEE

Supreme Court of Arkansas
Opinion delivered September 7, 2006

PER CURIAM. Ray Fulmer, of Fort Smith, is hereby appointed to the Client Security Fund Committee. The Court extends its thanks to Mr. Fulmer for accepting this appointment to this most important Committee.

The Court would also like to extend its thanks to JoAnn Maxey for accepting reappointment to this Committee.

The Court expresses its gratitude to Jill Jacoway, whose term has expired, for her years of service on the Committee.

IN RE: SUPREME COURT COMMITTEE ON CIVIL PRACTICE

Supreme Court of Arkansas
Opinion delivered September 28, 2006

PER CURIAM. Hon. Henry Wilkinson, Circuit Judge Retired, of Russellville, Hon. Don Glover, Circuit Judge, 10th Judicial Circuit, Hon. Richard Moore, Circuit Judge, Sixth Judicial Circuit, Randy Philhours, Esq., of Paragould, and Mariam Hopkins, Esq., of Little Rock are reappointed to the Civil Practice Committee for three-year terms to expire on July 31, 2009. We thank these members for their continued service.

IN RE: ACCESS TO JUSTICE COMMISSION

Supreme Court of Arkansas
Opinion delivered September 28, 2006

PER CURIAM. Hon. Jim Spears, Circuit Judge, 12th Judicial Circuit, and Dean Charles W. Goldner, Jr., of the University of Arkansas at Little Rock School of Law are reappointed to the Access to Justice Commission for terms to expire on October 15, 2009. We extend our appreciation to these members for their continued service to the Commission.

IN RE: SUPREME COURT COMMITTEE ON MODEL JURY INSTRUCTIONS – CIVIL

Supreme Court of Arkansas
Opinion delivered October 5, 2006

PER CURIAM. P.K. Holmes III, Esq., of Fort Smith is appointed to the Committee on Model Jury Instructions – Civil for a three-year term to expire on September 30, 2009. The court extends its appreciation to Mr. Holmes for his willingness to serve on this important committee.

Edwin Lowther, Esq., of Little Rock and Kent Rubens, Esq., of West Memphis are reappointed to the Committee on Model Jury Instructions – Civil for three-year terms to expire on September 30, 2009. The court extends its thanks to Mr. Lowther and Mr. Ruben for their continued service.

The court expresses its appreciation to Don Elliott, Esq., of Fayetteville, whose term has expired, for his years of valuable service to this committee.

IN RE: ARKANSAS STATE BOARD of LAW EXAMINERS

Supreme Court of Arkansas
Opinion delivered October 26, 2006

PER CURIAM. The Court appoints Mary Lile Broadaway of Paragould to the Arkansas State Board of Law Examiners. Ms. Broadaway shall be a representative of the First Congressional District and will serve a six-year term concluding on September 30, 2012. Ms. Broadaway succeeds Lucinda McDaniel of Jonesboro.

The Court appoints Kelly Carithers of Fayetteville to the Arkansas State Board of Law Examiners. Ms. Carithers shall be a representative of the Third Congressional District and will like-

wise serve a six-year term concluding on September 30, 2012. Ms. Carithers succeeds Kitty Gay of Fayetteville.

The Court thanks Ms. Broadaway and Ms. Carithers for accepting appointment to this important Board. The Court extends its sincere appreciation to Ms. McDaniel for her work on this Board, including serving one year as Chair, and to Ms. Gay for her many years of service to the Board.

IN RE: Darrell F. BROWN,
Arkansas Bar No. 72012

05-592

Supreme Court of Arkansas
Opinion delivered September 28, 2006

Petition for Voluntary Surrender of Law License denied.

PER CURIAM. Upon recommendation of the Supreme Court Committee on Professional Conduct, and upon reviewing Mr. Brown's petition to surrender his license, and the Committee's response, we must deny his request. We agree with the Committee and its panel B that Mr. Brown's petition fails to sufficiently acknowledge the serious misconduct and acceptance of responsibility shown and found by the Special Judge John Cole.

It is so ordered.

IN RE: Stephen Gregory HOUGH,
Arkansas Bar No. 84077

06-1012

Supreme Court of Arkansas
Opinion delivered September 28, 2006

Petition for Voluntary Surrender of Law License granted.

PER CURIAM. Upon recommendation of the Supreme Court Committee on Professional Conduct, and in lieu of disciplinary proceedings that are specifically set out in his petition, we hereby accept the voluntary surrender of the law license of Stephen Gregory Hough, Fort Smith, Arkansas, to practice law in the State of

Arkansas. Mr. Hough's name shall be removed from the registry of licensed attorneys, and he is barred and enjoined from engaging in the practice of law in this state.

It is so ordered.

IN RE: Jerry Hudson SHEPARD,
Arkansas Bar No. 97094

06-1084

Supreme Court of Arkansas
Opinion delivered September 28, 2006

Petition for Voluntary Surrender of Law License granted.

PER CURIAM. Upon recommendation of the Supreme Court Committee on Professional Conduct, and in lieu of disciplinary proceedings, we hereby accept the voluntary surrender of the law license of Jerry Hudson Shepard, Harrison, Arkansas, to practice law in the State of Arkansas. Mr. Shepard's name shall be removed from the registry of licensed attorneys, and he is barred and enjoined from engaging in the practice of law in this state.

We note that the Committee attached Mr. Shepard's petition with a list of documents that are placed under seal. Apparently, there is an ongoing investigation which may further involve Mr. Shepard's safety. That information is public, but if law enforcement officials believe or determine such information concerns an ongoing criminal investigation which places Mr. Shepard's safety in issue, those officials may take appropriate action.

It is so ordered.