CENTER FOR ARKANSAS LEGAL SERVICES

LEGAL AID of ARKANSAS
Equal Access to Justice

Poverty Law Practice Manual

Civil Procedure

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Introduction

Welcome to the Poverty Law Practice Manual. This manual is designed to help legal aid and pro bono attorneys better understand poverty law issues in Arkansas. The Center for Arkansas Legal Services and Legal Aid of Arkansas, Inc., maintain this manual. You can learn more about free legal aid in Arkansas by visiting arlegalservices.org.

Preliminary Note

In 1993, Rule 26 of the Federal Rules of Civil Procedure and certain other federal rules in regard to discovery were substantially revised (see VIII. Investigation and Discovery of Facts, infra). The United States Districts Courts in Arkansas have generally chosen to "opt out" of the revisions to the discovery rules (as they are permitted to do by the federal rules). As a result, the revisions generally do not apply in federal courts in Arkansas. However, where pertinent, the revisions are noted in the materials.

I

An Approach to Solving Civil Procedure Problems

Overview

When undertaking representation of a client involved in litigation, the lawyer should keep in mind that the answer to nearly all civil procedure questions can be found in the rules of procedure governing the court involved, the statutes applicable to matters of procedure (particularly in the jurisdiction and venue areas), and the cases interpreting those rules and statutes. Reference to other sources of authority (for instance local custom and practice, form books, etc.) will probably involve a less efficient use of time (the form book is never quite the one needed) and can result in mistakes. For instance, because the Rules of Civil Procedure contain step by step instructions for drafting a complaint (see V. below), nothing more is needed to draft a legally sufficient complaint, save relevant statutory and case law.

II

Civil Procedure Information to Be Obtained at the First Interview with the Client

Overview

The lawyer should normally begin to assemble needed procedural information at the first interview with the client. That information will usually include the following:

Facts Necessary

If Representing a Plaintiff

1. establish subject matter jurisdiction of the court
2. establish venue of the court
3. establish personal jurisdiction over the defendant
4. obtain service of process on the defendant
5. draft the caption and form of the complaint
6. state a claim for relief (cause of action) in the body of the complaint
7. state the kind and amount of relief to be demanded in the complaint
8. begin informal and formal discovery procedures

If Representing a Defendant

1. determine whether the court has subject matter jurisdiction of the case
2. determine whether the court's assertion of venue could be challenged
3. determine whether the court's assertion of personal jurisdiction could be challenged
4. determine whether service of process of the defendant was properly made
5. draft the caption and form of the answer or other response to the complaint
6. prepare the body or text of the of the answer or motion to be filed in response to plaintiff's complaint (see VII for a list of possible responsive motions)
7. state the relief to be demanded in the answer or motion to be filed in response to plaintiff's complaint
8. begin informal and formal discovery procedures

In addition, if representing a plaintiff who is indigent, the lawyer should determine at the first interview whether the case can be filed in forma pauperis (IFP). Filing the case IFP means that the client will not have to pay many, if any, of the court costs (filing fee, sheriff's fee for service of process, etc.). A client will be allowed to file the case IFP only if the client is sufficiently financially impoverished to meet the court's standards. The requirements for filing IFP, court costs, and the mechanics of filing a lawsuit are discussed below, at V.A.

It is unlikely that all of the above information will be obtained in the first interview. However, the lawyer contemplating litigation should realize that the information listed above must be obtained as soon as possible, and that the most likely source for most of the information will be the client. Some of the information (such as the date of service of process, if representing a defendant) must be obtained immediately if the client's interests are to be protected by the lawyer.

At the first interview (or soon thereafter) the lawyer should also consider, with the participation of the client, whether all civil procedure questions could be avoided through resolution of the client's problem by a process other than litigation. This involves weighing, again, through a collaborative effort between the client and lawyer, of the advantages and disadvantages of litigation versus resolving the matter through some means other than a lawsuit.

III

Introduction—Selecting the Proper Court: Rules of Procedure, Subject Matter Jurisdiction, Venue, Personal Jurisdiction, and Service of Process

A. Introduction

Factors to be Considered by the Attorney for the Plaintiff and the Attorney for the Defendant in Regard to the Proper Court for the Lawsuit

If representing the plaintiff, one of the first procedural concerns of the lawyer will be determining in which court the lawsuit will be filed. Often the case may be filed in one of several courts. Tactical considerations for choosing a forum go beyond the scope of these materials.

The court hearing the case ordinarily (1) must have the authority to hear the type of claim asserted (subject matter jurisdiction), (2) must be the proper court within a system of courts for trial of the case (venue), (3) must be able, under appropriate statutory and United States Constitutional standards, to assert jurisdiction over the defendant or their property (personal jurisdiction), and (4) must, in fact, assert personal jurisdiction over the defendant by giving them proper notice of the proceedings (obtain service of process).

With the exception of subject matter jurisdiction, all of the above (venue, personal jurisdiction, service of process) may be waived by the defendant. Thus, when representing the defendant, the lawyer must, as an initial matter, determine (1) whether the plaintiff has selected a proper court, and whether they want to challenge or waive any defect in the court's assertion of subject matter jurisdiction, (2) whether the court can assert personal jurisdiction over the defendant, (4) whether venue is proper, and (5) whether service of process has been properly made.

Depending on the defect in the court's assertion of authority over the defendant, that authority would be challenged under either the Federal Rules of Civil Procedure or Arkansas Rules of Civil Procedure, as follows: (1) lack of subject matter jurisdiction—Rule 12(b)(1), (2) lack of venue—Rule 12(b)(3), (3) lack of jurisdiction over the person—Rule 12(b)(2), and (4) defective service of process—Rule 12(b)(5). The form and content of procedural devices for formally challenging lack of subject matter jurisdiction, venue, personal jurisdiction, and defective service of process are discussed under VII.C., below.

B. What Rules of Procedure Apply to the Lawsuit

Although the Arkansas Rules of Civil Procedure apply to most lawsuits filed in Arkansas courts, the lawyer should be aware that the procedural rules governing a lawsuit will not necessarily be the same for all courts and for all proceedings in Arkansas. Differences in the rules applicable to two or more of the courts in which the lawsuit could be brought may be a factor in the selection of the proper court in which to file the lawsuit.

Rules 1 and 81 of the Arkansas Rules of Civil Procedure apply the Rules to all civil proceedings in circuit, chancery, and probate courts. Rule 10 of the Arkansas Inferior Court Rules provides that, "[w]here applicable and unless otherwise specifically modified [by the Arkansas Inferior Court Rules], the Arkansas Rules of Civil Procedure and rules of evidence shall apply to and govern matters of procedure and evidence in the inferior courts of [Arkansas]." Thus, Arkansas Rules of Civil Procedure are applicable to municipal court proceedings. In addition, some isolated procedural rules are found in the Arkansas Juvenile Code (A.C.A. §§ 9-27-301 et seq.).

For the courts to which the Inferior Court Rules apply (again, primarily municipal court), those rules modify the Arkansas Rules of Civil Procedure in regard to the manner in which a lawsuit is commenced (by filing a claim form rather than a complaint) (Rule 3), in the manner and time in which defenses and objections are presented (Rule 6), and in the manner in which judgments are entered (Rule 8).

In 1988, by per curiam order, the Arkansas Supreme Court abolished the authority of trial courts to promulgate local rules. In the Matter of Local Court Rules, 290 Ark. 617, 721 S.W.2d 669). At the same time, the supreme court recognized the authority of trial court judges to "publish administrative orders which will attend to necessary 'house-keeping' matters, such as the time and place court shall commence, the duties of the bailiff and the reporter and so on."

Federal Rules 1 and 81 make the Federal Rules of Civil Procedure generally applicable to proceedings in federal court. Pursuant to Federal Rule 83, the federal courts sitting in Arkansas have adopted a set of local rules published in booklet form, "Rules of the United States District Courts for the Eastern and Western Districts of Arkansas" (available from the clerk of the federal courts). The federal court local rules are also found in the Court Rules volume of the Arkansas Code.

C. Subject Matter Jurisdiction

Arkansas Courts

The subject matter jurisdiction of the various Arkansas Courts is a complex subject about which only a general description is possible here. That description is found in Appendix "A" to this chapter. The pertinent sections of the Arkansas Constitution and Statutes should be consulted for more specific details of the subject matter jurisdiction of particular courts. As a general matter, Arkansas Rule 2 directs that "actions in equity shall be brought in the Chancery Court and actions at law shall be brought in the Circuit Court." However, Linder v. Howard, 296 Ark. 414, 757 S.W.2d 549 (1988) recognized that a motion to dismiss for filing in the wrong court as between Chancery and Circuit Courts should be treated as a motion to transfer to the correct court. In addition, that case held that the filing of the action in the wrong court served to toll the statute of limitations.

Federal District Courts

Federal district courts are courts of limited jurisdiction because Congress has by statute limited the types of cases federal courts have authority to hear. In general, federal district court jurisdiction is of two types: (1) diversity of citizenship jurisdiction (a suit involving citizens of different states and more than $75,000 in controversy, 28 U.S.C. § 1332), and (2) federal question jurisdiction (a question arising under a federal statute or the United States Constitution, 28 U.S.C. § 1331).

It is very important to remember that there is no general grant of jurisdiction for the federal district courts. If a case is to be filed in federal district court, it almost always must be pursuant to a federal statute authorizing jurisdiction of that specific type of case. Many of the federal statutes granting federal court jurisdiction are found in Title 28 of the United States Code.

D. Venue

The question of venue is closely related to the question of jurisdiction. Venue is the place, or places, within a system of courts, anyone of which could acquire jurisdiction, at which the trial of the case is to take place. For instance, although any circuit court in the state of Arkansas may have both subject matter jurisdiction and personal jurisdiction over the parties in a suit for money damages for personal injuries arising out of an automobile accident, only the circuit court in the county where the accident occurred or the circuit court in the county where the injured person resided would have venue (A.C.A. § 16-60-112).

Unlike lack of subject matter jurisdiction, which can always be raised, improper venue, either in state court or in federal court, is waived if timely objection is not made by the defendant (see VII., below for procedure for objecting to venue) or is not made by the defendant's seeking non-compulsory affirmative relief by filing a third party complaint, by filing a permissive counterclaim, etc. (see Arkansas Game & Fish Comm'n. v. Lindsey, 292 Ark. 314, 730 S.W.2d 474 (1987)). Venue is waived if objection is not raised because venue is, as a general proposition, for the protection of the defendant (venue can be waived by the defendant even in divorce cases, see Hargis v. Hargis, 292 Ark. 487, 731 S.W.2d 209 (1987); Chappell v. McMillan, 296 Ark. 317, 756 S.W.2d 895 (1988)). As a result, the Arkansas Supreme Court has said in a number of decisions, "[t]he underlying policy in Arkansas is to fix the venue in the county of the defendant's residence unless for policy reasons there is a statutory exception." (see Odell v. Arkansas General Industries Co., 288 Ark. 356, 358, 705 S.W.2d 438, 439 (1986)).

The Arkansas Supreme Court provided further help in understanding the difference between jurisdiction and venue, stating: "[w]hile jurisdiction is the power and authority of the court to act, venue is the place where the power to adjudicate is to be exercised. Requirements of venue are grounded in convenience to the litigants and venue is a procedural question, not a jurisdictional one. Mark Twain Life Insurance Corp. v. Cory, 283 Ark. 55, 58, 670 S.W.2d 809, 811 (1984).

The Arkansas venue statutes are collected generally at A.C.A. §§ 16-60-112 et. seq. However, a few venue provisions are found elsewhere in the statute books. For instance, the statute governing venue in divorce actions is found at § 9-12-303. Federal court venue statutes are found generally beginning at Title 28 U.S.C. § 1391.

If the case is filed in a court in which venue is not proper, Rule 12(h)(3) of the Arkansas Rules allows the court to dismiss the case or transfer it to a court in a county in which venue would be proper. Federal courts are given similar authority by statute (see 28 U.S.C. § 1404, 1406).

E. Personal Jurisdiction over Defendant

A comprehensive discussion of the topic of personal jurisdiction is beyond the scope of these materials. The following discussion will therefore focus on the more significant factors involved in a court's possessing authority to acquire personal jurisdiction over a defendant. The primary concern of the discussion will be with personal jurisdiction over the defendant who is served with process outside the state.

As an initial matter, it is important to keep in mind that a court can always exert jurisdiction over a defendant who is served with process within the jurisdiction of the court, even if the defendant's presence within the jurisdiction is only momentary (see the 1990 United States Supreme Court decision of Burnham v. Superior Court, 110 S. Ct. 2105 (1990)). The extreme of this proposition is illustrated by Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959). In Grace, the Federal District Court for the Eastern District of Arkansas gained jurisdiction over a Tennessee resident through service of process which took place in a commercial airliner over Pine Bluff while the defendant was on a flight from Memphis to Dallas. The defendant otherwise had no contacts with Arkansas. In addition, it may be possible to establish the facts necessary to gain personal jurisdiction over the defendant (especially to establish the requisite "minimum contacts," discussed in the seventh paragraph of this subsection) by conducting discovery (see IX., below) to seek those jurisdictional facts. The United States Supreme Court approved the use of discovery done after the filing of the complaint to establish jurisdictional facts in Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982). See also English v. 21st Phoenix Corp., 590 F.2d (8th Cir. 1979).

Two elementary questions are involved in determining whether a court has acquired personal jurisdiction over an out-of-state defendant: (1) does the court have authority to exert personal jurisdiction over the defendant in the first place, and (2), if the answer to the first question is yes, have the proper procedures been followed to actually gain personal jurisdiction over the defendant? The first question is answered by a consideration of whether jurisdiction over the defendant is authorized by the Arkansas long-arm statute and whether the defendant has the requisite constitutional minimal contacts with Arkansas. The answer to the second question depends on whether the defendant has been properly served with process (Service of Process generally is discussed under Section III.F., below; the mechanics of service of process is discussed under Section VI., below). As a result of legislative revision in 1995, the test of jurisdiction under the Arkansas Long Arm Statute is now identical to the constitutional test. As revised, the relevant portion of the long arm statute provides:

> The courts of this state shall have personal jurisdiction of all persons, and all causes of action or claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution. A.C.A. § 16-4-101 (Supp. 1995).

The limit imposed by the United States Constitution on state court personal jurisdiction adopted by reference by the long arm statute is, of course, the famed "minimum contacts" test. The minimum contacts test was first announced in International Shoe, 326 U.S. 310, (1945), and the test was refined most recently by the United States Supreme Court in World Wide Volkswagen v. Woodson, 444 U.S. 286, (1980) (a tort case) and in Burger King Corp. v. Rudzewicz, 471 U.S. 462, (1985) (a contract case). Under the International Shoe standard, the defendants' activities must be shown to have had the requisite minimal relation to the state.

Even after over fifty years of court interpretation, the "minimum contacts" test is still quite vague. Whether a court is able to exert personal jurisdiction under the test will often depend on the ingenuity of the plaintiff's attorney in digging up facts to show the defendant's connection with the state. According to the Arkansas Court of Appeals, determination of whether the due process "minimum contacts" test has been satisfied requires examination of all of these considerations:

- the nature and quality of the contacts with the forum state
- the quantity of contacts with the forum state
- the relation of the cause of action to the contacts
- the interest of the forum state in providing a forum for its residents
- the convenience to the parties. Jagitsch v. Commander Aviation Corp., 9 Ark. App. 159, 163, 655 S.W.2d 468, 470 (Ark. App. 1983); Meachum v. Worthen Bank & Trust Co., N.A., 13 Ark. App. 229, 233, 682 S.W.2d 763, 766 (Ark. App. 1985)

SD Leasing, Inc. v. Al Spain & Assocs., 277 Ark. 178, 640 S.W.2d 451 (1982), pushed Arkansas' interpretation of the Constitutional standard for personal jurisdiction to the outer limits of the "minimum contacts" test. The Arkansas contacts of the out-of-state defendant in that case were limited to a single business transaction accomplished through the mails. (The lease agreement underlying the transaction in SD Leasing did contain a choice of law clause favoring Arkansas, as well as a clause by which the defendant consented to Arkansas jurisdiction in the event of default. However, the court indicated there were sufficient minimum contacts without regard to the agreement.)

SD Leasing, and two cases decided subsequent to it, indicate a trend of the Arkansas appellate courts to press the outer limits of what is permissible under the minimum contacts doctrine. See Meachum v. Worthen Bank & Trust Co., 13 Ark. App. 229, 682 S.W.2d 763, petition for review denied, 285 Ark. 198, 685 S.W.2d 173 (1985), cert. denied, 474 U.S. 844 (1985); Rice v. SD Leasing, Inc., 14 Ark. App. 180, 686 S.W.2d 450 (1985).

The Arkansas courts, however, may have approached the limits of the doctrine. In Meachum, Judge Glaze, joined by Judge Corbin in dissent, noted that the defendant had no contacts with Arkansas other than those associated with their mailing from Texas to the plaintiff in Arkansas a financial statement and a lease-guarantee. The lease-guarantee did guarantee a lease between two Arkansas corporations, and the defendant was closely associated (as an officer, director, and general counsel) with a Texas corporation also involved in the lease transaction and over which the Arkansas courts clearly had long arm jurisdiction. Judge Glaze noted Dr. Robert A. Leflar's reference to the 1982 SD Leasing decision as being a "marginal case." See Leflar, Conflict of Laws: Arkansas, 1978-82, 36 Ark. L. Rev. 191, 195 (1982-83). In the opinion of Judge Glaze, there were fewer minimum contacts in Meachum than in SD Leasing. Meachum, 13 Ark. App. at 237, 682 S.W.2d at 768 (dissenting opinion).

Further indication that the Arkansas Supreme Court may be having second thoughts about the extent to which the SD Leasing doctrine allows Arkansas courts to assert jurisdiction over nonresidents who have little connection with the state is seen in Justice Hickman's concurrence in the denial of review of Meachum. In that concurrence, Justice Hickman indicated that the expansive view of the limits of personal jurisdiction exemplified by the SD Leasing decision should be reexamined. Meachum v. Worthen Bank & Trust Co., 285 Ark. 198, 685 S.W.2d 173 (1985). See also Franklin v. Griffith, 282 Ark. 271, 668 S.W.2d 518 (1984) (long arm jurisdiction cannot be used to appoint a receiver on behalf of a nonresident driver involved in an auto accident in Arkansas to prosecute a contract action against the driver's insurer for failure to settle within policy limits, even though the driver is subject to the jurisdiction of the court in a tort action arising out of the accident) and CDI Contractors, Inc. v. Goff Steel Erectors, Inc., 301 Ark. 311 (1990) (no personal jurisdiction in circumstances quite similar to those of SD Leasing).

Because Federal Rule of Civil Procedure 4(k) incorporates, by reference, the jurisdictional law of the state in which the federal court sits as providing the basis for federal court personal jurisdiction, the test for personal jurisdiction in the federal district courts in Arkansas is the same as that for Arkansas state courts. That is, personal jurisdiction in both federal court and Arkansas state court is limited by the minimum contacts test of the United States Constitution.

As a result of the 1977 U.S. Supreme Court decision of Shaffer v. Heitner, 433 U.S. 186, the standard for jurisdiction over a defendant's property is the same as that for jurisdiction over the person of the defendant. That is including the defendant's property within the jurisdiction as a contact to be balanced with the other jurisdictional factors in the case, whether the defendant has the required "minimum contacts" with the jurisdiction.

F. Service of Process

Service of process is mentioned at this point in these materials primarily to indicate its close relationship to the question of personal jurisdiction. The discussion of service of process here is general only. The mechanics of serving process, both generally and in particular situations, are discussed at VI.

As indicated in E., above, a court possessing authority under United States constitutional and state statutory standards to obtain jurisdiction over a defendant must do so by using the appropriate method of service of process prescribed by either Arkansas or Federal Rules of Civil Procedure 4. Although most of the Arkansas Rules of Civil Procedure are identical or very similar to their counterparts in the FRCP, the methods of service of process under state and federal Rule 4 vary somewhat. Those rules should be consulted to determine whether service of process has been proper in a particular case.

A lawyer cannot rely on a sheriff (or other process server) or court to make sure that service is in accordance with the rule. The responsibility is the lawyer's, and since lack of original jurisdiction is always a defense to the enforcement of judgments, the lawyer who proceeds without good service of process may ultimately see their client's judgment become worthless following a successful attack on the jurisdiction of the court rendering the judgment.

Jurisdiction requirements and rules of service of process must be reviewed in advance of commencing the lawsuit to be certain that the court acquires jurisdiction of the case and the defendant. The procedures for obtaining jurisdiction and service of process may be traps for the unwary in particular cases.

IV

Drafting the Complaint, Other Claims for Relief, and Other Pleadings

A. Introduction

Many new attorneys will resort to form books or previously drafted forms as the basis for drafting a pleading. Finding the right form for such purposes can often be a time consuming and ultimately fruitless task. It is also an unnecessary task—it is usually far easier to draft a pleading from scratch. The rules tell the attorney how to do it. The following discussion will work through the drafting of a complaint from scratch, making reference to the specific rules of civil procedure that specify the form and the content of the complaint and of other pleadings. Because the rules that prescribe the form (Rule 10) and the body or text (Rule 8(a)) of the complaint also apply to all other pleadings that set forth claims for relief—including counterclaims, cross-claims, and third party claims—the discussion under B., C., and D., below, describes the steps to be followed in the drafting of those pleadings, as well as the steps required in drafting the complaint.

Complaints, counterclaims, cross-claims, and third-party claims all seek, as a common feature, affirmative relief (as opposed to the answer or to motions that assert defenses) against someone who is, or will become, a party to the lawsuit. The features that distinguish those pleadings can most easily be seen by considering the essential function of each:

Complaint (Rule 3)
The function of the complaint is to initiate the lawsuit for the original plaintiff against the original defendant.

Third-Party Complaint (Rule 14)
The function of the third-party complaint is very similar to that of the original complaint. It is the procedural device by which someone who is in the position of a defendant in a lawsuit makes a claim to shift their potential liability to someone not yet a party to the lawsuit.

Counterclaim (Rule 13(a), (b))
The counterclaim is the procedural device by which someone who is a party to the lawsuit makes an affirmative claim for relief against an opposing party to the lawsuit. It is a claim by a party against a party who has asserted a claim for relief (complaint, third party complaint, or cross-claim) against them. Counterclaims may be either compulsory (Rule 13(a)) or permissive (Rule 13(b)).

Cross-Claim (Rule 13(g))
A cross-claim is an affirmative claim for relief by one party against a co-party. It is a claim by a party against another person who is already a party to the lawsuit but who has not brought a claim for relief against the party bringing the cross-claim.

B. Drafting from Scratch: The General Form of Pleadings and the Caption

Rule 10 of both the Arkansas and Federal Rules specifically prescribe the general form of the pleading. Rule 10(a) first states that every pleading must have a caption. The rule then specifies the content of the caption: (1) the name of the court, (2) the title of the action (in the complaint, the names of all the parties, but in other pleadings, only the names of the first party on each side with an appropriate indication of other parties, i.e., et al), (3) the file number (if the complaint, this will be added by the clerk at the time of filing), and (4) a designation of just what kind of pleading it is (i.e., complaint, counterclaim, cross-claim, motion, answer, etc.). Rule 10 says nothing about the order in which the foregoing items must appear in the pleading nor of the location at which they must be placed. The information simply has to be in the pleading somewhere. Although the following format is not required by the rules, it is typically followed by lawyers in drafting a caption to a pleading:

In the Circuit Court of _____ County
Sally Jones
Plaintiff
v.

No. _____
Al Smith
Defendant

Complaint

Plaintiff, for their complaint against the defendant, states:

The above introductory clause is not required at all. However, an introductory clause is typically used to introduce the body of the complaint, and it makes the body somewhat easier to understand. There are many variations on the introductory clause. That set out above is recommended because it is simple, easy to read, and therefore not confusing to a layperson.

The only other requirement of Rule 10 as to the form of the pleading is that the text or body of the pleading be stated in numbered paragraphs, the contents of each of which is to be limited as far as practicable to a statement of a single set of circumstances. The rule also requires that each claim and each defense be stated in a separate count or defense. Rule 7(b)(2) applies Rule 10 by reference to the form of motions and other papers filed with the court.

All documents filed in all Arkansas courts must be on letter size paper (8 1/2" X 11"). (See ARCP 84; Rule 10 of the Arkansas Rules of Appellate Procedure; Rules 12(i) and 30 of the Supreme Court Rules; and Rule 11 of the Inferior Court Rules.

C. Drafting from Scratch: The Body or Text of Pleadings

Introduction

After drafting the caption and the introductory clause, the body, or text, of the pleading is drafted. Rule 8(a), both in state and in federal court, prescribes the contents of the body of pleadings that set forth a claim for relief, i.e., complaints, counterclaims, cross-claims, and third-party claims. Under 8(a)(1) of the Arkansas version of the Rule the pleading must state, in ordinary and concise language, facts showing all of the following:

- that the court has jurisdiction of the claim
- that the court is the proper venue for the case
- that the pleader is entitled to relief

In addition, Arkansas Rule 8(a)(2) requires that the pleader state a demand for the relief sought.

Although the language used in Federal Rule 8(a) to state the requirement for the content of the body or text of the claim for relief is quite similar to that of Arkansas Rule 8(a), a slight difference in wording creates a considerable difference in the pleading requirements between state and federal courts. Under Federal Rule 8(a) the body or text of the claim for relief must contain all of the following:

- a short and plain statement of the grounds upon which the court's jurisdiction depends (subject matter jurisdiction; no requirement of pleading venue)
- a short and plain statement of the claim showing that the pleader is entitled to relief
- a demand for judgment for the relief which is sought in the lawsuit

Each of the pleading requirements of both the federal and Arkansas rules will be considered in greater detail below.

1. Pleading Facts Showing the Court Has Jurisdiction and Venue of the Case

In 1992, the Arkansas Supreme Court amended Rule 8(a) to require that the complaint and other pleadings that set forth claims for relief include facts showing that the court has jurisdiction (see, e.g., Union Pacific Railroad Co., 316 Ark. 609, 873 S.W.2d 805 (1994); McKinney v. City of El Dorado, 308 Ark. 284, 824 S.W.2d 826 (1992))) and that venue is proper (see Fraser Bros. v. Darragh Co., 316 Ark. 297, 871 S.W.2d 367 (1994)). The Arkansas requirement of pleading jurisdiction

has reference to both personal (see, e.g., Malone & Hyde, Inc. v. Chisley, 308 Ark. 308, 825 S.W.2d 558 (1992)) and subject matter jurisdictions (see Hesser v. Johns, 288 Ark. 264, 704 S.W.2d 165 (1986)). Under Federal Rule 8(a)(1) only subject matter jurisdiction need be pleaded. There is no requirement under the federal rules of pleading venue.

2. Pleading a Statement of Facts (the Claim—Federal Court) Showing That the Pleader Is Entitled to Relief

The heart of the complaint in both state and federal court is prescribed by Rule 8(a)(2). Rule 8(a)(2) requires that the pleader state facts (Arkansas Rule) or a claim (federal rule) showing that the pleader is entitled to relief. In a series of cases beginning with Harvey v. Eastman Kodak Co., 271 Ark. 783, 610 S.W.2d 582 (1981), the Arkansas Supreme Court indicated that the difference between the pleading of facts under the Arkansas rule and pleading a claim under the federal rule is of significance. The effect of those decisions has been to proscribe in Arkansas state courts the conclusory type of pleading allowed under the federal rules (for example, "defendant negligently drove a vehicle against the plaintiff"—see Federal Rules Official Form 9). Actual facts supporting the legal conclusion (in the example from federal form 9, the statement of the legal conclusion is that the "defendant negligently drove") must be pleaded.

It is often difficult to distinguish facts from legal conclusions or to determine at what point facts have been alleged in sufficient detail. A synopsis of the allegations in the complaint in Harvey and some of its progeny may be helpful in developing a "feel" for the requirements of fact pleading.

- Allegation
  Defendant was negligent in the manufacture of glue used to hold prisms in place in surveying equipment used to survey plaintiff's fields.
  Held
  Complaint failed to allege how defendant was negligent. Harvey, supra.

- Allegation
  Plaintiff was injured upon stepping in hole on defendant's premises.
  Held
  Complaint failed to allege by what right (if any) plaintiff was on defendant's premises. Guthrie v. Tyson Foods, 285 Ark. 95, 685 S.W.2d 164 (1985).

- Allegation
  Complaint alleged certain facts seeking injunctive relief but did not allege "irreparable harm."
  Held
  Complaint stated "facts" for injunctive relief. It was not crucial to set out the words "irreparable harm." Fort Smith Symphony Orchestra, Inc. v. Fort Smith Symphony Ass'n., 285 Ark. 284, 686 S.W.2d 418 (1985).

- Allegation
  Cause of action was for "invasion of privacy."
  Held
  Court must look past the conclusory allegation that action was for "invasion of privacy" to determine whether facts alleged constitute that tort. The court found that the facts did not allege the tort of invasion of privacy. Dunlap v. McCarty, 284 Ark. 5, 678 S.W.2d 361 (1984).

- Allegation
  Defendant acted with "actual, specific, deliberate intent" to injure plaintiff by failing to provide a safe place to work, by failing to warn of dangers or provide safe working conditions, by deliberately placing defendant in a dangerous position, and by willfully violating governmental regulations.
  Held
  The nature of acts complained of determines the cause of action. The acts of defendant alleged in the complaint did not constitute an intentional tort. Miller v. Ensco, Inc., 286 Ark. 458, 692 S.W.2d 615 (1985).

- Allegation
  Defendant demanded and directed the action of his employees in an erroneous and negligent manner, resulting in injury to plaintiff.
  Held
  Complaint pleaded mere conclusions. It did not state any facts. Ratliff v. Moss, 284 Ark. 16, 678 S.W.2d 369 (1984).

- Allegation
  Defendant committed the tort of outrage by willfully and wantonly breaching a contract with plaintiff, causing plaintiff emotional distress.
  Held
  Complaint alleged mere conclusions, not facts, in regard to the tort of outrage. However, other facts alleged were sufficient to plead a cause of action for breach of contract. Rabalaias v. Barnett, 284 Ark. 527, 683 S.W.2d 919 (1985).

- Allegation
  Complaint alleged that oral contraceptive was defectively designed and manufactured, that the defendants were negligent in warning of the danger of the drug, and that the product breached the warranty of fitness.
  Held
  The allegations were conclusory, not factual. West v. Searle & Co., 305 Ark. 33, 806 S.W.2d 608 (1991). The Arkansas Supreme Court has held that the plaintiff cannot "bootstrap" their way into the pleading of a factually sufficient complaint by filing a complaint with insufficient facts, by conducting discovery to gather sufficient facts, and by then amending the complaint to allege the facts discovered. The Court stated that if it approved discovery to develop sufficient facts for pleading, we would virtually overrule Harvey v. Eastman Kodak Co., supra. A pleader then would be required only to give notice by a complaint, invalid on its face, that a claim may exist, and discovery could be used to ascertain whether it does or not. (Treat v. Kreutzer, 290 Ark. 532, 534, 720 S.W.2d 716, 717 (1986)).

Probably most trial lawyers believe they can preserve a degree of flexibility in conducting discovery and in proving the case at trial with a more general, as opposed to a more specific, pleading. See Hubbard v. Jackson, 298 Ark. 93, 766 S.W.2d 2 (1989)—failure to plead defendant's intoxication in complaint in automobile accident negligence case barred admission at trial of evidence of defendant's intoxication. Since challenges to complaints, and other claims for relief, on the ground that the pleading does not state sufficient facts are relatively unusual, the attorney may want to consider whether, at least in an initial matter, it would be preferable to draft a more general pleading. This is certainly true in some categories of cases, such as divorce actions, where it is generally not in anyone's interest to spell out the grounds for divorce in detail in the complaint. If the complaint is successfully challenged as failing to state sufficient facts, it can normally be amended (see Rule 12(j) of the Arkansas Rules of Civil Procedure—the court is to designate a certain number of days in which a party is to plead further).

To determine just what facts (Arkansas) or just what claim (federal) must be stated to satisfy the requirements of rule 8, the attorney must first determine the essential elements of the cause of action to be asserted in the complaint. In Arkansas, facts must be stated in the complaint to show that the requirements of each element are satisfied. Assistance in determining the necessary elements of the case, and just what facts must be plead to show that the pleader is entitled to relief under those elements, may be found, once again, not in a form book, but in the decisions of the Arkansas appellate courts. For instance, in a negligence case, May v. Ryder Truck Rental, Inc., 264 Ark. 751, 574 S.W.2d 264 (1978), the Arkansas Supreme Court said:

> Automobile owner's complaint, which alleged that truck rental company's negligence in failing to safeguard vehicle's removal from its property by thief, who subsequently collided with owner's parked automobile, was proximate cause of their damages but did not allege that company left key in vehicle, stated only conclusions of law and failed to state cause of action.

The pleading lesson to be learned from examining the facts as plead in the May case is that, when pleading negligence, a conclusory statement as to the act of defendant's negligence, such as "the defendant failed to safeguard plaintiff's vehicle against removal from defendant's property," will not be sufficient to state a cause of action (claim).

Legal research aids, such as the West Arkansas Digest, Shepards' Citations, and the computerized legal research services, all have research indexes (for instance, key numbers in the West services) that may be helpful in determining just what facts must be pleaded to satisfy the requirements of rule 8.

In regard to the style to be followed in pleading facts, the Arkansas Court of Appeals said "[t]he facts constituting the cause of action must be pleaded in direct and positive allegations, not by way of argument, inference or belief." (Big A Warehouse Distributors, Inc. v. Rye Auto Supply, Inc., 19 Ark. App. 286, 290, 719 S.W.2d 716, 718 (1986)).

3. Pleading a Demand for the Relief Sought (the Prayer)

This section of the complaint, prescribed by Rule 8(a)(3), is also called the prayer clause. It usually reiterates in conclusory fashion the items of damage or legal injury that have been alleged under the body or text section of the complaint ("the facts (or claim) showing the pleader is entitled to relief" section) immediately preceding the prayer clause. It need not be stated in stilted legal language such as "WHEREFORE, the plaintiff prays...." The following will suffice and, again, be easier for the lay person to understand and tolerate:

> THEREFORE, plaintiff requests that she be awarded judgment against the defendant in the amount of $20,000 together with all and other just and proper relief to which she might be entitled.

The "other just and proper relief" portion of the prayer clause probably has no meaning at all but is usually included in the prayer clause as a matter of custom and for "security blanket" purposes.

It should be noted that some items must be pleaded specially under Rule 9 (for instance, Rule 9(g) requires that items of special damage be specifically pleaded). That rule should be reviewed to determine the items which must be specially pleaded. However, since Arkansas Rule 8(a)(1) requires pleading of facts in any event, the more specific pleading requirements of Rule 9 probably add little or nothing to the general fact pleading requirement applicable in state court.

D. Signing or Verification of Pleadings and Motions

Rule 11 of both the Federal and Arkansas Rules governs the signature and the verification of pleadings. Except as provided in the Arkansas Rules as to state court, and except as provided in the Federal Rules and statutes as to federal court, pleadings, including the original complaint, must be signed by the lawyer, but pleadings need not be verified by the client (signed under an oath to the effect that the client has read the pleading and believes it to be true). Exceptions to Rule 11's general provision that client verification of pleadings is not required are unusual and are limited to particular kinds of cases (see, for instance, Rule 23.1, requiring plaintiff verification of derivative actions by shareholders).

Whether the client should verify the pleading, even though verification is not required, is a matter for the lawyer's decision in each case. Since the client's verification of the pleading may make it somewhat easier for the opposing attorney to impeach the client on the witness stand with the pleading, an argument can be made against verification in all cases. On the other hand, the lawyer may feel more comfortable having the client verify the pleading if the lawyer is concerned whether the client has been truthful in relating to the lawyer the facts contained in the pleading.

In both federal and state courts, the lawyer's signature constitutes a certification by the lawyer that the lawyer has read the pleading, motion, or other paper; that, to the best of their knowledge, information, and belief formed, after reasonable inquiry, the pleading, motion, or other paper is well grounded in fact and is warranted by existing law, or by a good faith argument, for the extension, modification, or reversal of existing law; and that the pleading, motion, or other paper is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the costs of litigation. (Arkansas Rule 11. Although the same basic principle underlies Federal Rule 11, the federal rule is somewhat more complex.)

A signature in violation of Rule 11 may result in the court imposing sanctions on the signing lawyer. Those sanctions may include the payment of reasonable expenses (including a reasonable attorney's fee) incurred by the other party. (See Miles v. Southern, 297 Ark. 274, 760 S.W.2d 868 (1988), on petition for rehearing, 297 Ark. 280-A, 763 S.W.2d 656 (1989) for the first decision of the Arkansas Supreme Court interpreting the Rule 11 sanction authority.)

Rule 11 also requires that the lawyer state their address. For the convenience of everyone, the lawyer should also state their telephone number on every pleading. Local Rule C-1(c) of the Rules for the Eastern and Western Districts of Arkansas requires that all pleadings include the attorney's telephone number and the Arkansas Supreme Court (or other Supreme Court) identification number.

V

Filing the Complaint and Other Pleadings and Motions

A. Court Costs and Filing In Forma Pauperis

The cost of filing a complaint in circuit court is $165.00. There are numerous other fees for filing various pleadings and documents in both state and federal courts, although there is generally no charge for filing a responsive pleading. If the client must pay court costs, those costs should be collected from the client in advance of filing the complaint, pleading, motion, etc. in court. Office procedure should be consulted as to the proper way to handle monies received from the client.

If the client is indigent, court costs may be waived. Under the U.S. Supreme Court's decision in Boddie v. Connecticut, 401 U.S. 371, (1971), and the decision of the Arkansas Supreme Court in Milks v. Carden et al., 269 Ark. 102, 598 S.W.2d 744 (1980), filing fees and court costs are not to be charged to indigent persons. As a practical matter, this usually means that the indigent client will not be charged with a filing fee or be charged with the cost of the sheriff's service of process. However, in Arkansas, the counties have traditionally not paid costs that would require an actual payment of cash out of the county's funds. Thus, costs of publication (in cases involving service by publication) and costs of service out of state have had to be borne by the individual party. Payment of such costs by the indigent client does not necessarily comport with the requirement of either the Boddie case or the Milks case.

The procedure in Arkansas courts for filing a case in forma pauperis is set out in ARCP 72. The procedure requires that the filing of a petition to file in forma pauperis contain an assertion of indigency and contain a verified supporting affidavit. Pursuant to the rule, the court is to provide the affidavit form. In addition, a copy of the proposed complaint is to be attached to the petition. A form of that affidavit is set out at 262 Ark. 913 (1977) of the Arkansas Reports. Although by its terms the form is limited to proceedings in Circuit Court, other Arkansas courts, such as Chancery Courts, routinely make in forma pauperis decisions based on an "affidavit of indigency" either identical to or similar to that approved by the Arkansas Supreme Court for use in Circuit Courts.

In addition to the Supreme Court approved in forma pauperis form, some Circuit, Chancery, and Probate judges have promulgated their own forms. If the attorney believes that an argument can be made for the client's indigency, even though the required form when completed would seem to indicate otherwise, the attorney should consider making the argument to the court that the client is nevertheless indigent and should be permitted to file in forma pauperis.

To file in forma pauperis, a "Motion for Leave to File In Forma Pauperis" must first be presented to the court together with the "affidavit of indigency" discussed above. If the court approves the motion to file in forma pauperis, it will issue an order (the attorney, of course, must prepare the order) allowing the plaintiff to proceed "in forma pauperis." The clerk will not file the complaint, and the sheriff will not make service, without payment of the ordinary fees unless the lawyer presents the in forma pauperis order.

B. The Mechanics of Filing the Complaint and Other Pleadings and Motions

The filing procedure here described is that generally followed in the Circuit, Chancery, and Probate courts of Pulaski County, Arkansas. However, the procedure should be basically the same, with minor variations, in all Arkansas courts.

The original of the complaint or other pleading or motion and four copies should be taken to the Clerk's office. The clerk in the office will keep the original and one copy. The other three copies will be stamped filed, and the clerk will attach the summons (the clerk prepares the summons) to one of the remaining three copies. At the same time the attorney will pay the filing fee or furnish the clerk with a copy of the order allowing the lawsuit to be filed in forma pauperis. After the filing has been completed, the attorney will then take the copy of the complaint with summons attached to the sheriff, or to another person who will make service of process, or the attorney will mail the complaint and summons to the defendant if service by mail is to be attempted

(see VI. below for the mechanics of serving process). One of the two copies then remaining should be mailed to the client along with a cover letter explaining what the lawyer has done by way of the filing and explaining what the client's responsibilities are (an appearance at a temporary hearing, etc.). The other copy should be placed in the file.

Filing procedures for other pleadings and motions filed subsequent to the complaint are the same as that described above (see Rule 5(c)). However, after the complaint, all pleadings and motions may be served by mailing them to the opposing party's attorney or, if the opposing party has no attorney, by mailing them directly to the opposing party (see discussion at VI.E., below). If a final judgment has been entered in the case and the case is the type over which the court has continuing jurisdiction, service must be upon the party to be served, not upon the attorney.

It is a good idea to make it a point to be on good terms with the people who work in the clerk's office. They can be very helpful with procedural questions, particularly questions in regard to filing.

VI

The Mechanics of Serving Process, Pleadings, Motions, and Other Papers

Overview

This section discusses the practical steps that must be taken to effect service of process. For a discussion of service of process generally and of how service of process relates to the questions of jurisdiction and venue, see III.F., above.

A. Service of Process Within the State of Arkansas

After the complaint (or other pleading) has been filed, the court clerk will prepare the summons. In Arkansas state courts, if the defendant is to be served within the state, Rule 4 allows service by mail, in addition to the methods of service allowed. Service by mail will normally be the least expensive method of making service. However, Rule 4(d)(8) contemplates that for good service the defendant who is served by mail, and no one else, will normally have to sign a receipt for the mail (see Wilburn v. Keenan Companies, 298 Ark. 461, 768 S.W.2d 531 (1989); Green v. Yarbrough, 299 Ark. 175, 771 S.W.2d 760 (1989)—for a person to sign as accepting mail service as defendant's agent, the defendant must have designated, in writing, the person as the defendant's agent in accordance with postal service regulations).

Service by mail is usually attempted by sending the summons and a copy of the complaint by either registered or certified mail (certified is cheaper and just as effective) to the defendant's address. In addition, by per curiam order of November 21, 1988, the Arkansas Supreme Court established an alternative method of service by mail that requires the defendant to acknowledge receipt of service by returning an "acknowledgment of service" form to the plaintiff. However, if the postal service is not able to deliver the letter, or if the defendant does not return the "acknowledgment of service," the lawyer will have to fall back to one of the other authorized methods of service, most likely to direct service by the sheriff or by another qualified person. (Rule 4(d)(8) establishes procedures for effecting service if the defendant refuses to accept service. However, the rule also allows any default to be set aside upon proof that the receipt was signed, or delivery was refused by someone other than the addressee. In any event, if the letter is refused, the postal service seldom indicates who refused to accept the letter. In the meantime, valuable time may be lost. Thus, when service must be accomplished quickly, the lawyer may want to try service through some method more likely to be successful than service by mail.

If service is not to be made by mail, service can be made by the sheriff (or deputy) of the county where the service is to be made, or any person at least 18 years old specially appointed by the court for the purpose of serving summons. If service is to be made by the sheriff and if the defendant is to be served within the county in which the lawsuit is filed, the lawyer will take the summons (with a copy of the complaint attached) from the clerk and deliver it to the sheriff (or other person appointed by the court to make service), along with instructions where the defendant can be served. If the defendant is to be served in a county in Arkansas other than that in which the lawsuit is filed, the lawyer will mail a copy of the summons to the sheriff of the county in which the defendant can be served, together with instructions where the defendant can be served. If possible, prior to mailing the summons, it is a good idea to call the sheriff's office in the county in which service is to be made. The lawyer should explain to the sheriff what is to be done with the summons and inquire as to the cost of service. (If the case has been filed in forma pauperis, a copy of the in forma pauperis order should also be made for the sheriff. The sheriff should then serve the complaint without charging a fee.) The fee for service can then be mailed to the sheriff along with the summons. Some county sheriffs will not serve process until the fee is received.

B. Service of Process Outside the State of Arkansas

If, in a state court proceeding, service is to be made on a defendant who is out of state, Arkansas Rule 4(e) offers several alternative ways of accomplishing service, including service by the same methods authorized for service within the state of Arkansas or service by the state in which service is to be made. As with in-state service, service by mail will normally be the least expensive method of making service. However, Rule 4(e) requires that the defendant who is served by mail sign a receipt for the mail. This means that service by mail out of state is fraught with the same difficulties discussed above in regard to service by mail in-state.

Although service by mail is the least expensive method of accomplishing service, it may well not result in good service. As with in state service, if service cannot be made by mail, the lawyer will have to fall back to one of the other authorized methods of service, most likely service by a sheriff or by another person appointed to service process in the other state. Because of the difficulties of communications and logistics involved in attempting to accomplish service in another state, even more valuable time may be lost than would be lost when serving process in state. Again, when service must be accomplished quickly, the lawyer may want to initially try service through some method more likely to be successful than service by mail.

In cases where it is especially important that, in the event of a default judgment, the judgment will not be set aside (property matters, adoptions, etc.), service by mail may not be a desirable way of accomplishing service in any event. It will be difficult to convince the court that service was good and that the court, as a result, had jurisdiction if the motion to set aside the judgment is made on an argument that, "I didn't sign that receipt, someone must have signed my name to it."

Rule 4 of the Federal Rules of Civil Procedure establishes the procedures to be followed for service of process in federal court. The recent revisions to Federal Rule 4 are designed to facilitate service of the summons and complaint. The revision authorizes the use of any means of service provided by the law of the forum state as well as the state in which the defendant is served. The revision establishes a detailed procedure for waiver of service by the defendant. A defendant who fails to comply with a request for waiver will be subject to the imposition of costs unless good cause is shown for the failure to waive.

Form 18-A, Notice and Acknowledgment for Service by Mail, has been replaced by form 1A entitled "Notice of Lawsuit and Request for Waiver of Service for Summons." In order to request a waiver, the plaintiff must send the following four items to the defendant: (1) Form 1A, Notice of lawsuit and Request for Waiver of Service of Summons, and an extra copy of this form, (2) a copy of the complaint with an identification of the court in which it was filed, (3) Form 1B, Waiver of Service of the summons, and (4) a prepaid means of compliance with the request in writing (e.g., a self-addressed and stamped envelope). Form 1A must be sent through first-class mail or other reliable means. The plaintiff will file the completed Waiver of Service, Form 1-B. Under Rule 4(d)(4), that filing date is equivalent to the date of service of the summons and complaint. Waiving service affects the time limits for responding to the complaint. See the discussion in part VII.B.

C. Service of Process in Special Circumstances

1. Introduction

Generally, the law establishes special protection for anyone who may be at a disadvantage in responding to a summons to court. Thus, special procedures must be followed when suing a prisoner (Arkansas Rules 4(d)(4) and 17(c)); a person for whom a plenary, limited, or temporary guardian has been appointed (Rule 4(d)(3)); a person under the age of 14 years (Rule 4(d)(2)); persons whose identity or whereabouts are unknown (Rule 4(f)); and persons whose rights (usually to property) may be affected by a judgment but who are not and who need not be subject personally to the jurisdiction of the court (in rem jurisdiction; Rule 4(j)). In addition, Rule 17(b) requires that special procedures be taken when "an infant or incompetent person" is suing or defending. Compliance with these rules, when they apply, is generally considered to be jurisdictional. Failure to comply with the applicable rules may be grounds for setting aside a judgment because the court never acquired personal jurisdiction.

The instances of special protection discussed below are those most commonly encountered in a poverty law practice. The appropriate rules indicated above should be consulted for the procedure to be followed in cases involving other instances of special protection.

2. Service on Persons Whose Identity or Whereabouts Are Unknown, Service in In Rem Cases, Substituted Service (Constructive Service—Service Other Than Through Personal Service, Including Service by Publication)

In a number of circumstances both the Arkansas and federal rules allow service of process by means other than personal service. Service of process by other than personal service is usually called substituted (or constructive) service. Normally substituted service is accomplished by newspaper publication of notice of the filing of the lawsuit.

In poverty-law practice, the need for substituted service most frequently arises in divorce cases and in quiet title cases in which the location at which the defendant can be served by regular process (personal service, including service by mail) is unknown, in which the identity of the defendant is unknown, or in which a personal judgment against the defendant is otherwise not sought or is impossible (for instance, the defendant in a divorce case has insufficient contacts with the jurisdiction for the court to assert personal jurisdiction over the defendant). In such cases, it is the first obligation of the plaintiff's attorney under the decision of the U.S. Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S.

306 (1950), and under Ark. R. Civ. P. 4(f), to be sure that an adequate investigation has been made concerning the defendant's whereabouts. The "due diligence" standard of Mullane translates into Arkansas Rule 4(f) as requiring either the attorney or the client to file an affidavit with the court "that after diligent inquiry, the ... whereabouts ... of [the] defendant remains [sic] unknown." If such an inquiry is not made, a default judgment for the plaintiff may be subject to later being set aside on the ground that the court did not properly acquire jurisdiction. See Gilbreath v. Union Bank, 398 Ark. 360, 830 S.W. 2d 854 (1992) (where, no showing in an affidavit that diligent inquiry made under Rule 4(f)(1), dismissal of complaint for improper service was appropriate). To help cement the court's jurisdiction in substituted service cases, the attorney may want the affidavit to reflect the extent of the inquiry.

After the affidavit required by Rule 4(f) (called an "affidavit for warning order") is filed, the clerk will issue a "warning order," warning the defendant to enter an appearance in the lawsuit within 30 days from the date of the first publication of the warning order or to be barred from answering or from asserting their interest. See Black v. Merritt, 37 Ark. App. 5, 822 S.W. 2d 853 (1992). (The clerk must issue warning order. Where an attorney issued it, the court was without jurisdiction and all proceedings as to the defendant were void.) The warning order must then be "published." If the attorney is representing a poverty client who has been granted leave to proceed as an indigent without prepayment of costs (in forma pauperis), Rule 4(f)(2) provides a no-cost alternative to the expense of newspaper publication. Pursuant to that rule, the warning order may be "conspicuously posted for a continuous period of 30 days at the courthouse of the county wherein the action is filed ...." The newspaper publication expense saved by posting the warning order at the courthouse can be significant to the indigent client.

If the plaintiff has not filed the action in forma pauperis, the warning order must be published in a newspaper as prescribed in Rules 4(f) and 4(j). See Phillips v. Commonwealth Savings & Loan Ass'n, 308 Ark. 654, 826 S.W.2d 278 (1992) (A two-week publication of warning order was sufficient. Provision (c) of Rule 4 preempts § 16-58-130(c) to the extent that later statute required different and longer publication.) Pursuant to those rules, the warning order must be published weekly for at least two weeks in a newspaper of general circulation in the county in which the court is held. In some counties (Pulaski, for instance), the clerk's office will arrange for publication of the warning order. In most counties, more than one newspaper will qualify as being of "general circulation." Particularly, when representing poor clients, the attorney should try to publish notice in a newspaper that will charge the lowest price for publication. (Of course, if the client has filed the lawsuit in forma pauperis, the attorney should take advantage of the procedure, described in the foregoing paragraph, for posting the warning order at the courthouse.) There can be a substantial difference in price. In Pulaski County publication in the Daily Record is considerably lower priced than is publication in the other newspapers.

Following publication of the warning order, the newspaper will mail to the lawyer a "proof of publication," which must then be filed with the court. The proof of publication is an affidavit by an official of the newspaper that the warning order was published in the newspaper as required.

Whether the warning order is published or posted at the courthouse, the attorney must also mail to the defendant at their last known address a copy of the complaint and a copy of the warning order. The complaint and warning order must be mailed by "any form of mail with delivery restricted to the addressee or the agent of the addressee" (certified mail is least expensive). Following return of the certified mail "green card," the attorney must prepare and file with the court a proof (return) of service reflecting the mailing and return of the "green card."

3. Special Service Procedures in Cases in Which the Judgment Affects or May Affect the Rights of Persons Who Are Not and Who Need Not Be Subject Personally to the Jurisdiction of the Court (Service in In Rem Cases)

Rule 4(j) prescribes the service procedures to be followed in in rem cases, that is, in cases in which the judgment affects or may affect the rights of persons who are not and who need not be subject personally to the jurisdiction of the court. The rule requires that service be by warning order (see the rule for the requirements in regard to the content of the warning order). Under 4(j), the warning order must be published weekly for at least two weeks in a newspaper of general circulation in the county in which the court is held (see 2., immediately above, in regard to newspaper publication). In addition, no default judgment may be taken pursuant to this procedure unless an affidavit is failed filed with the court stating that 30 days have elapsed since the first publication of the warning order (the newspaper will furnish the affidavit).

If the attorney seeking the in rem judgment knows of persons who might be affected by the judgment, a copy of the complaint (or other pleading) and warning order must be sent (the plaintiff's attorney can send them) to the defendant's last known address by a form of mail restricting delivery to the defendant or their agent. The attorney must also file with the court an affidavit reflecting the mailing of the complaint and warning order to the defendant. It would be good practice for the affidavit

to reflect the date of the mailing of the complaint and warning order, the method of mailing, and whether the letter sending the complaint and warning order was receipted for by the defendant. (Rule 4(j) does not require that the mailing be by certified or by registered mail, but the defendant's receipt for service (or lack thereof) would help cement the judgment against later attack). If the post office card (the green card) is returned indicating the defendant's receipt, it (or at least a copy of it) should be filed with the affidavit. It should be noted here that the appointment of an attorney ad litem is no longer required in cases in which service is by warning order.

D. Proof (or Return) of Service or Process

Under Arkansas Rule 4(g) and Federal Rule 4(l) the person serving the summons must make "proof of service." If service is made by the sheriff (state court) or the United States Marshal (federal court) this will normally be done by the officer completing a form on a copy of the summons indicating how service was made (by delivering a copy of the summons and complaint personally to the defendant, etc.). Other persons serving process must make an affidavit relating what was done to make service, the affidavit must then be filed with the court. For instance, if the attorney makes service by mail, they will need to make an affidavit relating the facts surrounding the service by mail and attach to the affidavit the return receipt signed by the defendant (if all goes well). As discussed above under VI.C.2., if service is by newspaper publication of a warning order, an official of the newspaper will prepare an affidavit relating the facts surrounding the publication and will attach to the affidavit a copy of the warning order as published in the newspaper.

The purpose of the proof of service is, of course, to show to the court and to anyone else who is or may become interested that service of process has been made and that jurisdiction has been established over the person served. The attorney should always check the "proof of service" prior to the initial hearing in the case to ascertain whether service has been properly made. If it has not, the attorney will again need to attempt to make good service on the defendant, perhaps by one of the other methods authorized by Rule 4.

E. Service of Other Pleadings, Motions, and Papers

After service of the original complaint with the summons, all additional pleadings, motions, and other papers, including all written communications with the court, must be served on all parties to the lawsuit (see Rule 5). However, such service may be made by mail by serving the attorney for the party or, if the party has no attorney, by serving the party, unless the case is one in which there has been a final judgment and the court has continuing jurisdiction. In such cases the service must be directly upon the party. See Federal Rule 4.1, in effect as of December 1, 1993, providing that service of process other than a summons shall be by U.S. Marshal or deputy marshal, or a person especially appointed for the purpose of making service.

Rule 5(e) requires that all pleadings, motions, and other papers served on the attorney or party, as prescribed above, must contain a certificate by the lawyer that service has been made in accordance with the rule (called a certificate of service). The certificate must also state the date and method of service and the name and address of each person served. Following is an example of a certificate of service:

CERTIFICATE OF SERVICE
I, John Lawyer, attorney for the defendant, Al Smith, certify that I served a copy of the foregoing answer (or other pleading or motion) upon the plaintiff by mailing a copy of the answer (or other pleading or motion) by first class mail to his attorney, Sharon Hughes, at her address: 205 W. 3rd, Little Rock, AR 72201, on this 15th day of July, 1994.

_____
John Lawyer

F. Time Limit for Service

Rule 4(i) of the Arkansas Rules of Civil Procedure and Rule 4(m) of the Federal Rules of Civil Procedure provide that, if service is not made within 120 days after filing of the complaint, the case shall be dismissed against the defendant without prejudice. However, under Rule 4(i) the court may extend the time for service beyond the 120 days upon plaintiff's motion made before the case is dismissed and a showing of good cause.

VII

Defendant's Response to Being Sued

A. Introduction

Should you file an answer or motion?

The usual response made by an attorney representing a defendant who has been served with summons and complaint is to file an answer under Rule 8(b) or to file a motion pursuant to Rule 12. The Rule 12 motions are:

- 12(b)(1) to dismiss for lack of subject matter jurisdiction
- 12(b)(2) to dismiss for lack of personal jurisdiction
- 12(b)(3) to dismiss for improper venue
- 12(b)(4) to dismiss because the process itself or (5) the manner in which it was served is insufficient
- 12(b)(6) to dismiss because the complaint failed to state facts (in federal court, a claim) upon which relief may be granted
- 12(b)(7) to dismiss for failure to join a person whose presence in the litigation is indispensable
- 12(b)(8) (in state court only) to dismiss because another lawsuit arising out of the same transaction or occurrence is pending between the same parties
- 12(f) to strike "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter"
- 12(e) for a more definite statement, if the pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading"

The defenses described in the Rule 12 motions may also be raised in combination with the answer, rather than by motion. However, if the defenses are to be made by motion rather than combined with the answer, the defenses must usually be combined in one motion and the motion must usually be made before filing the answer. The lawyer should be aware that, as provided in Rules 12(g), 12(h), and 15(a), many of the Rule 12(b) defenses will be waived if they are not timely and properly raised.

B. Time for Filing the Answer and Motions

Generally, the answer (see Rule 12(a) and (b)) and, under most circumstances, the Rule 12 motions (see Rule 12(h)(1)), must be filed in Arkansas state court within 20 days of service of the summons and complaint (30 days if service is upon a non-resident of the state). (In Webb v. Lambert, 295 Ark. 438, 748 S.W.2d 658 (1988) the Arkansas Supreme Court held that an answer served upon plaintiff's attorney within 20 days of service on the defendant but not filed until the 28th day following service was not timely.) Rule 12(a) of the Federal Rules has been revised to provide that answer must be served within 20 days after service with the summons and complaint unless service has been waived under Rule 4(d) in which case the defendant has 60 days to serve an answer (or 90 days if the defendant is outside the United States). If the answer is not filed (or served, in federal court) within the required time period, a judgment by default may be rendered against the defendant. Again, failure to present many of the Rule 12 motions within the time required may result in waiver of the right to make those motions (see Rules 12(g), 12(h)(1), and 15(a)).

If a Rule 12 motion is granted and the plaintiff can file an amended complaint, the court granting the motion will designate a certain number of days in which the plaintiff is to file the amended complaint (see Rule 12(j)). If the Rule 12 motion is denied, the defendant's responsive pleading (generally the answer) must be filed within 10 days after the defendant receives notice of the court's action (see Rule 12(a)).

The lawyer should keep in mind that an answer, or other pleading, once filed may be amended under the circumstances described in Rule 15 (in Arkansas state court generally as a matter of right, unless prejudice would result to the other party or disposition of the case would be unduly delayed—in federal court the court's permission may be needed to amend, but leave to amend "shall be freely given when justice so requires"). Since amendment is nearly always possible, it is always better to file a

timely, though not perfectly stated, answer than it is to suffer the possible adverse consequences that may flow from a failure to answer or otherwise respond. (See Allen v. Kizer, 294 Ark. 1, 740 S.W.2d 137 (1987)—answer not timely—filed one day late because attorney responsible for filing answer distracted by professional and personal problems of an associate in the law firm).

C. Drafting the Answer or Motion to Be Filed in Response to the Plaintiff's Complaint

1. Form of the Answer, Motion, and Other Papers

The form of the answer, motion, or other papers filed with the court, including responses to motions, is, as indicated in the discussion on "Drafting the Complaint and Other Pleadings," IV.B., above, governed by Rule 10 (for pleadings) and by Rule 7(b)(2) for motions (it refers back to Rule 10). As a practical matter, the caption of the answer, motion, or other paper filed in the case will generally follow that of the complaint. If an answer, the pleading should be titled as such; if a motion, the title should indicate the subject of the motion, i.e., motion to dismiss, motion for summary judgment; and if a response to a motion, the title should be "Response to (the title of the motion)."

2. Contents of the Answer

The answer, of course, is the defendant's response to the complaint. Rule 8(b) prescribes the contents of the answer. Rules 8(b) of both the Arkansas and Federal Rules of Civil Procedure are almost identical in language, and the two will be discussed here as though they are identical.

Rule 8(b) makes two general requirements: (1) the answer must contain either admissions or denials of the allegations made in the plaintiff's complaint, and (2) the answer must also state the defendant's defenses to the claim(s) made by the plaintiff's complaint (some defenses may be asserted pursuant to a Rule 12 motion (see above)).

As a practical matter, the first requirement (admit or deny the allegations of the complaint) has reference only to whether the defendant agrees or disagrees with what the plaintiff has alleged in the complaint. The second requirement (stating defenses to the claim(s) in the complaint), focuses on whether there are reasons why the plaintiff should not recover, at least completely, even if the allegations of the complaint are true. For instance, even if the allegations of the complaint in regard to the grounds for a divorce in a divorce case were true, the plaintiff could nevertheless not recover if the plaintiff had condoned the misconduct of the defendant that the plaintiff had asserted in the complaint as grounds for divorce. Rule 8(c) requires that defenses, such as condonation in a divorce case, that relate to the merits of the dispute between the parties, but that go beyond simply admitting or denying the allegations of the complaint, be specifically stated in the answer. Such defenses are generally called affirmative defenses.

The effect of Rule 8(c) is that if affirmative defenses are not stated in the original answer or in an amendment thereto, they are waived. Eighteen affirmative defenses are listed in Rule 8(c). However, the list is not complete. The test of an affirmative defense is whether it amounts to an "avoidance" of the plaintiff's claim, rather than a simple denial. To make the distinction between denials and affirmative defenses, application of the "yah but" test may be helpful. If after reading the plaintiff's complaint, it can be said, "Yah, but ...," even if the plaintiff proves the allegations of the complaint, they were contributorily negligent, assumed the risk, etc., then the defense is an affirmative defense, which must be specifically stated in the answer.

Although Rule 8(c) contemplates that affirmative defenses are to be stated in the answer, the Arkansas Supreme Court upheld a trial court decision that allowed the affirmative defense of res judicata to be raised in a Rule 12(b) motion to dismiss rather than in the answer. The Court noted that the better practice would be to assert an affirmative defense in an answer. Amos v. Amos, 282 Ark. 532, 669 S.W.2d 200 (1984). However, in two recent decisions the Arkansas Court of Appeals has upheld the trial courts' refusal to recognize matter included in answers to interrogatories as raising affirmative defenses. In Odaware v. Robertson Aerial- AG, Inc., 13 Ark. App. 285, 683 S.W.2d 624 (1985), the court said:

> ARCP Rule 8(c) requires that all affirmative defenses must be contained in the response to a complaint, and it specifically includes as affirmative defenses failure of consideration and set-off. The purpose of the requirement of Rule 8(b) and (c) that a party state, in ordinary and concise language, their defenses and affirmative defenses to each claim for relief against them is to give fair notice of what the claim is and the ground on which it is based so that each party may know what issues are to be tried and may be in a position to enter the trial with their proof in readiness....

Answers to interrogatories, as well as any other information disclosed on discovery, are not a pleading or a defense to a pleading. While such information may give rise to amendments to pleadings, it does not inherently constitute an amendment to a pleading or inject new issues into the case. (13 Ark. App. at 289, 683 S.W.2d at 626. See also National Security Fire & Casualty Co. v. Shaver, 14 Ark. App. 217, 686 S.W.2d 217 (1985).)

In addition to the general Rule 8(b) requirement that the answering party admit or deny the allegations of the plaintiff's complaint, the rule sets out fairly specific requirements as to how the admissions or denials are to be made. Following is a synopsis of those requirements:

> Denials must fairly meet the substance of the allegations denied. Therefore, if the intent is to deny only a part or a qualification of a statement in the complaint, the portion of the allegation that is true must be specified and the remainder of the allegation denied. For example, assume that the complaint alleges that a car driven by the defendant struck the plaintiff's car from the rear, causing severe bodily injury to the plaintiff. Also assume that the plaintiff can clearly prove that the defendant's car did strike the plaintiff's from the rear, but that it is doubtful whether the plaintiff was injured. Defendant's answer should be as follows: "Defendant admits that a car driven by themselves did strike the plaintiff's car from the rear, but they deny that severe bodily injury resulted to the plaintiff."
>
> Denials or admissions of allegations in the plaintiff's complaint may be made either by stating that the defendant admits or that the defendant denies (whichever is the case), and then by repeating verbatim the allegation as stated in the complaint or by reference to paragraphs. ("Defendant admits the allegations of paragraph 1 and 2 and denies all other allegations of the complaint.") In addition, the defendant may answer by making a general statement that all allegations of the complaint are denied except for those which are designated as expressly admitted.
>
> If the defendant intends in good faith to deny all allegations of the complaint (including jurisdiction and venue), a general denial of the entire complaint may be filed ("defendant denies all of the allegations contained in the complaint").
>
> If the defendant is without knowledge or information sufficient to form a belief as to the truth of an allegation, the defendant should so state (using the exact language of the rule). The statement will have the effect of a denial.

3. Contents of Motions and Other Papers Filed with the Court

Rule 7(b) of both the Arkansas Rules and the Federal Rules prescribes the content of motions and other papers filed with the court, including responses to motions. Rule 7(b) simply requires that motions and other papers be in writing, that they state with particularity the grounds for the motion or other paper, and that they set forth the relief or order sought. Under the rule, the requirement that the motion be in writing is satisfied if the motion is stated in a written notice of the hearing of the motion.

In addition, Rules 12(i) and 78(b) of the Arkansas Rules require that all motions be accompanied by a brief statement of the legal and factual reasons (including citations relied upon) in support of the motion. Rule C-7 of the Rules for the U.S. District Courts for the Eastern and Western Districts of Arkansas makes a similar requirement (a brief consisting of a concise statement of relevant facts and of applicable law).

4. Responding to Motions and Replying to Responses and Motions

C.1. and 3., above, discuss the form and contents of the response to a motion. Rules 12(i) and 78(b) of the Arkansas rules require that a response to a motion be filed within 10 days after service of the motion upon the respondent. The rule also requires that the response include a brief in support of the response. If the party filing the original motion wants to reply to the response to the motion, the reply must be filed within five days after service of the response.

Local Rule C-7 of the Rules for the U.S. District Courts for the Eastern and Western Districts of Arkansas provides that a response to a motion shall be filed within 11 days. Under Federal Rule 6(a), when the period of time prescribed is 11 days or greater, Saturdays, Sundays, and legal holidays are not excluded from the computation. The Federal Rules do not provide for the filing of a reply brief.

5. Signature and Verification of the Answer or Motion

The same requirements in regard to signing or verifying the complaint and the other pleadings discussed above also apply to signature and verification of the answer or other motions. Those requirements are found generally under Rule 11.

VIII

Investigation and Discovery of Facts

A. Introduction

Investigation and discovery is the process by which the lawyer ascertains what facts are available to prove both their case and their opponent's case. Modern discovery procedures have radically changed the way in which the lawyer prepares for and tries a lawsuit. The lawyer who fails to use discovery techniques to learn the facts available to them about both sides of the lawsuit, and who is surprised by evidence that surfaces for the first time at trial, is probably not providing competent representation.

As discussed below, discovery will include both formal methods and informal methods. Formal discovery is fact investigation using one of the discovery devices provided for in Rules 27-36 and 45 of the Rules of Civil Procedure. All other fact investigation is informal discovery.

Numerous books have been written on each of the various discovery devices. An excellent book on discovery, which also discusses specific discovery devices and techniques, is *Fundamentals of Pretrial Litigation* by Haydock, Herr, and Stempel (West) (available in paperback). The discussion here must of necessity be elementary and sketchy.

As indicated in the caveat at the beginning of these materials, in 1993 Rule 26 of the Federal Rules of Civil Procedure, and certain other federal rules in regard to discovery, were substantially revised. In summary, the changes to Federal Rule 26 require that, under some circumstances, the parties make mandatory disclosures, without awaiting formal discovery requests, of certain basic information that is needed in most cases to prepare for trial or to make an informed decision regarding settlement. In addition, under the revised federal rule parties are required to meet to develop a discovery plan (see F.R.C.P. 26(f)). The United States Districts Courts in Arkansas have generally chosen to "opt out" of the revisions to the discovery rules (as they are permitted to do by the federal rules). As a result, the revisions generally do not apply in federal courts in Arkansas. However, where pertinent, the revisions are noted in the materials.

B. Development of a Case or Discovery Plan

All discovery should be conducted pursuant to a case or discovery plan. Investigation and discovery that is not conducted pursuant to a plan developed at the beginning of the case will be at best a "hit or miss" proposition and may even be counterproductive. Where litigation is anticipated, a case plan or plan of discovery should be developed shortly after the initial client interview. Following is a suggested format for a case or discovery plan (arranged chronologically).

Case or Discovery Plan

1. Develop a tentative factual and legal theory of the case (as to the factual theory of the case, try to condense the case to a one sentence statement of the factual theme as to why your client should receive the relief you are seeking). (The legal theory of the case has reference to the substantive law or laws that govern the relief the client is seeking.)
2. Conduct research to determine whether there is law to support your legal theory of the case.
3. Prepare a list of the facts necessary and desirable to establish the elements of your case.
4. Prepare a list of sources of possible information from which the facts to be developed might be established.
5. Determine the investigation and discovery methods by which you will attempt to develop the facts listed in step 3, above, from the various sources of possible information listed in step 4, above (that is, determine which informal and formal discovery devices are most likely to be successful in developing the facts needed to establish your case).
6. Order the list of investigation and discovery methods (developed in step 5, above) by the sequence you will follow in pursuing them.
7. If representing a plaintiff or otherwise making a claim, tentatively decide at what point in the investigation you will file the complaint or other claim.
8. Begin the investigation—proceed in the order indicated in the list of investigation and discovery methods prepared pursuant to step 6, above.

9. As each information source is pursued, post (on a separate sheet of paper) the items of information gathered that establish the elements of the cause of action (claim) to which they relate, indicating whether the information supports or negates that element of the cause of action (claim).
10. Follow steps 1 through 5, above, for your opponent's case (that is, develop a case or discovery plan from the perspective of your opponent).

Any case or discovery plan should be considered to be tentative only. It must be updated as additional information is developed. The process of updating may even require the development of a new factual or legal theory of the case if additional information proves the initial theory to be unworkable.

C. Informal Discovery

Informal discovery includes those techniques for gaining information about the case that do not require specific authority from the Rules of Civil Procedure. The informal discovery techniques listed below can often be more effective devices for gathering information than can be the formal discovery devices found in Rules 27 through 36 and 45 of both Arkansas and Federal Rules of Civil Procedure. In part, informal discovery may be more effective, because the techniques involved can generally be used without notice to the other side.

The following list of informal discovery techniques is by no means complete. The methods of informal discovery are limited only to the lawyer's creative imagination. Among the techniques are:

- interviewing the client
- interviewing witnesses
- visiting the scene
- photographing the scene and other evidence
- inspecting physical evidence
- consulting with experts
- reviewing reports of governmental agencies
- anything else you can think of that is not illegal or prohibited by the Rules of Professional Conduct

D. Formal Discovery

1. Introduction

Often many of the formal discovery procedures sanctioned by the rules of civil procedure become informal as used in practice. For instance (as further indicated below), attorneys frequently informally agree to produce documents or allow a client's medical examination by the opponent's doctor because they know that a court order for such would be given as a matter of course.

Federal court "notice pleading" contemplates that most of the facts in the case will be developed through discovery and that discovery procedures should be made readily available. The Arkansas Supreme Court's decision in Cartwright v. Carney, 286 Ark. 121, 690 S.W.2d 716 (1985), indicates that discovery may be less easy to obtain and less readily available under the Arkansas "fact pleading" requirement. In Cartwright, the court stated, "[t]he law in this state does not permit 'notice pleading' with its concomitant heavy emphasis on discovery. One must demonstrate more than a suspicion before getting to the discovery phase of litigation." id. at 124, 690 S.W.2d at 718.

The formal discovery techniques are those specifically authorized by the Rules of Civil Procedure. All of them, with the exception of the subpoena duces tecum (Rule 45), are found in Rules 27-36 of both Arkansas and Federal Rules of Civil Procedure. The techniques are:

- depositions—Rules 27–32 (primarily Rule 30)
- interrogatories—Rule 33
- orders to produce documents and other tangible material—Rule 34
- orders to allow entry upon real property to inspect and measure, survey, photograph, test, or sample the property or objects or operations on the property—Rule 34
- orders for physical or mental examination of persons—Rule 35
- requests for admissions—Rule 36
- subpoena duces tecum (orders to produce documents or other items at a deposition, hearing, or trial)—Rule 45

Under Arkansas Rule 5, depositions, interrogatories, requests for production or inspection, proposed findings of fact and of conclusions of law, trial briefs, and proposed jury instructions need not be filed with the clerk, unless filing is ordered by the court. Rule C-1 of the local rules of the U.S. District Courts specifies that the same discovery materials and other documents to which Arkansas Rule 5 applies shall not be filed with the court unless ordered by the court or otherwise required by the rule. Because requests for admission are technically not a discovery device, in both state and federal courts, requests for admission must still be filed. Also, in both state and federal court, if unfiled discovery documents are relevant to a motion, the relevant portions of those documents must be submitted to the court with the motion.

2. The Purposes of Modern Discovery

All discovery will be done for one or more of the primary purposes set out below. Before conducting discovery, the lawyer should determine the purpose or purposes for which the discovery is being conducted. The purposes of modern discovery are:

- to preserve relevant information that might not be available for trial—most frequently used to preserve the testimony of doctors and other persons who may be unavailable at the time of trial
- to ascertain and isolate the issues and facts that are in dispute between the parties—requests for admission are particularly useful to accomplish this purpose
- to determine what testimony and other evidence is available on each of the disputed factual issues
- to develop information that may be used to impeach witnesses at trial
- to develop information in regard to the assets or financial circumstances of a judgment debtor as an aid in execution on the judgment (see Ark. R. Civ. P. 69; A.C.A. §§ 16-66-418 to -419)

3. The General Scope of Formal Discovery

A single, wide-ranging standard applies to the scope of each of the formal discovery techniques listed above. That standard, as expressed in Rule 26(b)(1) of the Arkansas Rules, allows discovery "regarding any matter, not privileged, which is relevant to the issues" in the lawsuit. The scope of discovery under Federal Rule 26(b)(1) is not limited to the "issues" in the lawsuit. The Federal Rule permits discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ...." In addition, under both the Arkansas and Federal Rules, if the information sought is relevant, Rule 26(b)(1) allows discovery even if "the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Thus, hearsay, if relevant, may be discovered.

As to specific matters, Arkansas Rule 26(b)(2) provides for the discovery of the existence and contents of insurance agreements. Under Rule 26(a) of the Federal Rules, the existence of an insurance agreement is a mandatory disclosure, and a party must make available for inspection and copying any insurance agreement.

Arkansas Rule 26(b) places limitations upon the discoverability of some materials prepared in anticipation of litigation or prepared for trial by an attorney or by another person. Federal Rule 26(b)(5) requires that any party claiming privilege make the claim expressly and describe the nature of the items which are claimed as privileged to enable the other parties to evaluate the applicability of the claimed privilege or protection.

Arkansas Rule 26(b)(4) can be used to restrict the discovery of information from experts (in practice, this provision is generally ignored). The federal rule regarding experts has been liberalized. Thus, 26(a)(2)(B) requires that any expert witness retained for the purpose of providing expert testimony shall provide a written report containing a "complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used . . .; the qualifications . . ., including a list of all publications authorized by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." Under Rule 26(b)(4), the deposition of the expert shall not be conducted until after the report has been provided.

Protective orders may be issued by a court "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Arkansas Rule 26(c). Rule 26(c) of both the Federal and Arkansas Rules requires that the parties confer, or attempt to confer, in a good faith effort to resolve the discovery dispute before filing a motion. Rule 26(c) lists eight examples of the use of protective orders.

Lawyers should be aware that, even though the client may have a sufficient basis for refusing to comply with a discovery request or for seeking a protective order, the refusal to comply with the discovery request or with the seeking of a protective order must be done as the rules require; otherwise, the client's rights and case may be lost or compromised. For instance, in Dunkin v. Citizens Bank of Jonesboro, 291 Ark. 588, 727 S.W.2d 138 (1987), the Arkansas Supreme Court upheld the trial court's striking of the defendant's answer because the defendant did not answer interrogatories within 30 days as required by Rule 33. The trial court also declined to let the defendant object to an interrogatory on the ground that the answer would violate defendant's right against self-incrimination, and the court declined to grant a protective order as to the same matter because of the defendant's failure to raise the issue within the 30 days allowed for response to interrogatories.

4. Discussion of Important Considerations in Regard to Selected Formal Discovery Devices—Depositions, Interrogatories, Requests for Admissions, Production of Documents, and Order to Enter upon Property for Inspection of the Property or Objects Thereon, etc.

a. Introduction

The following materials should be read with the clear understanding that it is impossible to condense even the important considerations regarding the discovery devices mentioned to the space allotted in this manual. The formal discovery devices discussed below were selected because, on average, they are the most useful and are the most frequently employed. Of course, in a particular case, other discovery devices not discussed (for instance, medical examination of the plaintiff) may be more useful.

b. Depositions

1. Description of a Deposition

The rules of civil procedure provide for several kinds of depositions. The type discussed here, and the type of deposition most frequently used, is the deposition upon oral examination pursuant to Rule 30.

A deposition is a formal recorded interview of a person (party or nonparty), under oath, from whom information is sought about some aspect of a lawsuit. As a matter of custom, a deposition of a party to the lawsuit normally takes place in the office of the lawyer representing the party being deposed. If the deposition is of a non-party witness, the deposition will normally be held in the office of the attorney who will call the witness at trial, held at the witness's place of business, etc. Usually present are the lawyer taking the deposition, the deposition witness (deponent), the lawyer for the deponent (if the deponent is not a party to the lawsuit, the deponent might not be represented by a lawyer), lawyers for other parties involved in the litigation, and the court reporter. The rules do not specifically bar the presence of other persons at a deposition, and lawyers involved in a deposition may, for special reasons, want other persons present. For instance, if an expert witness deponent's testimony is likely to be technical and difficult to understand for the lawyer taking the deposition, the lawyer may want their own expert present for consultation during the deposition.

Federal Rule 30(a)(2)(A), revised in 1993, limits the number of depositions the parties may take to 10, absent leave of court, or stipulation. Furthermore, leave of court is required if any witness is to be deposed more than once. The Rule has also been changed regarding the making of objections and the conduct of parties and counsel.

2. Advantages and Disadvantages of Depositions

As a general rule, depositions are the most useful of all formal discovery devices. Haydock, Herr, and Stempel (see VIII.D.4.a., above) list the following as advantages of depositions:

- exploring and obtaining information from the other side through prepared, spontaneous, and flexible follow-up questions
- determining what an opponent knows and does not know
- pinning down an opponent to a particular story
- assessing the deposition witness's demeanor to determine what type of trial witness that person would be
- confronting an adversary deponent with damaging information or probing the deponent about weaknesses in the case prior to trial
- preserving testimony to be used later as admissions, impeachment evidence, or for other evidentiary or cross-examination purposes at trial

Depositions do have some disadvantages, although they are usually outweighed by the advantages. Haydock, Herr, and Stempel list the following as disadvantages of depositions.

- depositions can be expensive (however, see below, 3., avoiding or reducing the costs of taking a deposition)
- depositions may force the other side to prepare or may trigger counter-depositions
- depositions may educate the witness; being deposed helps a witness to learn the testifying process, as well as what to say and not say in testimony
- a discovery deposition preserves the testimony of the opposing party or adverse witness, the transcript of which can be used at trial should the deponent be unavailable at that time

The advantages and disadvantages of taking depositions should be considered in the case or discovery plan (see VIII.B., above) along with the possibility of obtaining the information sought through other investigation and discovery devices.

3. Avoiding (or at Least Reducing) the Costs of Taking a Deposition

The primary disadvantage of depositions is the expense. Much of that expense is in connection with depositions that are stenographically recorded. As a practical matter, this is interpreted as depositions that are recorded in longhand by a shorthand reporter (seldom done today), recorded by a reporter operating a stenographic machine, or recorded by a reporter operating a voice mask machine.

Revisions to Federal and Arkansas Rule 30(b) may eliminate much of the cost problem associated with depositions. In both federal court and Arkansas state court parties may now take a deposition by other than stenographic means without leave of court and without agreement from other counsel.

Most court reporters base their charges on two factors: 1) an "appearance fee," and 2) a charge per page for the typed deposition. At the time these materials were prepared, the charges by court reporters in Little Rock ranged from a minimum "appearance fee" of $30.00 to $40.00 (going up to $75.00 to $100.00 for an entire day) plus a per-page charge ranging from .50 per page to .75 per page (for the original and for two copies). Assuming a deposition taking under 2 1/2 hours to complete (the maximum time to which the minimum "appearance fee" applies) and totaling fifty pages, the minimum cost would be approximately $200.00. Of course, a lengthier deposition or a deposition involving payment of transportation cost and per diem for witness(es) or attorneys could easily run into the thousands of dollars, not including the value of the time of the attorney taking the deposition.

In some cases it may be possible to reduce the cost of a deposition. (See below.) It will not be possible to reduce deposition costs by one of these suggestions in every case, and in many instances the nature of the case will require that the deposition be stenographically recorded and that the deposition testimony be typed up in formal deposition form. If discovery funds are available, stenographic recording and complete, formal transcription of the deposition should almost always be arranged. The following list is not complete. Ingenuity may suggest additions.

E. Reducing Deposition Costs

1. Introduction

Seek the agreement of the other attorney(s) in the case to not have the deposition transcribed. (Arkansas Rule 30(f)(2) requires that the party causing the deposition to be taken furnish one copy to any opposing party.) The court reporter will then only charge the "appearance fee." A slight variation on this suggestion is to take the deposition and await later developments in the case before deciding whether to order a transcription of the deposition. If the deposition is not transcribed, but significant information or damaging admissions do come from the deposition, the attorney may make a record of the information and the admissions by following up the deposition with interrogatories or requests for admissions directed at confirming the information or the admissions.

If a deposition is taken by videotape or audiotape, a transcript will be required by Rule 32(c) if the deposition is later to be offered as evidence at trial or offered as evidence on a dispositive motion under Rule 56.

If the deposition is transcribed, order transcription of the original with no copies. Since depositions no longer have to be filed with the court, the original of the deposition may be given to the opposing attorney, and the attorney taking the deposition can make a photocopy for their own use.

If the prospective deposition witnesses' testimony is thought to be beneficial to both sides, attempt an agreement with the other side to share the deposition cost.

Arrange for the deposition to be recorded by other than court reporter-stenographic means (see Federal Rule 30(b)(2) and Arkansas Rule 30(b)(3)—an agreement with opposing counsel for non-stenographic recording is no longer required under either the Federal or Arkansas rules). Permissible methods of non-stenographic recording include sound and sound-and-visual recording. Where transportation expenses prohibit the taking of the deposition, secure a stipulation from the opposition (or a court order) for a deposition by telephone pursuant to Rule 30(b)(7) of both Federal Rules and Arkansas Rules.

If the opponent is unwilling to stipulate to a special deposition procedure, bargain with the opponent in regard to not pursuing some other discovery right. For instance, seek the agreement of the opponent to taking the deposition by other than stenographic means in exchange for a promise not to submit interrogatories to the opponent on the areas covered by the deponent's testimony. Anything else could be considered if it is not illegal or prohibited by the Rules of Civil Procedure or the Code of Professional Responsibility.

2. Setting Up the Deposition

In Arkansas as a matter of practice some of the formalities prescribed by the rules for setting up the deposition are normally dispensed with. For instance, Rule 30(b)(1) requires that reasonable notice of the deposition be given in writing to every other party in the action. Frequently depositions are not set pursuant to the formal notice contemplated by 30(b)(1). Rather, the deposition is arranged through an informal exchange of correspondence or telephone conversations among the lawyers and the court reporter. Of course, agreement must be reached among all involved (lawyers, court reporter, and opponent) as to a time and place for the deposition. Because of difficulties in coordinating, scheduling arrangements for the deposition are frequently most easily made by telephone. However, once the arrangements have been made, the lawyer calling the deposition should confirm the arrangements by letter to all involved. The letter should include the information called for in the formal notice of deposition under 30(b)(1).

Formal notice pursuant to 30(b)(1) is sufficient to compel the attendance of a party-deponent at the deposition. However, if the deposition witness is a non-party and there is any doubt about whether the witness will attend the deposition, a subpoena for the witness should be issued pursuant to Rule 45(d). A subpoena is necessary to compel the attendance of a non-party witness in any event. In Arkansas State Courts the subpoena will be issued by the clerk of the court in which the case in pending (upon the filing of a notice of deposition). In federal court, Rule 45(a)(3) provides for issuance of the subpoena for the deposition by the clerk of the district court or, in some circumstances, by the attorney.

The deposition will normally be taken in the offices of the attorney setting the deposition. However, Rule 30(b)(1) provides that the attorney taking the deposition has a right to specify where it will be held. Depositions not held at the attorney's office may be held elsewhere for the convenience of the deponent or where documents or equipment necessary to the deposition will be accessible and obtainable.

3. Selection and Use of a Court Reporter

Through a rule effective February 1, 1984, the Arkansas Supreme Court has established a certification requirement for court reporters. The procedure for becoming certified includes the passage of both a performance examination and a written examination. Certification under the Court's procedure should do much to improve the quality of court reporting in Arkansas. However, the attorney contemplating the use of a particular court reporter's services for the first time should be aware that court reporters practicing in the state on or before July 5, 1983, may be certified without any examination. For those court reporters, the only requirement in Arkansas remains as it was before the certification procedure was adopted—that the reporter be a notary public.

In Pullan v. Fulbright, 285 Ark. 152, 685 S.W.2d 151 (1985), the Arkansas Supreme Court indicated that it would enforce the court reporter certification requirement by adhering to section 9 of its rule in regard to certification of court reporters. That rule provides that courts in Arkansas will accept as evidence only transcripts prepared by a court reporter who is certified (see Arkansas Supreme Court Board of Certified Court Reporter Examiners, 280 Ark. 598, 656 S.W.2d 694 (1983)). The rule does make provision for the issuance of temporary and emergency certificates under certain circumstances.

The first factor to consider in the selection of a court reporter is, even with certification, the abilities of court reporters vary considerably. Accurate recording of testimony requires considerable experience and skill on the part of the court reporter. A court reporter who is not competent may make serious errors in the taking or transcription of the deposition, which may substantially diminish the value of the deposition or substantially affect the outcome of the lawsuit. The lawyer should take special care to be sure that the court reporter employed is competent.

To some extent the competence of a particular court reporter can be learned only through experience working with the court reporter over a period of time. However, a lawyer employing a particular court reporter for the first time should contact other lawyers in the community who are regarded as competent, and who frequently employ court reporters, to ask advice as to the reporters who are regarded as being able. An excellent court reporter gave the author of these materials the advice that the competence of a court reporter can be tested during the deposition by requesting, at an early stage of the deposition, that the court reporter read back a portion of the witness' testimony. If the reporter has problems reading back the testimony, it is a sure indication that the reporter's competence is suspect.

Another indicator of the competence of a court reporter can be seen in the equipment the reporter uses to record the deposition. Most good reporters will have two systems to record the depositions, a primary system and a back-up system. For instance, a court reporter may use a stenographic machine or a voice mask as the primary system to record the deposition with an audio tape recorder as a back-up system. Because of the possibility of equipment failure or inadvertent erasure of audio tape, recording of the deposition by way of a single audio tape should be avoided. Since the stenographic machine operates mechanically, rather than electronically, and produces an immediate written record in the form of the stenographic tape, much is to be said for recording of the deposition by that method.

There are several things the attorney can do to assist the court reporter in recording an accurate deposition. Before the deposition the lawyer can provide the court reporter with a copy of the deposition notice (or equivalent information as to the style of the case, the participating attorneys, the name of the defendant, etc.), a glossary of technical terms, and a copy of anything that is to be read into the record. At the deposition, the lawyer can assist the court reporter by allowing the court reporter a choice of where to sit, making sure that the court reporter is comfortable, spelling difficult names or words during the deposition, allowing the court reporter a break at least every 90 minutes, and asking the court reporter at the end of the deposition if anything else is needed for the preparation of the record.

In taking the deposition, the attorney should keep in mind that, just as at trial, the attorney, not the court reporter, is responsible for the "record" of what happens at the deposition. This means, among other things, that the lawyer is responsible for having exhibits accurately marked and making sure that all testimony is placed on the record. If the witness responds to a question with a nod of the head, the lawyer must make sure that the court reporter records the nod of the head or that the lawyer follows the nod of head response with a question that elicits a verbal response recorded by the court reporter. All court reporters have individual proclivities in regard to the recording of nonverbal responses and the recording of off the record discussions. The lawyer will need to learn the proclivities of the court reporters with whom they work.

4. Deposition Techniques

This subheading is included primarily to indicate that there are definitely techniques involved in taking a deposition, that the attorney needs to be aware of those techniques, and that the attorney needs to develop a mastery of deposition techniques. The reader is referred to Chapter 5 of *Fundamentals of Pretrial Litigation*, mentioned above, for a more comprehensive discussion of deposition techniques. The matters discussed below are to alert the attorney who has recently entered practice to some of the primary considerations involved in taking the deposition.

The foremost technique involved in taking any deposition is simply to be prepared. Deposition preparation requires the same level of background preparation as does preparation for trial, at least in regard to the areas on which the deposition witness is to testify. In addition, if the attorney is representing the deponent, the attorney must prepare the deponent for the deposition. This involves familiarizing the deponent with the deposition procedures, discussing how to respond to deposition questions, and undertaking a comprehensive review of the facts upon which the deponent is likely to be called to testify.

Many new attorneys are caught off guard at the start of the deposition by a question by either the court reporter or by the opposing attorney, "Standard stipulations counsel?" Actually, there are no standard stipulations, and what is regarded as constituting the "standard stipulations" may vary slightly from court reporter to court reporter and attorney to attorney. However, the "standard stipulations" normally involve waiving some of the technical formalities required by the rules of civil procedure and agreeing on the record to the application of certain parts of the rules of civil procedure which apply to depositions regardless of whether there is an on the record agreement or not.

The standard stipulations usually include:

- The deposition may be taken at the time and place at which it is actually taken. (Any objections the witness may have to the time and place of the deposition are probably waived simply by appearing and sitting for the deposition. However, this stipulation clearly removes any objection in regard to the time and place of the deposition.)
- All formalities as to the taking of the deposition are waived, including:
    - Rule 28
      This stipulation is unnecessary because, under 32(c)(d)(2), the objection is waived unless made before the taking of the deposition or as soon as the disqualification is known or could be discovered with reasonable diligence.
    - Notice of the Deposition
      The attorney taking the deposition designates the time and place for the deposition. This stipulation is designed to eliminate any objections that may be made as to errors in the formal notice of deposition required by 30(b)(1) or as to the failure to give that notice. The stipulation is also probably unnecessary because under 32(d)(1) all errors and irregularities in the notice are waived unless written objection is promptly made.
    - Right to Review and Correct the Deposition Transcript
      Rule 30(e) provides that review by the deponent is required only if requested by the deponent or a party before the deposition is completed. If review is requested, a deponent is allowed 30 days to review the transcript or recording and to note any changes in form or substance. The signature of a deponent is required only if review is requested and changes are made. Under 32(d)(4) objections as to the reporter's handling of the deposition must be made with reasonable promptness after the defect is discovered or could have been ascertained, or the objection is waived. Thus, this stipulation is also probably unnecessary.
    - Filing and Notice of Filing
      The rules no longer require (see Arkansas Rule 5 and local federal Rule 3(f)) that the deposition be filed with the court. Thus, this stipulation is also unnecessary.
- All objections as to relevance, materiality, and competency are expressly reserved and may be raised if and when the deposition, or any part thereof, is offered at the trial of the case. (The stipulation is simply a verbatim restatement of the provisions of 32(cd)(3)(A) and is therefore not necessary. However, 32(cd)(3)(A) does require objection if the ground of the objection is one which might have been obviated or removed if presented at the deposition.)
- Errors and irregularities occurring at the deposition in the manner of taking the deposition, in the form of questions or answers, in the oath or the affirmation, and in the conduct of the parties, and errors of any kind that might be cured if promptly presented at the deposition, are waived, unless seasonable objection is made at the taking of the deposition. (This stipulation is the verbatim language of 32(cd)(3)(B) and is therefore unnecessary.)

Obviously, the "standard stipulations" noted above are made primarily for "security blanket" purposes for the ease of mind of the court reporter. The court reporter might feel obligated to comply with the technical, formal requirements of the above noted rules if there are no "standard stipulations." To comply would often involve considerable unnecessary extra work on the part of the reporter. Ordinarily attorneys should agree to the "standard stipulations" noted above. However, before agreeing, the attorney should clearly understand just what is covered by the "standard stipulation." Contrary to the feelings of many young attorneys, inquiry as to, "Just what are the 'standard stipulations'?" will probably enhance the image of the young lawyer in the eyes of the court reporter and opposing counsel.

Waiver of review and signing of the deposition by the deponent is sometimes included within the "standard stipulations." The right to review and sign the deposition is given pursuant to Rule 30(e). Because the court reporter can make errors of substance in transcribing the deposition, the right to review the deposition should always be asserted. However, because

the deponent's signature to the deposition may enhance the impeachment value of the deposition, the attorney for the deponent may want to forgo signature of the deposition by the deponent. The right to review and sign the deposition must be asserted by the deponent or a party prior to the completion of the deposition (Rule 30(e)).

After review of the deposition, the witness does have the right to correct errors in the transcription. However, the attorney for the deponent should carefully consider whether any errors are substantial enough to merit correction. Correction of errors in the deposition will also enhance the impeachment value of the deposition because after corrections have been made the deponent will be hard pressed on cross-examination to claim that any of the deposition testimony was transcribed incorrectly.

In determining deposition technique, approach, and questions, it is important to keep in mind the purpose of the deposition. Usually the purpose will be to get information. Normally that purpose will be best served by a non-adversarial approach, which uses open ended (as opposed to leading) questions followed by narrower questions to exhaust the deponent's recollection in regard to each topic covered in the deposition. Since the purpose of the discovery deposition is to uncover all information, both good and bad, about the case, the attorney will want to follow all information leads in the deposition, whether or not they result in favorable testimony for the attorney taking the deposition.

The deposition normally begins with a litany of standard questions that are asked in part to put the deponent at ease but also to enhance the impeachment value of the deposition at trial. These questions generally advise the deponent that the opposing lawyer will repeat or rephrase any questions that are not understood, ask the deponent whether they understand what a deposition is, ask the deponent if they understand that the testimony will be given under oath, and requests that the deponent give their best recollection in response to the questions. Similar questions are asked of the deponent at the close of the deposition. Again, a purpose of these questions is to enhance the impeachment value of the deposition at trial. Prior to impeachment at trial with an inconsistent statement from the deposition, the witness will be required to admit, by way of the examining attorney's questions, that they responded affirmatively at the deposition to the opening and closing deposition questions.

Other important deposition techniques that should be considered by the opposing lawyer include the handling of exhibits, dealing with confidential information, reacting to objections, controlling interference by the opposing attorney, and developing deposition question techniques. Again, *Fundamentals of Pretrial Litigation*, mentioned above, may be helpful.

5. Interrogatories and Requests for Admissions

Note! Under Rule 33 of the Federal Rules interrogatories are now limited to 25, including all discrete subparts, absent leave of court or written stipulation.

a. Introduction: The Difference Between Interrogatories and Requests for Admissions

Interrogatories (Rule 33) are simply written questions which must be answered under oath by a party to a lawsuit. Interrogatories seek information.

Requests for admissions (Rule 36) seek admission by a party to a lawsuit that "statements or opinions of fact or of the application of law to fact" are correct. Since interrogatories do seek information, they are true discovery devices. Requests for admissions are not technically discovery devices. The primary purpose for requests for admissions is to narrow the facts or issues which will be in controversy at trial. The attorney serving requests for admissions seeks to do this by discovering what is agreed to and what is controverted by the opposition.

The following discussion under this subheading is primarily directed to interrogatories. However, since interrogatories and requests for admissions are related, and because much of what is said about interrogatories also applies to requests for admissions, the two are combined here for discussion purposes.

b. Advantages and Disadvantages of Interrogatories (and to a Lesser Extent Requests for Admissions)

Among the advantages of interrogatories listed by Haydock, Herr, and Stempel, see above, are the following:

- They are an economical discovery tool. The attorney's time constitutes the major expense.
- Submitting interrogatories to the opposition can be quickly accomplished. There is no need to await the setting up of a deposition or the securing of a court order.
- Interrogatories can serve as a homing device. They will find and locate the proper person who may then be called upon to provide complete information at a deposition or pursuant to additional interrogatories.

- Interrogatories draw on the collective knowledge of the other party and their agents and will even discover information known to the other attorney.
- Interrogatories complement other methods of discovery. Answers received can be used to determine the best persons for later depositions or the best documents for later requests for production.
- Answers to interrogatories may reveal information that will put the parties in a realistic and informed position from which there may be a negotiated settlement or a stipulation to agreed facts.
    - However, interrogatories also have significant limitations, weaknesses, and risks. Among those listed by Haydock, Herr, and Stempel, see above, are the following:
        - They may be directed only to parties to the action.
        - They permit less than satisfactory responses. The answers will be drafted jointly by the other party and their attorney.
        - Interrogatories can be very difficult to draft. If they are not concise and precise, they may not result in satisfactory responses.
        - Interrogatories do not permit spontaneity. The attorney cannot easily frame follow-up questions.
        - They may become uneconomical if the opponent responds with motions, objections, briefs, and counter-interrogatories.
- A comprehensive set of interrogatories may require the opponent to research and prepare their case thoroughly in order to respond.
- Answers to interrogatories may be a long time in coming or may not come at all. The sanctions for failure to answer interrogatories are often very difficult to enforce. However, the sanctions for failure to answer requests for admissions may be more effective—see 5.c., below.

c. Sanctions for Failure to Answer Interrogatories and Requests for Admissions

Both interrogatories and requests for admissions normally must be answered within 30 days after service. Under the Arkansas rules, service of interrogatories and requests for admissions is proper with service of the summons and complaint on the defendant. The defendant then has 45 days to respond. With the revisions to the Federal Rules, formal discovery is not allowed prior to the meeting of the parties, under Rule 26(f), without leave of court. Therefore, service of discovery requests with the summons and complaint is no longer allowed.

If interrogatories are not answered within the initial time prescribed, nothing happens, at least immediately. Typically, the attorney who does not receive answers to interrogatories within the 30-day period will wait a week or two before contacting the attorney who is to supply the answers. Promises of an immediate response will often be made followed by additional periods of procrastination. The upshot is that often a motion to compel answers will have to be filed with the court. The court may not be able to hear the motion for some time, and it may well be months before even the first, unsatisfactory set of answers to the interrogatories is received.

However, lawyers should be aware that, in recent years, a trend has been slowly developing to more stringently enforce sanctions for failure to comply with discovery requests. For instance, as indicated above, Dunkin v. Citizens Bank of Jonesboro, 291 Ark. 588, 727 S.W.2d 138 (1987), the Arkansas Supreme Court upheld the trial court's striking of the defendant's answer because the defendant did not answer interrogatories within 30 days as required by Rule 33. The trial court also declined to let the defendant object to an interrogatory on the ground that the answer would violate defendant's right against self-incrimination and declined to grant a protective order as to the same matter because of the defendant's failure to raise the issue within the 30 days allowed for response to interrogatories.

The sanction for failure to answer requests for admissions is considerably stiffer. The primary sanction is that the requests for admission are deemed to be admitted if the answers are not submitted within 30 days. Since the requests for admissions may well ask for the admission of matter vital to the opponent's claim or defense in the lawsuit, answers to requests for admissions are normally submitted within the 30-day period. (See Rule 37 for the sanctions generally available for failure to make or cooperate in discovery.) Interrogatories and requests for admissions can no longer be combined in one document in an attempt to force the return of answers to interrogatories with the answers to requests for admissions. (See Arkansas Rule 36(c) and Rule D-1 of the Rules of the U.S. District Courts for the Eastern and Western Districts of Arkansas.)

d. Information Most Effectively Sought by Interrogatories

Although interrogatories may seek to discover any information discoverable under Rule 26 (see VIII.D.3., above), certain kinds of information are not readily or satisfactorily discoverable with interrogatories. Interrogatories calling for opinions, subjective interpretation of information, information dependent upon the demeanor and credibility of the answering party, and complex or confusing types of information will all be better left to depositions. However, interrogatories may be used to obtain certain categories of information. (Federal Rule 26(a) now requires that much of the information listed below be disclosed as a matter of course and without the need to propound discovery requests.) Haydock, Herr, and Stempel, see above, list the following:

- the identities of persons who have provided a party with statements
- the persons who have been interviewed in the course of trial preparation
- the facts solicited from a witness who gave no written statement and who has become unavailable
- the existence, description, condition, and location of documents, witness statements, etc.
- information concerning letters, notes, and other materials that a party or witness has written, signed, or read
- summary explanations of technical data and statistics, manuals, reports, studies, and materials containing technical information
- other contacts or transactions between or relating to the parties before or after the events of the case
- similar incidents, complaints, problems encountered by third persons and related to the subject matter of the case (may be discoverable only under the broader federal rules scope of discovery)
- business and corporate information concerning the nature, extent, principal place of business, initial date of incorporation, state of incorporation, and states that license the business
- financial information, including reports, balance sheets, and the financial status of a business, and the income, assets, and liabilities of parties (if relevant)
- the financial status and net worth of a defendant who is defending a claim for punitive damages
- government licenses that authorize or regulate facets of a party's conduct
- the names of expert witnesses who will testify at trial, who are employees of a party, or who have been retained (but not those informally consulted)
- the opinions and bases for the opinions of experts who will testify at trial or who are employees
- the existence and coverage of liability or other insurance
- measurements, including accurate answers or best estimates of time, distance, speed, location, and other dimensions of occurrences (though often the better approach will be to seek this information at a deposition)
- facts going to the court's jurisdiction
- attorney work-product information, if good cause is shown, i.e., necessity

In addition, interrogatories may be used to learn the identity and location of persons having information about the subject matter of the case, and the identity and location of witnesses who will be called to testify at trial. Interrogatories may also ask the other party to agree to supplement answers to all or certain questions. Rule 26(e) details which answers need to be supplemented pursuant to the rules. Also, although not specifically required by the rules, interrogatories frequently request that documents be provided in conjunction with answers to the interrogatories. Since the answering attorney knows that the documents can generally be sought pursuant to Rule 34, the documents sought are usually provided with the answers to interrogatories.

e. General Drafting Techniques

The discussion of specific drafting techniques for interrogatories and requests for admissions is beyond the scope of these materials. However, both interrogatories and requests for admissions should contain clear, precise, and direct questions. They should neither be vague, too broad, nor overly inclusive. The questions should have the attorney upon whom they are served immediately thinking, "Yes, I understand what they want to know."

The discussion of the form of interrogatories, of dealing with objections to interrogatories, and of answering interrogatories is also beyond the scope of these materials. Again, see Haydock, Herr, and Stempel, above.

6. Production of Documents

As a practical matter, documents that are sought may be produced pursuant to a Rule 34 request for production of documents, in conjunction with answers to interrogatories, or in response to a subpoena duces tecum under Rule 45. Seeking the production of documents in response to interrogatories is perhaps the most frequent method by which documents are produced in practice. However, there is no authority under the rules for production of documents in this way. In addition, both interrogatories and Rule 34 requests for production of documents (the primary method contemplated by the rules for the production of documents) can be addressed only to parties. A subpoena duces tecum under Rule 45 can be served on nonparties. However, it must theoretically be in connection with a deposition or trial or other hearing.

Some attorneys do use a Rule 45 subpoena duces tecum to secure information in the hands of a nonparty, even when a deposition, trial, or other hearing is not set or, at least, is not intended. For example, assume that information about the defendant's income is sought for use in a temporary hearing in a divorce proceeding. The specific information sought is the defendant's payroll records from the defendant's employer. A subpoena duces tecum may be served on the employer for the employment records together with a notice to appear at the temporary hearing (or to appear at a deposition). Once the employer delivers the payroll records to the requesting attorney (as directed in the subpoena duces tecum or in a separate letter to the employer), the requirement for an appearance by the employer at the hearing or deposition may be canceled. The payroll records, although technically hearsay, may then be used for effective impeachment, if necessary, at the temporary hearing.

7. Requests to Enter upon Property to Inspect, etc., the Property or to Inspect, etc., Objects Located on the Property

This Rule 34 procedure is mentioned here only because its value may sometimes be overlooked. In any case involving an issue relating to a party's land or a party's other property, the attorney may well want to inspect the property or objects thereon if for no other reason than to make more comprehensible to the attorney the testimony in regard to the property or to the objects. This discovery device may be useful in cases in which the condition of the property is in question, for instance, cases involving child custody disputes where the living conditions of the children are in controversy. Federal Rule 45 has been expanded to allow the use of a subpoena to compel the inspection of the premises of a non-party.

8. Sanctions for Failure to Make or Cooperate in Discovery

The various sanctions available upon the failure of a party or other person to make or cooperate in discovery are found in Rule 37. In Cagle v. Fennell, 297 Ark. 353, 761 S.W.2d 926 (1989), the Arkansas Supreme Court held that a finding of willful or deliberate disregard of discovery obligations is not a prerequisite to the imposition of Rule 37 sanctions. In addition, imposition of the sanction of striking pleadings for failure to respond to discovery does not require that the pleadings bear a direct relationship to the requested discovery (Graham v. Sledge, 28 Ark. App. 122, 771 S.W.2d 296 (1989)). Rule 37(d) of both the Federal and the Arkansas Rules requires that, before filing a motion for sanctions, the moving party certify that the party has attempted to informally obtain responses to interrogatories or to a Rule 34 request.

IX

Adjudication of the Case Without Trial and Withdrawal of Counsel

A. Introduction

(Inclusions: Summary Judgment, Default Judgment, Voluntary Dismissal, Dismissal for Failure to Prosecute, Consent Judgment, and Withdrawal of Counsel.)

As is a common theme, the procedural devices discussed in this section result in conclusion of the lawsuit prior to a trial on the merits. Of the devices discussed, summary judgment is probably the most important, because it can result in a short-circuiting of the entire litigation process and because it can result in a decision on the merits of the case without a full trial on the merits.

B. Summary Judgment

The motion for summary judgment under Rule 56 is a close cousin of the 12(b)(6) motion to dismiss the complaint for failure to state facts (claim) upon which relief may be granted. The challenge to the plaintiff's case under a 12(b)(6) motion to dismiss (see VII.) is directed exclusively to the pleadings (generally the complaint) filed by the plaintiff or by another claimant. The question under a 12(b)(6) motion is whether the pleading states facts (or a claim in federal court) sufficient to state a legal claim against the opposing party under the applicable law. In ruling on such a motion, the judge will consider only the sufficiency of the facts alleged in the pleading, and the judge and will not go beyond the pleading to consider whether there is sufficient evidence to support the facts as alleged.

If, on a 12(b)(6) motion to dismiss for failure to state facts upon which relief can be granted, the court does consider matters outside of the pleadings, Rule 12(b) directs that the court treat the motion as one for summary judgment under Rule 56. However, in Guthrie v. Tyson Foods, Inc., 285 Ark. 95, 685 S.W.2d 164 (1985), the Arkansas Supreme Court limited the matters that may be considered outside the pleadings, under those circumstances, to those set out in Rule 56(c), that is, "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any." In Guthrie, the defendant moved to dismiss for failure to state facts upon which relief could be granted. In ruling on the motion, the trial court considered, in addition to the pleadings, statements by counsel for both sides and considered exhibits to the briefs filed in connection with the motion. The Arkansas Supreme Court held that even if the motion to dismiss were treated as a motion for summary judgment, the trial court should not have considered the statements and the exhibits. In addition, in Pinkston v. Lovell, 296 Ark. 543, 759 S.W.2d 20 (1988), the Court held that affidavits in support of a motion for summary judgment must be presented prior to, rather than at, the hearing on the motion.

Another distinction, between a motion to dismiss for failure to state facts upon which relief may be granted and a motion for summary judgment, is that granting the motion for summary judgment results in a dismissal of the case (or at least results in an issue in the case) with prejudice, while a plaintiff may usually file an amended complaint or new lawsuit if a motion to dismiss for failure to state facts is granted. In Ratliff v. Moss, 284 Ark. 16, 678 S.W.2d 369 (1984), the Arkansas Supreme Court recognized this distinction. The trial court, it was held, should have dismissed a complaint, because the complaint failed to state sufficient facts. The trial court should not have dismissed by granting defendant's motion for summary judgment. The practical effect of basing the dismissal on Rule 12(b)(6) rather than Rule 56 was to allow the plaintiff to file an amended complaint or to file a new lawsuit.

As indicated above, summary judgment procedure under Rule 56 does allow the court to consider evidence, going beyond the statement of facts alleged in the complaint or in another pleading. In ruling on the motion for summary judgment, the judge must determine whether there is a genuine issue as to any material fact and determine whether the moving party is entitled to judgment as a matter of law. In making that ruling, the judge may consider not only the pleadings but also depositions, answers to interrogatories and admissions on file, and any affidavits filed by the parties in support of, or in opposition to, the motion for summary judgment. The summary judgment procedure is designed to allow the judge to summarily decide cases in which the claimant has stated facts in the complaint (or other pleading) sufficient to state a claim but in which, when evidence going beyond the pleadings is considered, there is no real dispute between the parties as to the facts.

Under Rule 56(e) the affidavits in support or in opposition to the motion for summary judgment (affidavits are simply written statements signed under oath by the affiant (the person making the affidavit)) must be made on the basis of personal knowledge, must set forth facts that would be admissible in evidence, and must show that the person making the affidavit is competent to testify to the matters stated in the affidavit. Rule C-14C-10 of the Rules for the United States Court for the Eastern and Western Districts of Arkansas requires that a party moving for summary judgment attach a separate statement of the material facts that the party contends are not in dispute. The opposing party must then file in response a statement of the material facts as to which it contends a genuine issue exists to be tried. All material facts set forth in the moving party's statement shall be deemed admitted unless controverted by the non-moving party's statement.

Of course, affidavits and other materials filed in response to the motion for summary judgment which controvert the facts alleged in the motion for summary judgment and its supporting materials will leave the judge with no choice but to decide that there is a dispute as to the facts in the case and that a trial will be necessary. Partial summary judgment may be granted when it appears that there is no genuine issue as to the material facts in regard to some aspect of a claim (for instance, in a tort case there may be no issue as to liability, but an issue may exist as to damages).

In practice, the motion for summary judgment has often been restricted to cases that depend on documentary evidence or on the determination of a question of law in a case involving undisputed facts that have been brought into sharper focus than is possible by generalized pleadings. The reason is that appellate court decisions have not permitted the motion to be granted if there is any possibility that the factual aspects of the case will appear different at trial from the evidence set forth in support of and against the motion. However, in Short v. Little Rock Dodge, Inc., 297 Ark. 104, 759 S.W.2d 553 (1988), the Arkansas Supreme Court interpreted Rule 56 in the same manner as the U.S. Supreme Court interpreted the corresponding federal rule in Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Under the Short and Celotex cases, summary judgment is proper when the plaintiff cannot present proof on an essential element of the plaintiff's cause of action. In Short the Arkansas Supreme Court noted that federal Rule 56 is identical in every material respect to the Arkansas rule. The Celotex case and its companion decisions Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indust. Co. v. Zenith Radio, 475 U.S. 574 (1986), have been widely interpreted as signaling a liberalization of the U.S. Supreme Court's attitude toward the granting of summary judgment under Federal Rule 56.

There are several reasons why courts have been reluctant to find no genuine issue as to the facts and reluctant to grant motions for summary judgment: (1) summary judgment affidavits are made under oath, but without cross-examination—cross-examination is a powerful instrument for exposing error and probing statements for possible qualifications, (2) where a case is decided upon affidavit or deposition, demeanor evidence of the witness' testimony is lost, and (3) there may be a chance that a person who is willing to perjure themselves in an affidavit and even in the informal atmosphere of a deposition may be impelled by the formalities of trial and the presence of the judge to tell the truth. In general, summary judgment will not be granted in any case in which there is the slightest doubt as to whether trial could produce a factual dispute. For an excellent review of Arkansas summary judgment procedure, see John J. Watkins, Summary Judgment Practice in Arkansas, 15 U. Ark. Little Rock L.J. (1992)).

Generally, a party seeking affirmative relief in the lawsuit may move for summary judgment after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. A party who is defending may move for summary judgment at any time.

C. Default Judgment

Rule 55 governs judgment by default. It may be entered whenever a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided in the rules (generally, failure to answer within the required time).

The mention of default judgment at this point is intended primarily to serve as a warning to attorneys for claimants that the procedures required by Rule 55 (including the necessity of possibly proving damages), must be followed if a judgment by default is to be obtained. In addition, mention of default judgment is made to alert the attorney representing the defendant to the possibility that the client may never get their day in court because of the attorney's failure to respond to the claimant's action as required by the rules. If the client comes to the attorney for the first time at 4:00 p.m. on answer day, it is far better that the attorney file that day a general denial answer which can be amended than that the attorney file no answer at all and suffer the possibility that a judgment by default will be entered against the client.

By 1990 amendments to Rule 55, the Arkansas Supreme Court adopted a stricter standard for the granting of default judgments and liberalized the procedure for setting aside default judgments. The procedure for setting aside default judgments is now to be exclusively under Rule 55(c).

D. Voluntary Dismissal

The attorney may at some point want to voluntarily withdraw (dismiss) the lawsuit that they have filed, which, within the limits of Rule 41(a), the attorney has the right to do. See Rule 41(a) for the extent of that right and for the procedures to be followed in effecting that right. Rule 41(a) of the federal rules imposes greater restrictions on the plaintiff's right to voluntarily dismiss the lawsuit than does Arkansas Rule 41(a).

Unless the plaintiff has previously dismissed in any federal or state court a lawsuit based on or including the same claim, the voluntary dismissal of a lawsuit by the plaintiff generally will be without prejudice to future actions by the plaintiff. That is, the dismissal will not operate as an adjudication on the merits, and the plaintiff will be free to later refile the same lawsuit (assuming the statute of limitations has not run). As a matter of local practice, a motion and order dismissing the lawsuit will probably be required.

E. Dismissal for Failure to Prosecute or Comply with Procedures or Orders

Under both Federal and Arkansas Rules 41(b) a lawsuit may be dismissed for failure of the plaintiff to pursue (prosecute) the lawsuit or for failure to comply with the rules of civil procedure or any order of the court. Under Federal Rule 41(b) the defendant must move for dismissal. The Arkansas version of Rule 41(b) requires that in all civil cases in which there has been no action of record for 12 months, the court must notify all attorneys of record that the case will be dismissed unless good cause is shown why it should be continued as a pending case. The rule specifically provides that dismissal pursuant to the rule is without prejudice unless the action has previously been dismissed. If the case has been previously dismissed, the dismissal operates as an adjudication on the merits. The federal rule provides that dismissal under 41(b) generally operates as an adjudication upon the merits unless the court otherwise specifies in its order for dismissal.

F. Consent Judgment

It is ironic that although many cases reach a settlement resulting in a consent judgment, the rules of civil procedure offer almost no guide to the court or litigants in regard to preparation and submission of a judgment by consent. Many judges have special requirements in regard to the form and submission of consent judgments. In any event, the consent judgment should be in writing. Generally, it should recite the fact that the parties have reached an agreement to settle the case, that the judge finds that a judgment by consent of the parties should be ordered, and that the judge does order that a judgment pursuant to the consent be entered.

Often the consent judgment agreed to by the parties is in connection with an agreement that the judgment be paid over a period of time in installments. Such an agreement (the agreement for payment by installments) is generally best left to be included in a separate document or letter signed by the attorney and the party who is to make the payments. This separate agreement should include a promise by the party whom the judgment favors not to attempt enforcement of the judgment so long as the other party makes payments pursuant to the agreement. Inclusion of such an agreement in the consent judgment to be filed with the court can cause problems. If the installment payment agreement is part of the consent judgment filed with the court and the payments are not made, the court may need to hear evidence, make findings, and issue an order in regard to the failure to make the payments before proceedings to enforce the judgment may be begun.

G. Withdrawal of Counsel

Rule 64 of the ARCP requires that the attorney seeking to withdraw from representation of a party secure permission to do so from the court in which the proceeding is pending. Permission may be granted for good cause shown if the attorney seeking permission shows, by motion, that they have done each of the following:

- taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel
- delivered, or stands ready to tender to the client, all papers and property to which the client is entitled
- refunded any unearned fee or part of a fee paid in advance, or stands ready to tender such a refund upon being permitted to withdraw

X

Trial

A. Introduction

Although both the Federal and Arkansas Rules 38–53 are indexed under the heading "Trials," the rules offer little guidance as to what is actually to happen at trial. Although any one or all of those rules may be significant in a given case, the following are most likely to play an important role in a typical case.

1. Rules of Civil Procedure Applicable to the Trial

a. Rule 38—Demand for Jury Trial

If the right to a jury applies in federal court as to any issue, Rule 38(b) requires that there be a written demand for the jury trial not later than 10 days after service of the last pleading directed to that issue. Under Arkansas Rule 38(a) the demand must be made not later than 20 days prior to the date of trial. However, the court in which the case is being tried may attempt to compel the parties to make a decision in regard to the jury trial at an earlier date. In any event, the federal and Arkansas rules provide that failure to make a demand as required by Rule 38 constitutes a waiver of trial by jury.

b. Rule 47(a)—Examination of Jurors

Under Federal and Arkansas Rules 47 the court may conduct the voir dire (examination of jurors to determine their qualifications) or may permit the parties or their attorneys to conduct the examination. However, in Arkansas state courts the examination is customarily conducted primarily by the attorney, and in federal court the examination is usually conducted primarily by the court.

c. Rule 48—Number of Jurors

Under Federal Rule 48, the court may seat a jury of no fewer than six jurors and of no more than 12 jurors. The parties may stipulate that the verdict of a stated majority of the jurors shall be taken as the verdict or finding of the jury. Arkansas Rule 48 recognizes that Amendment 16 to the Arkansas Constitution permits 9 of 12 jurors to agree upon a verdict. However, it also allows the parties to stipulate that the jury may consist of any number less than 12 and that a verdict may be rendered by a majority of that number.

d. Rule 49—Special Verdicts and Interrogatories

Ordinarily in a civil case the jury will return a general verdict, that is, a verdict which finds either for the plaintiff or defendant and, if for the plaintiff, states the amount of the verdict. Rule 49(a) of the federal rules authorizes the court to require the jury to return a "special verdict" in the form of a special written finding upon each issue of fact. Similar provision is made by Arkansas Rule 49(b). Arkansas Rule 49(a) and federal Rule 49(b) also permit the court to submit to the jury written interrogatories upon one or more of the issues of fact in the case, along with a general verdict form.

e. Rule 50—Motions for Directed Verdicts and for Judgments Notwithstanding the Verdict

Arkansas Rule 50(a) governs the motion for a directed verdict. The motion may be made either at the close of the evidence offered by an opponent or at the close of all the evidence. The motion must state the specific grounds for which it is made. Motions for directed verdicts are made only in jury trials. In trials before a judge, the motion (the purpose of which is to test sufficiency of the opponent's evidence) is simply called a motion to dismiss. Motions for judgments notwithstanding the verdict are made pursuant to Rule 50(b). The motion must be made not later than 10 days after the judgment and can be made only by a party who has previously moved for a directed verdict. A motion for a new trial under Rule 59 may be combined with the motion for judgment, notwithstanding the verdict.

Federal Rule 50 has been revised. The rule authorizes a party to move for judgment as a matter of law at any time during the trial. The motion shall be granted as to any claim when it becomes apparent that a party has not presented a legally sufficient evidentiary basis on an issue on which it has the burden of proof. Rule 50(b) requires that a post-verdict motion for judgment be made 10 days after the entry of a judgment.

f. Rule 51—Instructions to the Jury

Under Federal Rule 51 "the court, at its election, may instruct the jury before or after [closing argument of counsel], or both." Arkansas Rule 51 requires that the jury be instructed as to the law prior to the closing arguments. Under the federal rule, objections to the giving or failure of giving a jury instructions must be made before the jury retires to consider its verdict. Under the Arkansas Rule, the objection must be made before or at the time the instruction was given, and, in addition, objection to the failure to give an instruction on any issue must be accompanied by a proposed instruction on that issue. Under both the federal and Arkansas rules, the attorney making the objection must state distinctly the matter to which the objection is raised and must state the grounds for the objection. Objections to the instruction should be made out of the hearing of the jury.

g. Rule 52—Findings of Fact and Conclusions of Law by the Court in a Trial by a Judge Without a Jury

Federal Rule 52(a) requires that the judge in a trial without a jury make special findings of fact and separate conclusions in regard to the law applicable to the facts. Under the federal rules, requests for findings of fact and conclusions of law are not necessary for purposes of appellate review. Arkansas Rule 52(a) does not require the judge to make special findings of fact and separate conclusions of law unless requested to do so by a party. However, the court's findings of fact and conclusions of law can be very important to framing the issues for an appeal.

Federal Rule 52(c) has been added to authorize the court to enter a judgment at any time that it can make a dispositive finding of fact on the evidence. It parallels revised Rule 50(a) but is applicable to non-jury trials. It also replaces part of Rule 41(b), which authorized dismissal at the close of the plaintiff's case if the plaintiff failed to carry the burden of proof.

2. Other Rules and Customs Applicable to the Trial—Effective Trial Advocacy

What does happen at trial is governed primarily by the rules of evidence and by custom and practice. The federal and Arkansas rules of evidence are nearly identical. Arkansas has adopted (with a few variations) Uniform Rules of Evidence, which is found in Court Rules Volume of Arkansas Code Annotated.

The competency of a trial advocate is developed primarily through experience. However, assistance in acquiring the knowledge necessary to be an effective trial advocate can be acquired, in part, from a number of books and articles published on the subject (the author of these materials recommends *Fundamentals of Trial Techniques* by Thomas Mauet (2d Ed. Little Brown and Co. 1988)) and can be acquired by attending various trial advocacy seminars.

The nature of these materials does not permit a discussion of the use of the rules of evidence at trial (both Law Schools in Arkansas have acquired a series of excellent video tapes by Irving Younger discussing the use of the rules of evidence at trial—they are generally available to interested attorney groups). Nor does the space allotted to these materials allow an extensive discussion of the custom and practice of trial advocacy. The topics discussed below under this heading are somewhat arbitrarily selected on the basis of their importance to the young attorney.

B. Preparation for Trial

The most important factor to the success of a trial lawyer is preparation, which comes mainly through conducting a thorough investigation and discovery of the facts before a trial (see VIII. Investigation and Discovery of Facts). After completing the investigation and discovery of the case, the attorney must prepare for trial by organizing the information accumulated and by making a plan for what is to happen at trial. Assistance in planning for trial may be had through the completion of the "Hearing or Trial Checklist and Outline" found in Appendix "B" to this section. It should be completed well in advance of the trial or hearing and revised and updated as necessary.

C. Making a Record

The making of a good record in the trial court is crucial to the success of any appeal that may follow the decision of the trial court. The first factor to consider in making a record in the trial court is that no record at all will be made unless a court reporter is present to record the testimony. (Rule 6(d) of the Arkansas Rules of Appellate Procedure does allow the appellant to prepare a statement of the evidence or proceedings from the best means available, including from the appellant's recollection. However, this will generally constitute a very unsatisfactory record for appeal purposes.) Although some courts have a court reporter in

attendance at all proceedings, others do not. It is the responsibility of the attorney to make sure that the proceedings will be recorded by a court reporter. In many cases the employment of a court reporter will be unnecessary. However, a court reporter should be employed to record the proceedings if an appeal may be anticipated.

As with the recording of depositions (see VIII.D.4.b.3., above), the court reporter will charge only a relatively nominal "appearance fee" for recording the trial. Greater expenses will be incurred if a transcript of a trial is to be prepared. A decision on ordering the preparation of a transcript can await the decision to appeal the case.

Assuming that a court reporter is present to record the proceedings, the task of making a proper record for appeal requires constant vigilance on the part of the attorney. Among the factors that must be kept in mind by the attorney at trial in connection with the making of the record is the necessity of having all documents and exhibits properly marked and identified. In addition, witnesses referring to the documents and exhibits must do so in such a way that the appellate court will be able to determine specifically the portion of the document or exhibit to which the witness's testimony relates. Also, if evidence or documents are excluded, the attorney must be prepared to make an offer of proof and recite the evidence that would be put forth if allowed. An excellent guide to the making a good trial record is Waltz and Kaplan's *Evidence: Making the Record* (Foundation Press 1982).

D. Order of Events at Trial

The order of trial events varies slightly in jury trials within the Arkansas court system from those within the federal court system. In addition, some events in a jury trial simply do not occur in a trial before a judge. Other events are customarily treated somewhat differently in judge trials, as opposed to jury trials—the following discussion will attempt to summarize the differences.

1. Voir Dire of the Jury (Examination of the Juror's Qualifications)

   In Federal court voir dire of the jury will be done primarily by the judge, in Arkansas state court, primarily by the attorneys involved in the case. Jurors may be excluded both for cause and on peremptory challenge. In state and federal courts there is no limit to the number of jurors who may be excluded for cause. A juror excluded for cause is excluded because the judge concludes that the juror does not meet the qualifications necessary to be a juror (see A.C.A. §§ 16-31-101 to -107 and Chapter 121 (§§ 1861-1874) of Title 28 of the U.S.C. for qualifications of jurors). Under both federal and Arkansas statutes (28 U.S.C. 1870; A.C.A. §§ 16-33-204 and 16-30-102(c) (alternate jurors) each party in a civil lawsuit is allowed three peremptory challenges. This means that each side may exclude three prospective jurors without stating reasons for their exclusion.

2. Opening Statements

   After the jury is selected, the plaintiff's attorney will give the first opening statement. Although technically the defendant's attorney may postpone their opening statement until after the plaintiff has rested, most trial attorneys feel that the defense attorney should give the opening statement immediately following the plaintiff's opening statement. Opening statements are not to include argument of the case. Argument by the attorneys must await closing arguments at the conclusion of the trial. However, a fine line is between what constitutes an argument and what constitutes a legitimate opening statement that advises the jury as to the evidence that the attorney expects will be produced in the lawsuit. A thumb nail test is found in the answer to the question, "will a witness testify as to what is being said in an opening statement." If a witness will, it is legitimate material for an opening statement—if not, it should be left to closing argument. In a trial before a judge, opening statements should ordinarily be considerably more brief and succinct than in a trial to a jury of lay persons.

3. Presentation of Evidence for the Plaintiff

   After the opening statements, the plaintiff will begin calling their witnesses. After the plaintiff's attorney examines each witness, the defendant's attorney may then cross-examine that witness. The cross-examination of the witness may be followed by a redirect examination on the part of the plaintiff's attorney, to be followed by a re-cross-examination by the defendant's attorney.

   Whenever an opposing attorney wishes to inquire into the qualifications of a witness to testify or the foundation laid for the admission of evidence, the attorney may voir dire the witness (inquire into the witness' qualifications or into the foundation) near the start of the witness' substantive testimony (before the plaintiff's attorney continues with the direct examination). A rule of evidence in regard to direct examination (Rule 611(c)) requires that testimony of a witness on direct examination be elicited by other than leading questions. The same rule allows the use of leading questions on cross-examination.

4. Plaintiff Rests
After the plaintiff has called all of their witnesses, the plaintiff will rest. By resting, the plaintiff surrenders the right to call additional witnesses except in rebuttal (see 8., below).

5. Defendant's Motion for Directed Verdict (Jury Trial) or Motion to Dismiss (Judge Trial) or Motions for Judgment as a Matter of Law in Federal Court
The motion for directed verdict or the motion to dismiss is made on the ground that the plaintiff has not produced enough evidence to make a prima facie case, that is, the motion requests that the judge determine that all reasonable minds would agree that the plaintiff has not established their case by a preponderance of evidence. If the judge grants the motion, the case is concluded. If the judge denies the motion, the defendant may then present their evidence, or the defendant may rest and either allow the case to be submitted to the jury or, in a judge trial, allow the judge to decide the case at that point.

6. Defendant's Presentation of Evidence
The defendant's presentation of evidence follows the same procedural pattern as that described for the plaintiff in 3., above.

7. Defendant Rests
The Defendant will rest after all of their witnesses have been called. By resting, the defendant waives the right to call any additional witnesses except in response to rebuttal witnesses called by the plaintiff (see 8., below).

8. Rebuttal Evidence by Plaintiff (and Defendant)
After the defendant rests, the plaintiff may call additional witnesses, but only in rebuttal to the evidence produced by the defendant. The defendant may then call additional witnesses, but only in rebuttal to the evidence produced by the plaintiff in rebuttal.

9. Motions for Directed Verdict by Plaintiff and Defendant or Motions for Judgment as a Matter of Law in Federal Court
At the close of all the evidence by the plaintiff and defendant both parties may move for directed verdicts in their favor. Again, the party moving for a directed verdict is asking the judge to conclude that the case should not be submitted to the jury because all reasonable minds would agree that the evidence preponderates in their favor. Motions for directed verdict are made pursuant to Rule 50 of both Arkansas rules and federal rules.

10. Judge's Instructions to the Jury in Regard to the Law to Be Applied (Arkansas State Courts Only)
Rule 51 of the ARCP requires that the judge instruct the jury after the close of all the evidence and instruct the jury prior to the closing arguments of counsel. (See A.1.f., of this subsection, above, for further discussion concerning the judge's instructions.)

11. Closing Arguments by Plaintiff and Defendant
The plaintiff's closing argument is made first. In the closing argument the attorney may argue any inference that may be drawn from evidence that has been produced in the case. (For further discussion of closing arguments see the books and materials mentioned in A., above.)

12. Plaintiff's Rebuttal Closing Argument
Following the defendant's closing argument, the plaintiff may make a rebuttal closing argument. However, the argument must truly be in rebuttal to the closing argument of the defendant; the argument cannot raise new matter. This means, for instance, if the plaintiff's attorney has failed to argue (in a civil damages case) damages in their initial closing argument, such argument will be barred on rebuttal.

13. The Judge Instructs the Jury Regarding Law (Federal Court Only)
Under Rule 51 of the FRCP, the judge may instruct the jury before or after closing argument of counsel, or the judge may instruct at both times. (See 10., above, and A.1.f., of this subsection, for further discussion in regard to the judge's instructions to the jury.)

14. Closing Arguments by Plaintiff and Defendant (Federal Court Only)
See 11. and 12., above, for further discussion of closing arguments.

15. The Jury Retires to Consider its Verdict
N/A

16. The Jury Returns its Verdict
In Arkansas state court the jury may return a verdict if nine of its 12 members agree (Rule 48). Normally in federal court a unanimous verdict is required. However, in both Arkansas state court and Arkansas federal court, the parties may stipulate that the jury consist of a number less than 12 or stipulate that a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

17. Entry of Judgment by the Judge
Assuming that the judge does not grant a judgment notwithstanding the verdict pursuant to Rule 50, and assuming that the judge does not grant a new trial pursuant to Rule 60, the judge will enter judgment on the verdict by the jury. If the trial was heard by the judge without a jury, the judge will enter judgment and, in federal court, make findings of fact and make conclusions of law. In Arkansas court, findings of fact and conclusions of law will be made by the judge only if requested by one of the parties. In regard to the obligation to make findings of fact and conclusions of law, see Rule 52 and the discussion under A.1.g., of this subsection, above.

18. Post-Trial Motions
Post-trial motions, allowed by Arkansas rules, include a motion for judgment notwithstanding the verdict pursuant to Rule 50 and include a motion for a new trial under Rule 59. In federal court, a post-trial motion for judgment as a matter of law is allowed pursuant to Rule 50, and a motion for a new trial is allowed pursuant to Rule 59. These motions must be made not later than 10 days after entry of the judgment. See those rules for the grounds on which the motions can be made.

Even after the expiration of the time allowed for motions for judgment notwithstanding the verdict or for a new trial, it may still be possible to obtain relief from the judgment under Rule 60. Rule 60 of the federal rules and the Arkansas rules should be consulted for the grounds under which relief from judgment may be pursued under those rules.

Under Arkansas Rule 60(d)(e), no judgment may be set aside (pursuant to Rule 60) unless the party that is seeking the relief asserts and proves a prima facie defense to the action (cause of action in the case of a plaintiff). However, proof of a valid defense or a cause of action is not required if the defect in the judgment is that the court lacked jurisdiction (for instance, because of defective service of process). See Halliman v. Stiles, 250 Ark. 249, 464 S.W.2d 573 (1971).

E. Form of Judgment at Trial

If the trial is before a judge, not before a jury, Federal Rule 52 requires that the judge make findings of fact and that the judge make conclusions of law on the findings of fact. Arkansas Rule 55 requires that the judge make findings of fact and that the judge make conclusions of law only if requested by a party. Since, as indicated in A., to this subsection, above, findings of fact and conclusions of law may be an important basis for appeal, if an appeal is anticipated, special attention should be paid to the court's making appropriate finding of fact and appropriate conclusions of law.

XI

Appeal

Overview

In federal courts, appeals from the decision of trial courts are governed by the Federal Rules of Appellate Procedure. In Arkansas courts, civil appeals are governed by the Arkansas Rules of Appellate Procedure-Civil and the Rules of the Arkansas Supreme Court (two separate sets of rules).

The procedure for appeal is paved with innumerable traps for the unwary. The attorney who has not previously been involved in appellate procedure should read the appellate rules carefully and consult with an experienced attorney before attempting an appeal.

Rules 4(a) of both the Arkansas and Federal Rules of Appellate Procedure prescribes the time within which an appeal must be taken. The appeal is taken by filing a notice of appeal which, under Rule 3(c) (federal rules), 3(e) (Arkansas rules) must specify the party or parties taking the appeal, designate the judgment, decree, order or part thereof appealed from, and, in Arkansas courts only, the contents of the record on appeal, and, in federal court only, the court to which the appeal is taken. In addition, under Arkansas Rule 3(e), the notice of appeal must contain a statement that the transcript, or specific portions thereof, has been ordered by the appellant (see the rules for additional requirements). Note well! The time period designated in Rule 4(a) is the period for filing the notice of appeal generally. There are exceptions. In addition, there are many other time periods involved in the appellate process, including the time for filing the record on appeal and the time for filing briefs.

XII

Enforcement of Judgments

Overview

Often the attempt to collect a judgment awarded in a civil case can involve a process as complicated and arduous than the trial itself. A person against whom a money judgment has been awarded in a civil case (at least a judgment at law) may ignore the judgment with impunity at least until such time as the party awarded the judgment attempts enforcement. Even then, the person against whom the judgment has been awarded may sit back and let the enforcement processes run their courses. The methods of enforcing a judgment are discussed in “Post Judgment Relief” in “Consumer Law” of this manual.

XIII

Appendices

A. Appendix A—Subject Matter Jurisdiction of Arkansas Courts

Caveat: this outline of subject matter jurisdiction of the Arkansas court system is provided as a rough guide only. The reader should be aware that it is incomplete and, thus, in specific instances, may be misleading. It should be regarded as providing a sketchy introduction to the subject rather than as providing a complete statement and analysis.

1. Arkansas Courts of General Subject Matter Jurisdiction

(Although a precise definition of "courts of general jurisdiction" is somewhat difficult to state and is the subject of some dispute, for the purposes of this outline, a court of general subject matter jurisdiction should be considered to be one "which has jurisdiction to hear a variety of matters.")

a. Circuit Court

Established by Article 7 § 11 of the Arkansas Constitution as the court to have jurisdiction of all matters not specifically committed to some other court. In general, each circuit court has jurisdiction of the following matters:

- actions at law (generally where money damages are the only relief sought)
- exclusive jurisdiction of criminal felony cases
- concurrent jurisdiction (primarily with municipal court) in misdemeanor cases
- appellate and superintending jurisdiction over limited jurisdiction courts (appeals from limited jurisdiction courts to circuit courts are generally heard dede novonovo)
- miscellaneous special proceedings: writs of habeas corpus, prohibition, mandamus, challenges to actions of state administrative agencies, see A.C.A. § 25-15-207 and § 25-15-212, etc.

b. Chancery Court

The Arkansas General Assembly is given authority by Article 7 § 15 of the Arkansas Constitution to establish separate chancery courts. The General Assembly did so by legislative act in 1903. In general, Chancery Court jurisdiction is as follows:

- equity matters (generally where the remedy at law—money damages—is inadequate (for example, actions for injunctions and specific performance and certain matters in regard to real estate: quiet title, foreclosure, etc.))
- domestic relations disputes—actions for divorce and separate maintenance
- special proceedings—writ of habeas corpus, etc.
- juvenile and paternity matters—Act No. 194 of 1989, implemented Arkansas Constitutional Amendment 67 of 1989 (the juvenile court amendment) by placing jurisdiction over juvenile matters, including dependency-neglect, families in need of services, juvenile delinquency, and termination of parental rights matters and paternity matters in the Juvenile Division of Chancery Court
- jurisdiction over a variety of other matters is assigned by statute to Chancery Court

N.B.—because there is no right to a jury trial in chancery court, the lawyer must give special consideration to the filing of cases in which both equitable and legal (money damages) relief is sought.

c. Probate Court

Article 7 § 34 of the Arkansas Constitution provides that the judge having jurisdiction in equity matters shall also be the judge of probate court. Thus, the chancellor (having jurisdiction in equity matters) is also the judge of probate court. In general, probate court has jurisdiction of the following matters:

- decedents' estates and trusts
- adoption proceedings
- guardianship proceedings
- mental commitment proceedings
- proceedings for approval of power of attorney for benefit of the infirm

2. Courts of Limited Jurisdiction

The jurisdiction of courts of limited jurisdiction is specifically defined, and, generally, narrowly confined. In addition, appeals from courts of limited jurisdiction generally must pass through a court of general jurisdiction before reaching the highest appellate court in a state.

a. Limited Jurisdiction Courts of Primary Importance in Arkansas

1. Municipal Court

Municipal courts have county wide jurisdiction within the county in which the court sits. Municipal court is the only court of limited jurisdiction in which the judge is required to be a lawyer. Generally, municipal court jurisdiction is limited to the following:

- violations of city or county ordinances
- traffic offenses
- misdemeanors (concurrent with circuit court)
- preliminary hearings in felony matters
- bond settings in criminal misdemeanor and felony matters
- limited civil jurisdiction (generally up to $5,000) (see A.C.A. § 16-17-704 (1997 Supp.), but not personal injuries or damages to land (see Miles v. Southern, 297 Ark. 274, 763 S.W.2d 656 (1989)
- some municipal courts have small claims divisions in which lawyers are barred from appearing; in 1996 there were 122 municipal courts in Arkansas

2. County Court

County court is established by Article 7 § 28 of the Arkansas Constitution. The judge of county court need not be, and almost invariably is not, a lawyer. The primary responsibility of the county judge is the administration of county business (not judicial jurisdiction). With the adoption of Amendment 67 to the Arkansas Constitution in 1989 removing jurisdiction over paternity matters from County Court, county judges no longer have any judicial jurisdiction.

b. Limited Jurisdiction Courts of Lesser Importance

The courts listed under this heading are characterized as being of "lesser importance" primarily because they are not found in all areas of the state. The jurisdiction of all of the courts listed below is concurrent with that of other Arkansas courts, listed above, primarily municipal court. Since jurisdiction over the matters which could be handled in the courts listed below is also in municipal or some other court, most communities have chosen not to institute these courts.

1. City Courts

violations of city ordinances (city courts may be established only in towns and second-class cities—the mayor is the judge of the court, but may appoint someone else to hold court for them)—there were 94,101 city courts in Arkansas in 1996

2. Courts of Common Pleas

civil jurisdiction up to $1,000 (in 1996 there were 54 courts of common pleas)—the county judge presides over courts of common pleas

3. Justice of the Peace Courts

misdemeanors and some civil matters up to $300—although constitutional and statutory authority exist for justice of the peace courts, none were in existence in the state in 1996

4. Police Courts

the jurisdiction of police courts is the same as that of city courts (city ordinances), but the judge is elected as judge of the police court, not as mayor—there were 5 police courts in Arkansas in 1996

3. Appellate Courts

a. Circuit Court

Appeals from all inferior courts are taken first to circuit court where the case is heard de novo. Appeals originating in inferior courts are then taken from circuit court to the Arkansas Supreme Court or to the Arkansas Court of Appeals, depending upon the court to which the case would be assigned on appeal by virtue of the operation of Supreme Court Rule 291-2.

b. Arkansas Supreme Court and Arkansas Court of Appeals

The Arkansas Supreme Court has some original, non-appellate, jurisdiction. For instance, it can issue writs of mandamus and prohibition to lower courts and can issue the writ of quo warranto.

Amendment 58 (adopted in 1978) to the Arkansas Constitution provided that the General Assembly could create a Court of Appeals, the jurisdiction of which would be determined by the Arkansas Supreme Court. The 1979 session of the General Assembly did create a Court of Appeals pursuant to Amendment 58. The simplest statement of the division of appellate jurisdiction between the Arkansas Supreme Court and the Arkansas Court of Appeals is that the Arkansas Supreme Court retains all appellate jurisdiction, save that which is given by Rule 291-2 of the Arkansas Supreme Court to the Court of Appeals. A detailed description of the division of jurisdiction is beyond the scope of this brief outline. However, as a general rule, the more complex civil and criminal cases are heard by the Arkansas Supreme Court. The Arkansas Supreme Court can transfer cases over which it has initially taken jurisdiction to the Court of Appeals as well as transfer to itself cases over which the Court of Appeals has assumed initial appellate jurisdiction.

B. Appendix B—Hearing or Trial Checklist and Outline

Plaintiff: (Name)
Defendant: (Name)

Hearing or Trial Checklist

- list each witness who will testify for plaintiff
  - name, address(es), telephone
- list each witness who will testify for the defendant
  - name, address(es), telephone
- attach a list of questions for direct examination of your witnesses
- attach a list of possible cross examination questions for opponent's witnesses
- list all pleadings and note location in file
- list all exhibits and note method of introduction
- list all other documents (including subpoenas, briefs, depositions, etc.) and note location in file