SUPREME COURT OF ARKANSAS

IN RE: ARKANSAS RULES OF CIVIL PROCEDURE; ADMINISTRATIVE ORDERS; RULES OF EVIDENCE; AND RULES OF THE SUPREME COURT AND COURT OF APPEALS

Opinion Delivered May 25, 2007

PER CURIAM

The Arkansas Supreme Court Committee on Civil Practice has submitted its annual proposals and recommendations for changes in rules of procedure affecting civil practice. We have reviewed the Committee's work, and we now publish the suggested amendments for comment -- except for the proposed changes to Ark. R. Civ. P. 51 and Ark. R. App. P. -- Civ. 5, which we choose not to publish at this time. The Notes explain the changes, and the proposed changes are set out in "line-in, line-out" fashion (new material is italicized; deleted material is lined through).

We call attention to three significant recommendations: First, the proposed change to Rule 5-2 of the Rules of the Supreme Court and Court of Appeals would provide that all decisions are precedent, even if the decision is not designated for publication in the official reporter. A thorough explanation of this proposal is found in the accompanying Reporter's Note. Second, the proposed changes to Ark. R. Civ. P. 26 (b) and Ark. R. Evid. 502 would protect parties who inadvertently disclose material protected by an evidentiary privilege or

doctrine of protection, such as the attorney work product doctrine. Recently, the Arkansas Bar Association filed a petition that recommends similar changes to these rules. Finally, a new Administrative Order is proposed prescribing minimum qualifications for private civil process servers, as well as a procedure for appointment.

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

Comments on the suggested rules changes should be made in writing before August 1, 2007, and they should be addressed to: Leslie W. Steen, Clerk, Supreme Court of Arkansas, Attn.: Civil Procedure Rules, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

A. ARKANSAS RULES OF CIVIL PROCEDURE

Rule 4. Summons.

* * *

(c) *By Whom Served.* Service of summons shall be made by (1) a sheriff of the county where the service is to be made, or his or her deputy, unless the sheriff is a party to the action; (2) any person ~~not less than eighteen years of age~~ appointed *pursuant to Administrative Order No.* __ for the purpose of serving summons by either the court in which the action is filed or a court in the county in which service is to be made; (3) any person authorized to serve process under the law of the place outside this state where service is made; or (4) in the event

of service by mail or commercial delivery company pursuant to subdivision (d)(8) of this rule, by the plaintiff or an attorney of record for the plaintiff.

Addition to Reporter's Notes, 2007 Amendment: *New Administrative Order Number __ prescribes minimum qualifications for private process servers appointed by the circuit courts, as well as the procedure for their appointment. The change in Rule 4(c) eliminates the one former qualification (being at least eighteen years old) and incorporates by reference the expanded qualifications contained in the new Administrative Order.*

Rule 26. General provisions governing discovery.

* * *

(b) *Scope of Discovery*. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * *

(4) *Trial preparation: experts*. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (I) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which he is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) *Subject to subdivision (b)(4)(C) of this rule, a party may depose any person who has been identified as*

an expert expected to testify at trial. ~~Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.~~

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(5) Inadvertent Disclosure. (A) A party who discloses or produces material or information without intending to waive a claim of privilege or attorney work product shall be presumed not to have waived under these rules and the Arkansas Rules of Evidence if the party takes the following steps: (I) within fourteen calendar days of discovering the inadvertent disclosure, the producing party must notify the receiving party by specifically identifying the material or information and asserting the privilege or doctrine protecting it; and (ii) if responses to written discovery are involved, then the producing party must amend them as part of this notice.

(B) Within fourteen calendar days of receiving notice of an inadvertent disclosure, a receiving party must return, sequester, or destroy the specified materials and all copies. After receiving this notice, the receiving party may not use or disclose the materials in any way.

(C) A receiving party may challenge a disclosing party's claim of privilege or protection and inadvertent disclosure. The reason for such a challenge may include, but is not limited to, the timeliness of the notice of inadvertent disclosure or whether all the surrounding circumstances show waiver.

(D) In deciding whether the privilege or protection has been waived, the circuit court shall consider all the material circumstances, including: (I) the reasonableness of the precautions taken to prevent inadvertent disclosure; (ii) the scope of the discovery; (iii) the extent of disclosure; and (iv) the interests of justice. Notwithstanding Model Rule of Professional Conduct 3.7, and without having to terminate representation in the matter, an attorney for the disclosing party may testify about the circumstances of disclosure and the procedures in place to protect against inadvertent disclosure.

Addition to Reporter's Notes, 2007 Amendment: *Paragraph (4)(A) of subdivision (b) has been amended to conform the Rule to current practice. Parties routinely depose testifying experts, as they do other witnesses, without first getting a court order allowing the deposition. This amendment eliminates an unnecessary provision that no one was following.*

Paragraph (5) has been added to subdivision (b). These provisions protect parties who inadvertently disclose material protected by any evidentiary privilege or doctrine of protection, such as the attorney work product doctrine. This provision draws on the work of the Arkansas Bar Association's Task Force on the Attorney-Client Privilege, American Bar Association Resolution 120D (adopted by House of Delegates in August 2006), and a 2006 amendment to Federal Rule of Civil Procedure 26. The Arkansas Bar Association specifically endorsed this change in the Arkansas Rule.

Lawyers do their best to avoid mistakes, but they sometimes happen. Discovery has always posed the risk of the inadvertent production of privileged or protected material. The advent of electronic discovery has only increased the risk of inadvertent disclosures. This amendment addresses this risk by creating a procedure to evaluate and address inadvertent disclosures, including disputed ones.

Arkansas law on this issue is scarce. In Firestone Tire & Rubber Co. v. Little, 276 Ark. 511, 639 S.W.2d 726 (1982), a letter between two lawyers for Firestone "made its way" to one of Firestone's customers, who produced the letter in another lawsuit. The Supreme Court held that Firestone waived the privilege by allowing the letter to get into the customer's hands. 276 Ark. at 519, 639 S.W.2d at 730. The Court, however, did not discuss how the customer obtained the letter or whether Firestone's disclosure was inadvertent. The Eighth Circuit has endorsed the multi-factor approach contained in this Rule as amended. Gray v. Bicknell, 86 F.3d 1472, 1483–84 (8th Cir. 1996) (predicting in a diversity case that Missouri courts would adopt this approach, which is the majority view).

The new provision creates a presumption against waiver if the disclosing party acts promptly after discovering the inadvertent disclosure. Notice by the disclosing party must be specific about both the material inadvertently disclosed and the privilege or doctrine protecting it. After receiving this kind of notice, a party may neither use nor disclose the specified material. Instead, the receiving party must either return, sequester, or destroy the material (including all copies). A party's failure to fulfill these obligations will expose that party to sanctions under Rule 37. The new provision also creates a procedure for the receiving party to challenge a notice of inadvertent disclosure and a procedure for the circuit court to resolve the dispute. This procedure, which requires the court to consider all the material circumstances, "strikes the appropriate balance" and is "best suited to achieving a fair result." Gray, 86 F.2d at 1484.

B. ADMINISTRATIVE ORDERS

ADMINISTRATIVE ORDER NUMBER __

Private Civil Process Servers

Appointment—Qualifications

(a) Authority to Appoint Persons to Serve Process in Civil Cases. The administrative judge of a judicial circuit, or any circuit judge(s) designated by the administrative judge, may issue an order appointing an individual to make service of process pursuant to Arkansas Rule of Civil Procedure 4 (c)(2).

(b) Minimum Qualifications to Serve Process. Each person appointed to serve process must have these minimum qualifications:

(1) be not less than eighteen years old and a citizen of the United States;

(2) have a high school diploma or equivalent;

(3) not have been convicted of a crime punishable by imprisonment for more than one year or a crime involving dishonesty or false statement, regardless of the punishment;

(4) hold a valid Arkansas driver's license;

(5) demonstrate familiarity with the various documents to be served; and

(6) obtain prior written approval from the sheriff of each county in which the person will serve

process.

Each judicial district may, with the concurrence of all the circuit judges in that district, prescribe additional qualifications.

(c) Appointment Procedure.

(1) A person seeking court appointment to serve process shall file an application with the circuit clerk. The application shall be accompanied by an affidavit stating the applicant's name, address, occupation, and employer, and establishing the applicant's minimum qualifications pursuant to section (b) of this Administrative Order.

(2) The judge shall determine from the application and affidavit, and from whatever other inquiry is needed, whether the applicant meets the minimum qualifications prescribed by this Administrative Order and any additional qualifications prescribed in that circuit. If the judge determines that the applicant is qualified, then the judge shall issue an order of appointment. The circuit clerk shall file the order, and provide a certified copy of it to the process server. The circuit clerk of each county shall maintain and post a list of appointed civil process servers.

(d) Identification. Each process server shall carry a certified copy of his or her order of appointment, and a Arkansas driver's license, when serving process. He or she shall, upon request or inquiry, present this identification at the time service is made.

(e) Duration, Renewal, and Revocation.

A judge shall appoint process servers for a fixed term not to exceed three years. Appointments shall be renewable for additional three-year terms. A process server seeking a renewal appointment shall file an application for renewal and supporting affidavit demonstrating that he or she meets the minimum qualifications prescribed by this Administrative Order and the judicial circuit. Any circuit judge may revoke an appointment to serve process for any of the following reasons: (1) making a false return of service; (2) serious and purposeful improper service of process; (3) failing to meet the minimum qualifications for serving process; (4) misrepresentation of authority, position, or duty; or (5) other good cause.

(f) Forms. Forms for the application, affidavit, order of appointment, and renewal of appointment are available at the Administrative Office of the Courts section of the Arkansas Judiciary website, http://courts.state.ar.us .

***Explanatory Note**: This new Administrative Order imposes expanded minimum qualifications for private process servers in civil cases. Arkansas Rule of Civil Procedure 4(c)(2) formerly provided than the circuit court could appoint any person more than eighteen years old to serve process. Given the importance and effect of service of process, that qualification is insufficient. The expanded minimum qualifications imposed by this Administrative Order will help ensure the competence and character of private process servers. The Order establishes a floor, not a ceiling: the circuit judges in each judicial district may establish additional qualifications. Rule 4(c)(2) has been amended to incorporate this Order*

by reference. The Order also creates a uniform procedure for appointment and reappointment by the circuit court, as well as giving examples of the good cause which would justify revocation of the privilege of serving process. Finally, the Order requires process servers to carry a certified copy of their order of appointment, and their driver's license, to establish the server's legal authority.

C. ARKANSAS RULES OF EVIDENCE

Rule 502. Lawyer-client privilege.

(e) *Inadvertent disclosure. A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if the disclosing party follows the procedure specified in Rule 26(b)(5) of the Arkansas Rules of Civil Procedure and, in the event of a challenge by a receiving party, the circuit court finds in accordance with Rule 26(b)(5)(D) that there was no waiver.*

***Explanatory Note**: New subdivision (e) cross-references the 2007 amendment to Rule of Civil Procedure 26(b), which governs inadvertent disclosures of privileged or otherwise protected material during discovery.*

D. RULES OF THE SUPREME COURT AND COURT OF APPEALS

Rule 5-2. Opinions.

~~(a) *Supreme court — Signed opinions*. All signed opinions of the Supreme Court shall be designated for publication.~~

~~(b) *Court of appeals — Opinion form*. Opinions of the Court of Appeals may be in conventional form or in memorandum form. They shall be filed with the Clerk. The opinions need not contain a detailed statement of the facts, but may set forth only such matters as may be necessary to an understandable discussion of the errors urged. In appeals from decisions of the Arkansas Board of Review in unemployment compensation cases, when the Court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.~~

~~(c) *Court of appeals — Published opinions*. Opinions of the Court of Appeals which resolve novel or unusual questions will be released for publication when the opinions are announced and filed with the Clerk. The Court of Appeals may consider the question of whether to publish an opinion at its decision-making conference and at that time, if appropriate, make a tentative decision not to publish. Concurring and dissenting opinions will be published only if the majority opinion is published. All opinions that are not to be~~

~~published shall be marked "Not Designated for Publication."~~

~~(d) *Court of appeals — Unpublished opinions*. Opinions of the court of appeals not designated for publication shall not be published in the *Arkansas Reports* and shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case). Opinions not designated for publication shall be listed in the *Arkansas Reports* by case number, style, date, and disposition.~~

~~(e) *Copies of all opinions*. In every case the Clerk will furnish, without charge, one typewritten copy of all of the Court's published or unpublished opinions in the case to counsel for every party on whose behalf a separate brief was filed. The charge for additional copies is fixed by statute.~~

(a) Filing, Notice, and Website Publication. The Supreme Court and Court of Appeals shall file every opinion with the Clerk, who shall provide a copy of the opinion to each pro se litigant and all counsel of record for each party in the case without charge. The Reporter of Decisions shall promptly post every opinion on the Arkansas Judiciary's website and maintain a searchable library of opinions on the website, which shall include all opinions issued after January 1, 2000.

(b) Arkansas Reports and Arkansas Appellate Reports. The Supreme Court and Court of Appeals shall decide which of their opinions will be included in the Arkansas Reports *and the* Arkansas Appellate Reports, *the official reporter. Opinions marked "Not Designated For Inclusion In the*

Arkansas Reports *or* Arkansas Appellate Reports*" shall not be reproduced there, but shall be listed by case number, style, date, and disposition.*

(c) Precedential Value. Every Supreme Court and Court of Appeals opinion is precedent and may be relied upon and cited by any party in any proceeding. Whether an opinion is included in the Arkansas Reports *or* Arkansas Appellate Reports *shall have no effect on its precedential value.*

(d) Copies and Service of Certain Pre-2000 opinions. During any proceeding before any court or administrative body, a party who cites an opinion issued before January 1, 2000, and not included in the Arkansas Reports *or* Arkansas Appellate Reports *shall serve a copy of that opinion on all the other parties and file proof of service.*

(e) Uniform citation. (1) Decisions included in the Arkansas Reports *and* Arkansas Appellate Reports *shall be cited in all court papers by referring to the volume and page where the decision can be found and the year of the decision. Parallel citations to an unofficial reporter, and pinpoint citations to specific pages, are strongly encouraged. For example:*

Smith v. Jones, 338 Ark. 556, 558, 999 S.W.2d 669, 670 (1999).

Doe v. State, 74 Ark. App. 193, 198, 45 S.W.3d 860, 864 (2001).

(2) Decisions not included in the Arkansas Reports *or* Arkansas Appellate Reports, *but available on the Arkansas Judiciary website, shall be cited in all court papers by referring to the case name, appellate docket number, the court name, and date of decision. Parallel citations to an unofficial electronic database, and pinpoint citations, are strongly encouraged. A pinpoint citation to the electronic version of a decision on the Arkansas Judiciary website shall refer to the page of the PDF (or WordPerfect version, if no PDF exists) where the matter cited appears. For example:*

> *White v. Green, No. CA04-543, at p.3, 2004 WL 3109899, at *2 (Ark. App. Jan. 19, 2004).*

> *Roe v. State, No. CA99-288, at p.3, 1999 AR 1002003, at p.2 (VersusLaw) (Ark. App. Mar. 1, 1999).*

(3) Decisions not included in the Arkansas Reports *or the* Arkansas Appellate Reports, *nor available on the Arkansas Judiciary website, shall be cited in all court papers by referring to any electronic database and including the case name, the appellate docket number, the court name, and the date of the decision. Parallel citations to other electronic databases, and pinpoint citations to specific pages, are strongly encouraged. For example:*

> *Red v. Brown, No. CA06-173, 1998 WL 012345, at *3, 1998 Ark. App. LEXIS 54321, at *4 (Ark. App. May 20, 1998).*

*Blue v. State, No. CA87-456, at p.5 (Loislaw, Ark. Case Law), 1987 WL 54321, at *6 (Ark. App. Dec. 1, 1987).*

(f) Affirmance Without Opinion. In appeals from decisions of the Arkansas Board of Review in unemployment-compensation cases, when the appellate court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.

Reporter's Note: *Unlike our other Arkansas court rules, the Rules of the Supreme Court and Court of Appeals do not contain reporter's notes. To encourage comments from the bench and bar on this proposal, however, this note explains why the Committee on Civil Practice unanimously recommends that the Supreme Court revise Rule 5-2.*

The proposed rule recognizes that, as a matter of legal principle, all Arkansas appellate decisions have some precedential value. When an appellate court says what the law is for a particular set of facts, that decision binds that court and lower courts in later, similar cases—unless the prior decision has been overruled, can be distinguished from the case under consideration, or is overruled in the process of deciding the current case . Jackson v. State, 359 Ark. 297, 310-11, 197 S.W.3d 468, 478 (2004). The force of precedent disciplines judicial power and is a pillar of the rule of law. Anastasoff v. U.S., 223 F.3d 898, 899-900, 903-05(8th Cir. 2000), vacated, 235 F.3d 1054 (8th Cir. 2000). The proposed rule helps keep bright this line between judicial decision-making and legislation.

The proposed rule also recognizes that, as a practical matter, there is no longer any such animal as an "unpublished" opinion. Every decision made by an Arkansas appellate court since 2000 is available to the public without charge in a searchable format on the Arkansas Judiciary website at www.courts.state.ar.us. Many decisions from earlier years are available there too. The new rule obligates the Reporter of Decisions to keep this database up to date, as she already does. Internet databases accessible to the public for a nominal fee or for free contain almost all Arkansas appellate decisions since statehood. Our court rules should acknowledge the ready electronic availability of judicial decisions and capitalize on it for the benefit of litigants, lawyers, and the public.

The proposed rule also protects litigants and lawyers who lack, or cannot afford, access to a complete electronic database of Arkansas appellate opinions. A litigant who cites a decision made before 2000—and thus which is not available for free on the internet through the Arkansas Judiciary website—must serve a copy of that decision to all the other parties in the case. This obligation eliminates a potential prejudice from the rule.

The proposed rule recognizes that the Arkansas Reports *and the* Arkansas Appellate Reports *remain the official reporter for decisions by the Supreme Court and Court of Appeals. Publication of those books, however, is an increasingly expensive endeavor. The proposed rule contemplates that, because certain decisions address issues of first impression, clarify our law, or extend it, these decisions will merit inclusion in the official reporter. But the financial realities that dictate how many opinions can be included in the books each year should not dictate the precedential value of all the decisions. Anastasoff, 223 F.3d at 904. This proposal preserves the ability of the Supreme Court and Court of Appeals to give prominence to certain decisions by including them in the official reporter, while recognizing that being*

included in the books does not determine precedential value. Instead, that determination is a matter of judgment for the court deciding a current controversy in light of past judicial decisions.

The proposed rule sweeps more broadly than a recent amendment to the Federal Rules of Appellate Procedure. New federal Rule 32.1 provides that no United States Court of Appeals may prohibit or restrict the citation of federal decisions issued on or after January 1, 2007, which have been designated "unpublished", "not precedential", or the like. That salutary step, however, does not resolve the deeper issue: the precedential value of an opinion which, for whatever reason, was not included in an official, printed reporter. See, generally, Scott E. Gant, Missing the Forest For A Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1, 47 B.C. L. REV. 705 (2006). New Rule 32.1 also creates a troublesome gap by forever depriving certain pre-2007 decisions of precedential value. That line may be convenient, but it is unprincipled. The proposed Arkansas rule answers the question of citation by recognizing that all Arkansas appellate decisions are precedents, and thus may be cited by any party to any court. Using the familiar judicial tools for evaluating precedents, that court must then determine the weight, if any, it should accord an earlier decision in a current case.

New subdivision (e) prescribes uniform citation rules. These provisions cover the three categories of opinions from Arkansas's appellate courts: opinions printed in the books; opinions not included in the books, but on the Arkansas Judiciary website; and opinions that are neither in the books nor on the website. This provision also notes the strong preference for parallel citations and pinpoint citations. New subdivision (e) necessitates a change and cross reference in Rule 4-2, which governs the contents of briefs.

The proposed rule preserves certain aspects of current Rule 5-2. As provided in subdivision (a), the Clerk of the Courts remains obligated to file as a public record all decisions of the Supreme Court and

Court of Appeals. The Clerk must also continue to provide a copy of every decision to every litigant in the case. And subdivision (f) retains that part of current Rule 5-2 which allows the Arkansas Court of Appeals to affirm decisions of the Arkansas Board of Review in unemployment-compensation cases in certain circumstances.

The scholarly literature on unpublished opinions, non-precedential opinions, and no-citation rules is extensive. See, e.g., Gant, supra, at p. 706, note 5 (collecting citations). A good survey is Anastasoff, Unpublished Opinions, and "No-Citation Rules," 3 J. APP. PRAC. & PROCESS 169 (2001). Almost thirty years ago, the operation of then-new Arkansas Supreme Court Rule 21—the ancestor of current Rule 5-2—was the subject of an empirical study. David Newbern and Douglas L. Wilson, Rule 21: Unprecedent and the Disappearing Court, 32 ARK. L. REV. 37 (1978). The authors concluded that our judicial system was being ill-served by unpublished opinions and recommended that they be abandoned. In a companion article, Justice George Rose Smith argued that selective publication was working well in Arkansas and should continue. George Rose Smith, The Selective Publication of Opinions: One Court's Experience, 32 ARK. L. REV. 26 (1978). Three decades of experience show that Newbern and Wilson were correct. The Committee on Civil Practice believes that revised Rule 5-2 is sound in principle, workable in practice, and worthy of adoption.

Rule 4-2. Contents of Briefs.

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

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(7) *Argument.* Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. For each issue, the applicable standard of review shall be concisely stated at the beginning of the discussion of the issue. ~~Citations of decisions of the Court which are officially reported must be from the official reports. All citations of decisions of any court must state the style of the case and the book and page in which the case is found. If the case is also reported by one or more unofficial publishers, these should also be cited, if possible.~~ *Rule 5-2(e) governs citation of decisions of the Arkansas Supreme Court and Court of Appeals. Citation of decisions from other jurisdictions should follow the most recent edition of The Bluebook: A Uniform System of Citation.* Reference in the argument portion of the parties' briefs to material found in the abstract and Addendum shall be followed by a reference to the page number of the abstract or Addendum at which such material may be found. The number of pages for argument shall comply with Rule 4-1(b).