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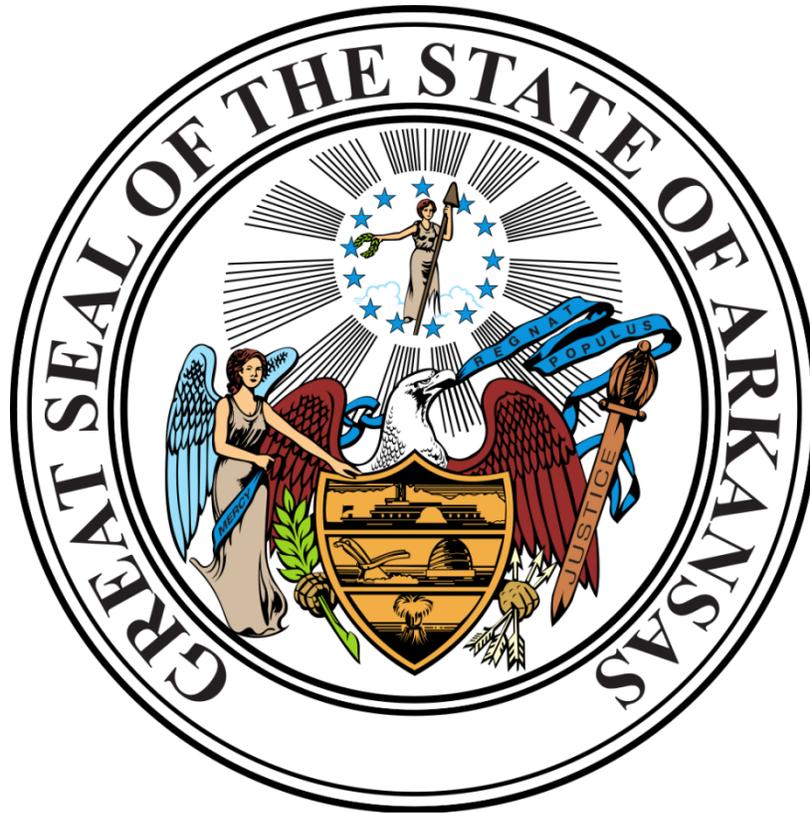
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Arkansas Circuit Courts  
**Judges' Benchbook**  
Civil & Criminal Divisions



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# **I. Jurisdiction**

## **Subject Matter Jurisdiction**

Circuit courts are established as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Arkansas Constitution. Ark. Const., Amendment 80 §6 (A).

The circuit court shall have original jurisdiction, exclusive of the district court, for the trial of offenses defined as felonies by state law and shall have original jurisdiction concurrent with the district court for the trial of offenses defined as misdemeanors by state law. Ark. Code Ann. § 16-88-101.

The local jurisdiction of circuit courts shall be of offenses committed within the respective counties in which they are held. Ark. Code Ann. § 16-88-105.

## **Relevant Statute**

If, during the trial, it shall appear that the offense was committed out of the jurisdiction of the court, but within the jurisdiction of some other court of this state, the court shall stop the trial, discharge the jury, and transfer the case to the proper court.

If it appears the offense was committed out of the state, the trial shall be stopped and the defendant either discharged or ordered to be retained in custody for a reasonable time until the counsel for the state shall have an opportunity to inform the chief executive officer of the state in which the offense was committed of the facts and to allow the officer an opportunity to require the delivery of the offender.

Ark. Code Ann. § 16-89-119.

## **Personal Jurisdiction**

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. Ark. Code Ann. § 16-4-101.

“Due process of law” requires only that in order to subject a defendant to a judgment in personam, if he be not present within territory of forum, he has certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310 (1945).

In order to satisfy due process in cases in which service of process is accomplished by means of a long-arm statute, the foreign corporation must have certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice, and in addition, it is essential in each case that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state. *Hutson v. Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978).

Foreseeability that is critical to due process analysis of state court's jurisdiction of a nonresident defendant is not mere likelihood that a product will find its way into the forum state but rather it is that a defendant's conduct and connection with the forum state are such that he should reasonably anticipate being hauled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559 (1980).

A single contract can provide the basis for exercise of personal jurisdiction over a nonresident defendant if there is a substantial connection between the contract and the forum state. *SD Leasing, Inc. v. Al Spain & Associates, Inc.*, 277 Ark. 178, 640 S.W.2d 451 (1982)(Arkansas court had jurisdiction over Florida defendant in suit brought by Arkansas corporation for default on noncancellable lease agreement where, though lease was executed in Florida, it was mailed to lessor in Arkansas where it was reviewed, approved and finally accepted, lessee mailed its monthly payments directly to lessor in Arkansas as well as two memos informing lessor that it was going out

of business, lease agreement specifically provided that it would be governed by Arkansas law, and lease also provided that, in event of default, lessee would consent to and be subject to jurisdiction of Arkansas courts).

Personal jurisdiction can be either general or specific. *Lawson v. Simmons Sporting Goods, Inc.*, 2019 Ark. 84, 569 S.W.3d 865.

A foreign corporation that has qualified to do business in Arkansas and designated an agent for service of process is subject to general jurisdiction if it has substantial operations and employees in the state and owns property here, either directly or through a wholly owned subsidiary. See *Volunteer Transport, Inc. v. House*, 357 Ark. 95, 162 S.W.3d 456 (2004); *Davis v. St. John's Health System, Inc.*, 348 Ark. 17, 71 S.W.3d 55 (2002).

Specific personal jurisdiction concerns an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. The specific-jurisdiction analysis is confined to the adjudication of the issues deriving from or connected with, the very controversy that established jurisdiction. The focus of the specific-jurisdiction analysis is the relationship among the defendant, the forum, and the litigation. *Lawson v. Simmons Sporting Goods, Inc.*, 2019 Ark. 84, 569 S.W.3d 865.

The following criteria are necessary for personal specific jurisdiction: (1) the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise from or relate to the defendant's contacts with the forum state; and (3) the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of

personal jurisdiction over the defendant reasonable. *Lawson v. Simmons Sporting Goods, Inc.*, 2019 Ark. 84, 569 S.W.3d 865.

The plaintiff has the burden of proving that a non-resident defendant has sufficient contacts with Arkansas to be sued in personam. *Hawes Firearm Co. v. Roberts*, 263 Ark. 510, 565 S.W.2d 620 (1978).

Any cause of action arising out of acts done in this state by an individual in this state or by an agent or servant in this state of a foreign corporation may be sued upon in this state, although the defendant has left this state, by process served upon or mailed to the individual or corporation outside the state. Ark. Code Ann. § 16-58-120.

A defendant may consent to jurisdiction, impliedly or expressly. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir.1990).

*See also Hutson v. Fehr Bros., Inc.*, 584 F.2d 833 (8th Cir. 1978)(Arkansas state law permitted in personam jurisdiction over Italian corporation, that repackaged and resold allegedly defective chain which broke and caused personal injury to plaintiffs, since the corporation's alleged acts or omissions outside of Arkansas caused the tortious injury in Arkansas, and since the corporation, while at least two steps removed from American company which allegedly derived \$74,551.35 in revenue from Arkansas sales over a four-year period, could be said to have derived “substantial revenue” from the sale of its chains in Arkansas).

For a thorough discussion of all the above issues, see 2 Arkansas Civil Prac. & Proc. § 10:2 (5th ed.).

### **In Rem Jurisdiction**

An “in rem action” is one in which the court is required to act directly on property or on title to property. *RMP Rentals v. Metroplex, Inc.*, 356 Ark. 76, 146 S.W.3d 861 (2004).

Only a court with geographic jurisdiction over the county where the land is located has in rem jurisdiction. *RMP Rentals v. Metroplex, Inc.*, 356 Ark. 76, 146 S.W.3d 861 (2004).

Courts need not have in personam jurisdiction of all persons whose interests may be affected by an in rem determination of title to property. *Arndt v. Griggs*, 134 U.S. 316 (1890).

The only limitation is that the best possible notice must be given to a person whose interests are to be affected. *Ingram v. Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968).

In rem jurisdiction is founded upon physical power and the basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum state. *In re: Estate of Torian v. Smith*, 263 Ark. 304, 564 S.W.2d 521 (1978).

The U.S. Supreme Court's decision in *Shaffer v. Heitner* extended to in rem jurisdiction the “minimum contacts” requirement developed initially for in personam jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

*See also RMP Rentals v. Metroplex, Inc.*, 356 Ark. 76, 146 S.W.3d 861 (2004) (where the court has subject-matter jurisdiction, forum-selection clauses are enforceable if enforcement would be fair and reasonable);

*Freeman v. Alderson*, 119 U.S. 185 (1886) (power to act against the thing itself regardless of personal jurisdiction over owner); and

*Dowdle v. Byrd*, 201 Ark. 775, 147 S.W.2d 343 (1941) (thing must be present in state).

### **Quasi-in-Rem Jurisdiction**

A proceeding in rem has been defined to be a proceeding against the property while a proceeding “quasi in rem” is a proceeding against a person in respect to the property. *Simpson v. Reinman*, 146 Ark. 417, 227 S.W. 15 (1920).

Quasi in rem jurisdiction as well as personal jurisdiction over an absent defendant depend on the defendant's contacts with the forum state so as to meet traditional notions of fair play and substantial justice, the formula stated in *International Shoe Co. v. Washington. Levi Strauss & Co. v. Crockett Motor Sales, Inc.*, 293 Ark. 502, 739 S.W.2d 157 (1987). [Note: Actions involving receivership, marshaling of assets, and administration of trusts are quasi in rem. A quasi-in-rem action may also be based on a claim for money begun by attachment or other seizure of property when the court has no jurisdiction over the person of the defendant but has jurisdiction over a thing belonging to the defendant or over a person who either is indebted or owes a duty to the defendant.]

Although a judgment in rem affects the interests of all persons in designated property, a judgment quasi in rem affects the interests of particular persons in designated property and refers to actions in which the plaintiff is seeking to secure a preexisting claim in the subject property, and to extinguish or establish the nonexistence of similar interests of particular persons, and to actions in which the plaintiff seeks to apply what he or she concedes to be the property of the defendant to the satisfaction of a claim against the defendant. 20 Am. Jur. 2d Courts § 70.

### **Challenges to Jurisdiction**

A challenge to jurisdiction of parties is waived if not included in a motion to dismiss or other responsive pleading if no motion to dismiss is filed. Ark. R. Civ. P. 12(h).

The defense of lack of jurisdiction over the subject matter is never waived and may be raised at any time. Ark. R. Civ. P. 12(h).

Subject-matter jurisdiction is always open, cannot be waived, can be questioned for the first time on appeal, and can be raised by the Supreme Court. *Terry v. Lock*, 343 Ark. 452, 37 S.W.3d 202 (2001).

The Arkansas Rules of Civil Procedure shall not be construed to extend or limit the jurisdiction of circuit court. Ark. R. Civ. P. 82.

## II. Venue

### Civil Actions In General

In general, all civil actions (other than those mentioned in Ark. Code Ann. §§ 16-60-102–109, 16-106-101, and specific venue provisions codified in another title of the Arkansas Code) shall be brought in any of the following counties:

The county in which a substantial part of the event or omission giving rise to the cause of action occurred;

The county in which an individual defendant resided at the time of the event or omission giving rise to the cause of action;

If the defendant is an entity other than an individual, the civil action shall be brought in the county where the entity had its principal office in this state at the time of the event or omission giving rise to the cause of action; or

The county in which the plaintiff resided at the time of the event or omission giving rise to the cause of action.

If the plaintiff is an entity other than an individual, the civil action shall be brought in the county where the plaintiff had its principal office in this state at the time of the events or omissions giving rise to the cause of action. Ark. Code Ann. § 16-60-101.

The residence of a properly joined named class representative may be considered in determining proper venue in a class action. Ark. Code Ann. § 16-60-101.

The residence of a putative or actual member of a class other than a named representative shall not be considered in determining proper venue for a class action. Ark. Code Ann. § 16-60-101.

In a civil action with multiple plaintiffs, venue shall be proper as to each named plaintiff joined in the civil action unless:

The plaintiffs establish that they assert any right to relief against the defendant jointly, severally, or arising out of the same transaction or occurrence; and

The existence of a substantial number of questions of law or material fact common to all the plaintiffs not only will arise in the civil action, but also that:

The common questions of law or material fact will predominate over individual questions of law or material fact pertaining to each plaintiff;

The civil action can be maintained more efficiently and economically for all parties than if prosecuted separately; and

The interest of justice supports the joinder of the parties as plaintiffs in one civil action. Ark. Code Ann. § 16-60-101.

When venue is proper as to one defendant, it is also proper as to any other defendant with respect to all causes of action arising out of the same transaction or occurrence. Ark. Code Ann. § 16-60-101.

### **Local Civil Actions**

A civil action for the following causes shall be brought in the county in which the subject of the civil action, or some part of the civil action, is situated:

The recovery of real property, or of an estate or interest therein;

The partition of real property;

The sale of real property under a mortgage, lien, or other encumbrance; or

An injury to real property. Ark. Code Ann. § 16-60-102.

Actions by the State Highway Commission to condemn a right-of-way shall be brought in the county where the land is situated. Ark. Code Ann. § 27-67-309.

In an action to enforce a mechanics' or materialmans' lien, venue is proper in the county in which the building, erection, or other improvement to be charged with the lien is situated. Ark. Code Ann. § 18-44-117.

**Actions on Debt, Account, or Note**

A civil action on a debt, account, or note, or for goods or services against a city of the first class, a city of the second class, an incorporated town, a public facilities board, or a county shall be brought in the county in which the city, town, public facilities board, or county lies. Ark. Code Ann. § 16-60-106.

**Actions for medical injury**

A civil action for medical injury brought under Ark. Code Ann. §§ 16-114-201 et seq. against a medical care provider, as defined in Ark. Code Ann. § 16-114-201, shall be filed in the county in which the alleged act or omission occurred. Ark. Code Ann. § 16-60-105.

**Contract actions by resident subcontractor, supplier, or materialman against nonresident prime contractor or subcontractor**

A civil action in contract by a resident subcontractor, supplier, or materialman against a prime contractor or subcontractor who is a nonresident of this state or who is a foreign corporation may be brought in the county in which the plaintiff resided at the time the cause of action arose. Ark. Code Ann. § 16-60-107.

**Action by insured or beneficiary against surety on contractor's performance bond**

A civil action brought in this state by or in behalf of an insured or beneficiary against a domestic or foreign surety on a contractor's payment or performance bond may be brought in the county:

In which the loss occurred;

Of the insured's residence at the time of loss; or

Of the beneficiary's residence at the time of loss. Ark. Code Ann. § 16-60-108.

**Actions against a public school district**

A civil action, other than a civil action described in Ark. Code Ann. § 16-60-104 or a civil action for personal injury or death, against a public school district, a public school district board of directors, or a public school district's officer, agent, servant, or employee acting within the course and scope of his or her agency or employment shall be brought in the county or in the judicial district of the county in which the public school district is situated or has its principal office. Ark. Code Ann. § 16-60-109.

### **Local Criminal Actions**

Prosecutions shall be in the county where the crime was committed. Ark. Const., Art. 2 §10.

When the crime is committed on a boundary line, either county has concurrent jurisdiction. *Bottom v. State*, 155 Ark. 113, 244 S.W.2d 334 (1922).

### **Transitory Cases**

If any offense is committed on the boundary of two counties, or if the person committing the offense is on one side of the boundary and the injury occurs on the other side of the boundary, the indictment and trial may be in either county. If the boundary line is uncertain, the indictment and trial may be based in either county.

If an offense is committed in a river that is the boundary between two counties or an island in that river, the criminal jurisdiction of each county shall embrace the offense.

Where the offense is committed partly in one county and partly in another the jurisdiction is in either county.

Ark. Code Ann. § 16-88-108.

An indictment against an accessory to a felony may be found in the county where the offense of the accessory may have been committed, regardless of where the principal offense may have been committed. Ark. Code Ann. § 16-88-114.

## **Transitory Actions**

### **Causes of Action**

Venue is in the county where all or part of the cause of action arose in the following actions:

For recovery of fine, penalty, or forfeiture imposed by statute.

Against a public officer for an act done by virtue of or under color of office, or for neglect of official duty.

Upon official bond of public officer other than state officer.

Ark. Code Ann. § 16-60-103.

### **Actions Involving the State**

Venue is proper in Pulaski County in the following actions:

Civil actions on behalf of the state, or which may be brought in the name of the state, or in which the state has or claims an interest, except as provided in Ark. Code Ann. § 16-106-101, except that if a civil action could otherwise be brought in another county or counties under the venue laws of this state, then the civil action may be brought either in Pulaski County or the other county or counties;

A civil action brought by state boards, state commissioners, or state officers in their official capacity, or on behalf of the state, except as provided in Ark. Code Ann. § 16-106-101, except that if a civil action could otherwise be brought in another county or counties under the venue laws of this state, then the civil action may be brought either in Pulaski County or the other county or counties;

A civil action against the state or a civil action against state boards, state commissioners, or state officers based on their official acts, except that if a civil action could otherwise be brought in another county or counties under the venue laws of this state, then the civil action may be brought either in Pulaski County or the other county or counties; and

Civil actions brought against an organization that regulates extracurricular interscholastic activities in grades seven through twelve in both public and private schools if the organization's main administrative office is located in Pulaski County.

Other civil actions required by law to be brought in Pulaski County.

Ark. Code Ann. § 16-60-104.

### **Objections to Venue**

Unless venue objections are waived by the defendant or by unanimous agreement of multiple defendants, if venue is improper for any plaintiff joined in the civil action, then the claim of the plaintiff shall be severed and transferred to a court where venue is proper.

If severance and transfer is mandated and venue is appropriate in more than one court, a defendant sued alone or multiple defendants, by unanimous agreement, may select another court to which the civil action shall be transferred.

If there are multiple defendants who are unable to agree on another court, the court in which the civil action was originally filed may transfer the action to another court. Ark. Code Ann. § 16-60-101.

An objection to venue is waived if not included in a motion to dismiss, or other responsive pleading if no motion to dismiss is filed. Ark. R. Civ. P. 12(h). [Note: The Arkansas Rules of Civil Procedure are intended to be procedural only and do not affect any substantive issues such as venue and jurisdiction. These rules assume that venue and jurisdiction are proper. Whether this is true depends upon substantive law and due process requirements. Ark. R. Civ. P. 82.]

### **Change of Venue Procedure - Civil**

Any party to a civil action to be tried by a jury may obtain an order for a change of venue by motion upon a petition. The petition should state that the petitioner believes that he or she cannot obtain a fair and impartial trial

because of undue influence of his or her adversary, or of the undue prejudice against the petitioner, his or her cause of action, or defense.

The petition must be signed by the party and verified as pleadings are verified. It must also be supported by the affidavits of at least two credible persons who believe the statements of the petition are true.

When a corporation files the petition, neither of the credible persons may be directly or indirectly connected with the corporation in any way and neither shall receive any benefit or favor from the corporation within the next 12 months.

The motion shall be made to the circuit court where the action is pending. It may be made in open court or with reasonable notice to the adverse party and attorney.

Ark. Code Ann. § 16-60-201.

If a change is necessary to obtain a fair and impartial trial, the court may order a change of venue to another county to which there is no valid objection, and which is most convenient to the parties and witnesses. Ark. Code Ann. § 16-60-203.

If the motion is granted, the clerk shall thereupon transfer the necessary papers. The movant shall be responsible for paying the necessary fees and costs within the statutory time required. Ark. Code Ann. § 16-60-204.

In a civil case, only one order for a change of venue shall be granted to the same party in the same action. Ark. Code Ann. § 16-60-205.

### **Change of Venue Procedure - Criminal**

Any criminal case pending in any circuit court may be removed by the order of the court, to the circuit court of another county whenever it shall appear, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had in that county. Ark. Code Ann. § 16-88-201.

When there are several defendants in any indictment or criminal prosecution and the cause of the removal of the defendants exists only as to one or more of them, the other defendants shall be tried and all proceedings had against them in the county in which the case is pending, in all respects as if no order of removal had been made as to any defendant. Ark. Code Ann. § 16-88-202.

Only one change of venue shall be granted in any criminal case or prosecution. Ark. Code Ann. § 16-88-203.

The application of the defendant for an order of removal shall be by petition setting forth the facts on account of which the removal is requested. The truth of the allegations in the petition shall be supported by the affidavits of two credible persons who are qualified electors, actual residents of the county, and not related to the defendant in any way.

Reasonable notice of the application shall be given to the prosecuting attorney.

The court shall hear the application and, after considering the facts set forth in the petition and the affidavits accompanying it and any other affidavits or counter affidavits that may be filed and, after hearing any witnesses produced by either party, shall either grant or refuse the petition according to the truth of the facts alleged in it and established by the evidence.

The order shall state whether it is made on the application of the party or on facts within the knowledge of the judge making the order, and shall specify the cause of removal, and designate the county to which the cause is to be removed.

Ark. Code Ann. § 16-88-204.

When the order is made, the defendant, if not in custody and the offense charge is bailable, shall enter into recognizance with sufficient security for his or her appearance to answer the charges in the court to which the cause is to be removed. Ark. Code Ann. § 16-88-205.

If the defendant is in actual custody, the court granting the order of removal shall also make an order commanding the sheriff to remove the body of the defendant to the jail of the county into which the cause is to be removed. Ark. Code Ann. § 16-88-206.

### **III. Specific Actions**

#### **Real Property**

##### **Eminent Domain**

Arkansas Constitution, Art. 2 § 23, recognizes the state's right of eminent domain, but Arkansas Constitution, Art. 2 § 22 also recognizes that the right of property is before and higher than any constitutional sanction, and that private property shall not be taken, appropriated, or damaged for public use, without just compensation therefore.

The eminent domain procedures are by and large found in Title 18, Subtitle 2, Chapter 15 of the Arkansas Code. They include:

The condemnor should first attempt to reach agreement with property owner. Ark. Code Ann. § 18-15-1303.

If no agreement, the condemnor must file application with circuit court of county in which all or part of the property is located. Ark. Code Ann. § 18-15-1202. The application shall describe the affected property or make reference to a map or plat. Ark. Code Ann. § 18-15-604.

Notice shall be given to property owners and all interested persons by personal service or certified mail, by publication of notice for nonresidents, incompetents or unknown parties, or by summons or notice by mail to the guardian or personal representative of an infant, incompetent, or deceased owner. Ark. Code Ann. §§ 18-15-1202, 18-15-504, 18-15-1403, 18-15-303, 18-15-408, 18-15-907, 18-15-1004, & 18-15-1005.

An eminent domain action shall take precedence over other matters. Ark. Code Ann. § 18-15-403.

Guardian ad litem shall be appointed for any infant or incompetent individual without a legal representative. Ark. Code Ann. § 18-15-1203.

The circuit court shall set time of hearing, summon a jury, and take evidence. The jury shall determine just compensation. Ark. Code Ann. § 18-15-1204.

At the trial of the cause, a jury shall assess the amount of damages the applicant shall pay for the property taken in the proceedings. Thereafter, a judgment shall be entered stating that title to the property shall vest in the applicant upon payment to the clerk of the court of the amount of damages so assessed. Ark. Code Ann. § 18-15-404.

If there is more than one interested party, the court shall divide the proceeds. Ark. Code Ann. § 18-15-307.

For more information or an overview of the eminent domain process, you may look to Part II, Chapter 18 of the Arkansas Law of Damages.

You may also find helpful the following law review article: Carol J. Miller & Stanley A. Leasure, Post-Kelo Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law, 59 Ark. L. Rev. 43 (2006).

### **Forcible Entry and Detainer**

A person shall be guilty of a forcible entry and detainer if the person shall:

Enter into or upon any lands, tenements, or other possessions and detain or hold them without right or claim to title;

Enter by breaking open the doors and windows or other parts of the house, whether any person is in it or not;

Threaten to kill, maim, or beat the party in possession or use words and actions as have a natural tendency to excite fear or apprehension of danger;

Put out of doors or carry away the goods of the party in possession; or

Enter peaceably and then turning out by force or frightening by threats or other circumstances of terror the party to yield possession.

Ark. Code Ann. § 18-60-303.

Likewise, a person shall be guilty of an unlawful detainer if the person shall, willfully and without right:

Hold over any land, tenement, or possession after the determination of the time for which it was demised or let to him or her, or the person under whom he or she claims;

Peaceably and lawfully obtain possession of any land, tenement, or possession and hold it willfully and unlawfully after demand made in writing for the delivery or surrender of possession of the land, tenement, or possession by the person having the right to possession or his or her agent or attorney;

Fail or refuse to pay the rent for the land, tenement, or possession when due, and after three days' notice to quit and demand made in writing for the possession of the land, tenement, or possession by the person entitled to the land, tenement, or possession or his or her agent or attorney, shall refuse to quit possession;

Fail to maintain the premises in a safe, healthy, or habitable condition;  
or

Cause or permit the premises to become a public or common nuisance (See Ark. Code Ann. §§ 14-54-1501 et seq., Ark. Code Ann. § 16-105-401 et seq.). Ark. Code Ann. § 18-60-304.

The plaintiff shall file a signed complaint with the clerk of the circuit court in the county in which the offense has been committed. The complaint should specify the lands, tenements or possessions forcibly entered and/or detained, specify by whom and when done, and it should be accompanied by plaintiff's own or another credible person's affidavit stating the plaintiff's lawful possession and the defendant's forcible entry and/or detainer. Ark. Code Ann. §§ 18-60-306 – 307.

The clerk shall then issue a summons in the customary form and a notice of intention to issue writ of possession. Within five days after the summons is served, the defendant may file written objections and the plaintiff shall obtain and give notice of hearing date by certified mail, postage prepaid. If defendant fails to file written objections, a writ of possession shall issue. Ark. Code Ann. § 18-60-307.

The court shall order issuance of writ of possession if the plaintiff presents sufficient evidence at the hearing to convince the court that he or she is likely to succeed on the merits and if the plaintiff provides adequate security. Within five days of issuance of the writ, the defendant may retain possession upon payment of adequate security as determined by the court. Ark. Code Ann. § 18-60-307.

A plaintiff demanding an immediate writ of possession who is a housing authority is entitled to an expedited hearing within ten days of the filing of objections by defendant if surrender of possession is sought as a result of defendant being convicted under Uniform Controlled Substance Act. Ark. Code Ann. § 18-60-307.

If the court's finding or the jury's verdict is for the plaintiff, the court shall enter judgment with costs and issue a writ of possession if the plaintiff is not already in possession. The court or jury shall assess the amount of rent due if agreed upon (if not, then the fair rental value). In addition, liquidated damages shall be assessed in the amount equal to the rental value for each month, or portion thereof, that the defendant has forcibly entered and

detained or unlawfully detained the property if the property is for residential purposes only. If the property is for commercial or residential and commercial purposes, then the liquidated damages will be three times the rental value per month for the time that the defendant has unlawfully detained the property. Ark. Code Ann. § 18-60-309.

If the finding or verdict is for the defendant, the court shall enter a judgment with costs and damages sustained by dispossession and issue a writ of restitution if the property is in plaintiff's possession. The defendant may present evidence showing damages sustained by being dispossessed of the land or property. Ark. Code Ann. § 18-60-309.

Title to property shall not be adjudicated upon or given in evidence except to show right and extent of possession. Ark. Code Ann. § 18-60-308.

The sheriff shall execute the writ of possession in accordance with the procedures in Ark. Code Ann. § 18-60-310.

### **Escheated Estates**

The prosecutor may file an information on behalf of the county in the circuit court if there is reason to believe that any real estate in the county has escheated and the estate has not been sold for payment of the debts of the deceased within three years after the death of the last person seized. The information shall describe the estate, name the person last lawfully seized, name the terre-tenants and persons claiming the estate, if known, and set out facts and circumstances creating the claimed escheat. Ark. Code Ann. § 28-13-106.

The court shall issue a *scire facias* against such claimants requiring them to appear and show cause against the escheat. The court shall also make an order setting forth the contents of the information and requiring all claimants to appear and show cause. The order shall be published for four weeks in a newspaper printed in the state. Ark. Code Ann. § 28-13-106.

Claimants may appear and plead and may contest the facts on the

information any time within three days of the return of the *scire facias*. Other claimants may appear and plead in open court within the time for pleading. If no claimants appear or plead, a default judgment for the county shall be entered. Ark. Code Ann. § 28-13-106.

If any person appears and denies the title set up by the county, or contests any material fact in the information, the issue shall be tried as other issues of fact. A survey may be ordered as in other cases where the titles or boundaries of land are drawn in question. Ark. Code Ann. § 28-13-106.

If it appears from the facts found or admitted that the county has good title to the lands and tenements in the information mentioned, or any part thereof, then judgment shall be rendered that the county is seized thereof and shall recover costs against the defendant. When any judgment shall be rendered that the county is seized of any real estate, the judgment shall contain a description of the real estate and shall vest the title in the county. Ark. Code Ann. § 28-13-107.

If it appears that the county has no title in the estate, the defendant shall recover his or her costs, to be taxed and certified by the clerk and the county treasurer shall issue a warrant therefor on the treasury of the county.

However, no defendant shall be entitled to recover costs unless the title to the estate appears to the court, by the facts found, to be in him or her. Ark. Code Ann. § 28-13-107.

### **Ejectment – In General**

The action of ejectment may be maintained in all cases in which the plaintiff is legally entitled to the possession of the premises. Ark. Code Ann. § 18-60-201. This includes under or by virtue of:

An entry made with the register and receiver of the proper land office of the United States,

A preemption right under the laws of the United States, or

When the plaintiffs make an improvement on public lands if another person

is in possession of the improvement. Ark. Code Ann. § 18-60-202. The action also includes claims of possession under or by virtue of an entry made with the proper swampland agent or land agent of proper state land office. Ark. Code Ann. § 18-60-203.

The action shall be maintained in the parties' real names. It may be brought against the person in possession of the premises or his or her lessor, or both. The person from or through whom the defendant claims title to the premises may, on his or her motion, be made a codefendant. Ark. Code Ann. § 18-60-204.

The complaint shall set forth and attach as exhibits all deeds and other written evidences of title upon which suit relies and shall state such facts that show *prima facie* title in plaintiff. The answer shall set forth and attach as exhibits all deeds and written evidence of title, state facts showing *prima facie* title in defendant, and set forth exceptions to plaintiff's documentary evidence which specifically note objections taken. Ark. Code Ann. § 18-60-205.

The plaintiff shall, within three days after the answer is filed, file exceptions to defendant's documentary evidence. The court shall rule on objections, and evidence to which exception is sustained shall not be used at trial unless the defect is covered by amendment. Objections to evidence not specifically raised shall be waived. Ark. Code Ann. § 18-60-205.

Plaintiff may recover on a showing that, when action commenced, defendant was in possession of premises and plaintiff had title or right to possession as declared to be sufficient to maintain action of ejectment. Ark. Code Ann. § 18-60-206.

If judgment for plaintiff is returned, it shall be for recovery of premises, damages, and costs. Damages shall consist of rents and profits to the time damages are assessed. [NOTE: If plaintiff seeks to recover an improvement from defendant and plaintiff has entered such improvement in any U.S. land office in the state, no damages are recoverable.] If judgment should be

rendered against the defendant, the judgment shall be for the recovery of the premises, and a writ of inquiry shall be awarded to assess the damages. Ark. Code Ann. §§ 18-60-207; 209.

A writ of possession may issue if plaintiff recovers both possession and damages and shall command officer to whom writ is delivered to deliver possession of premises to plaintiff, and levy and collect damages and costs as in executions on judgments in personal actions. Ark. Code Ann. § 18-60-208.

Plaintiff shall pay to defendant who entered peaceably in belief of ownership all taxes paid by defendant on premises and the value of improvements defendant has made. Ark. Code Ann. § 18-60-213.

The court or jury shall assess the value of improvements, damages from waste, mense profits allowed by law and accruing within three years prior to suit, and taxes paid by occupant. If improvements and taxes exceed in value damages and profits, court shall order, as part of final judgment, that no writ of possession shall issue until balance due occupant shall have been paid. Rents accruing from date of judgment shall be set off against value of improvement and taxes. Ark. Code Ann. § 18-60-213.

### **Ejectment – Tax Deed**

An action to recover lands sold by the collector or Commissioner of State Lands for nonpayment of taxes or on tax forfeiture or donation deed may be commenced within two years after sale by owner or owner's successors in interest.

The plaintiff shall file affidavit setting forth that the claimant has tendered to the purchaser(s) thereof the full amount of taxes and costs first paid on account of lands with 25% interest and the full value of improvements made by purchaser. The court shall dismiss the action if the affidavit is not filed before commencement of the action.

If judgment is for plaintiff, it shall be for the possession of the premises in question and damages shall be assessed in favor of the defendant for the full

amount of all taxes, costs, and interest, and the value of all improvements. It shall be a lien upon the land until satisfied.

Ark. Code Ann. § 18-60-212.

If a tax sale is later determined to be void, or it is determined that the owner may redeem the forfeiture, the rightful deed holder is entitled to recover the value of any improvements or betterments made to the land by reason of a survey. The holder of the tax deed shall have a lien on the lands for this amount, which may be enforced by equitable proceedings at any time within three years after the date of the judgment. Ark. Code Ann. § 18-60-214.

### **Partition**

Any person having an interest in land held in joint tenancy, tenancy in common, coparceny, or an estate by entirety not a homestead and occupied, may seek partition. Ark. Code Ann. § 18-60-401.

The petition must contain a description of the property, the names of each party having an interest in the property, the nature and amount of those interests, and a prayer for the division the property. The petition may also request the sale of the property if it appears that partition cannot be made without great prejudice to the owners. The petition must also summons all having an interest if they have not joined in the petition. Ark. Code Ann. § 18-60-401. Parties may be constructively summoned as provided by Rule 4 of the Arkansas Rules of Civil Procedure. Ark. Code Ann. § 18-60-407. Those summoned have a right to contest the petition by filing a written answer. Ark. Code Ann. § 18-60-410.

Any person having an interest may intervene by showing his or her interest by affidavit. Ark. Code Ann. § 18-60-408. Guardians should be appointed for minors and insane or incompetent persons. Ark. Code Ann. §§ 18-60-405; 18-60-406.

The court shall determine whether the property is heirs property as defined in Ark. Code Ann. § 18-60-1002. If the court determines after notice and

hearing or otherwise that the property is heirs property, the Uniform Partition of Heirs Property Act found at Ark. Code Ann. § 18-60-1001 et seq. shall, unless all of the cotenants otherwise agree in a record as defined by Ark. Code Ann. § 18-60-1002, apply to the partition of the property and to the extent of any conflicts between Ark. Code Ann. § 18-60-401 et seq. and the Uniform Partition of Heirs Property Act found at Ark. Code Ann. § 18-60-1001 et seq. govern the procedures and rights of the parties concerning the heir's property. Ark. Code Ann. § 18-60-401.

Partition is to be ordered when all join or there is a failure to answer. Ark. Code Ann. § 18-60-409. Even upon default, the petitioners should present their case by exhibition to the court of the evidence of their title upon which they claim. Ark. Code Ann. § 18-60-411. The court shall determine and declare the rights, titles, and interests of all the parties to the proceedings and give judgment that partition be made according to those rights. Ark. Code Ann. § 18-60-412.

Upon judgment, the court should appoint commissioners to partition the land in accordance with Ark. Code Ann. §§ 18-60-414 – 426. They will report to the court whether partition is feasible and can be made without great prejudice to the owners, upon which they will either issue deeds to the partitioned land or direct the court to issue an order of sale with the proceeds to be divided among the interested parties according to their rights.

For a discussion on these procedures and the related case law, see 2 Arkansas Civil Prac. & Proc. § 39:7 (5th ed.).

### **Adverse Possession & the Statute of Limitations for Land Actions**

Unimproved and unenclosed land is deemed and held to be in possession of the person who pays the taxes thereon if he or she has color of title and has paid the taxes for at least seven years in succession. Ark. Code Ann. § 18-11-102.

All suits for any lands shall be filed within seven years after the right accrued unless the party is a minor or not of sound mind and then within

three years upon reaching twenty-one or coming of sound mind. Ark. Code Ann. § 18-61-101.

All actions against a purchaser for the recovery of lands sold at judicial sales shall be brought within five years after the date of the sale, unless the party is a minor or not of sound mind and then within three years upon reaching twenty-one or coming of sound mind. Ark. Code Ann. § 18-61-105.

No entry upon land is valid as a claim unless suit is brought within one year after entry and within seven years when the right of entry accrued. Ark. Code Ann. § 18-61-102.

No action of ejectment can be brought when the plaintiff has not possessed the land for five years. Ark. Code Ann. § 18-61-103.

Three years' peaceable and uninterrupted possession of the premises bars a complaint for forcible entry and unlawful detainer. Ark. Code Ann. § 18-61-104.

### **Public Nuisances**

The sale of alcoholic beverages in violation of the law, and the operation of a roadhouse, tourist camp, public dance hall, or nudist camp in violation of law, are public nuisances. Any person carrying on or permitting use of the premises shall be deemed to be carrying on or engaging in the undertaking. Ark. Code Ann. § 16-105-204.

Circuit courts have jurisdiction to abate public nuisances by petition of the attorney general, prosecuting attorney, or five freeholders of the county making bond for costs and damages. Ark. Code Ann. §§ 16-105-205 & 206.

The defendant shall be given five days' notice in writing before the hearing of a permanent injunction, but no notice shall be required of the hearing of a temporary injunction. Violation of an injunction is punishable by contempt as provided in Ark. Code Ann. § 16-105-203; Ark. Code Ann. § 16-105-207.

Evidence of the general reputation of the building or place where the nuisance is alleged to exist shall be admissible for the purpose of proving or tending to prove the existence of the nuisance. Evidence of payment of tax as a retail liquor dealer or possession of a tax stamp is *prima facie* evidence of sales of intoxicating liquors. Ark. Code Ann. § 16-105-208.

If the existence of the nuisance is established, the court shall enter an order of abatement in accordance with Ark. Code Ann. § 16-105-209.

See Title 16, Subtitle 7, Chapter 105 for other provisions concerning the abatement of nuisances, including dance halls, drug nuisances, and noise pollution.

See also 1 Arkansas Law of Damages § 28:2 (5th ed.) for a summary of the chapter and pertinent case law.

## **Specific Writs**

### **Mandamus and Prohibition**

The circuit courts shall hear and determine petitions for writs of mandamus (commanding an executive, judicial, or ministerial officer to perform or omit to do an act enjoined by law) and writs of prohibition (to an inferior court prohibiting an inferior court from proceeding in a cause or matter over which it has no jurisdiction). Ark. Code Ann. §§ 16-115-101 & 102 (as modified by *Stilley v. Makris*, 343 Ark. 673, 38 S.W.3d 889 (2001)).

Petitions for writs of mandamus or prohibition shall have precedence over all other actions and proceedings and shall be heard and determined summarily. Ark. Code Ann. § 16-115-103.

It is within the judge's discretion to determine from the petition, records, and files whether an evidentiary hearing is warranted. If a hearing is deemed necessary, it shall be held within forty-five days from the date of application. Ark. Code Ann. § 16-115-104. Written notice of the hearing shall be served upon the officer or persons against whom the relief is sought, and shall state

the style of the court, the docket number of the action or proceeding, the date and place of hearing, and the relief sought. Ark. Code Ann. § 16-115-105.

The party against whom the writ of mandamus or prohibition is sought, when properly served with notice, shall file an answer before the hearing and show cause why the writ should not be granted; otherwise, upon a proper showing, suitable relief shall be speedily granted. Ark. Code Ann. § 16-115-106.

The court shall hear and determine all issues of law and fact. The order granting or denying writ shall be a final and appealable order. Ark. Code Ann. § 16-115-107. During pendency of proceedings, court may make temporary orders to prevent injury, waste, or damage. Ark. Code Ann. § 16-115-108.

A writ of mandamus is a discretionary remedy to be issued only when the petitioner has shown a clear and certain legal right to the relief sought and there is no other adequate remedy. *Saunders v. Neuse*, 320 Ark. 547, 898 S.W.2d 43 (1995); *Rothbaum v. Arkansas Local Police and Fire Retirement System*, 346 Ark. 171, 55 S.W.3d 760 (2001).

*See also* Ark. R. Civ. P. 78(d) - writs of mandamus and prohibition in election contests.

### **Certiorari**

Circuit courts have the power to issue writs of certiorari to any officer or board of officers, city or town council, or any inferior tribunal of their respective counties in order to correct any erroneous or void proceeding or ordinance.

An application for a writ of certiorari may be made on reasonable notice. A temporary restraining order may be granted on bond.

Evidence may be introduced by either party. The record of an inferior tribunal is conclusive.

The court shall have power in such cases to enforce its judgment by mandamus, prohibition, and other appropriate writs. Ark. Code Ann. § 16-13-205.

## **Corporations**

### **Dissolution & Liquidation**

The processes and procedures by which a corporation may be dissolved and liquidated are found in Ark. Code Ann. §§ 4-26-1101 – 1109. They include:

The circuit court shall have full power to liquidate the assets and business of a corporation in an action by a shareholder when it is established that:

The directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof;

The acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent;

The shareholders are deadlocked in voting power and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or

The corporate assets are being misapplied or wasted.

Ark. Code Ann. §4-26-1108.

The circuit court shall have full power to liquidate the assets and business of a corporation in an action by a creditor when:

The claim of the creditor has been reduced to judgment and an execution thereon returned unsatisfied and it is established that the corporation is insolvent; or

The corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent.

Ark. Code Ann. §4-26-1108.

The circuit court shall also have full power to liquidate the assets and business of a corporation upon an action filed by the attorney general to dissolve a corporation when it is established that liquidation of its business and affairs should precede the entry of a decree of dissolution. Ark. Code Ann. §§4-26-1107 - 1108.

The court shall have all the powers to supervise liquidation specified in Ark. Code Ann. § 4-26-1106, which include: notice to creditors and claimants; determination of the validity of claims; barring untimely creditors; determination and enforcement of the liability of any director, officer, shareholder, or subscriber; payment and satisfaction of claims; return of subscription payments; destruction of records; issuance of injunctions; and ordering and supervising the sale of assets.

It shall not be necessary to make shareholders parties to any such action or proceeding unless relief is sought against them personally. Ark. Code Ann. §4-26-1108.

Orders of the court shall be binding upon the attorney general, the corporation, its officers, directors, shareholders, subscribers for shares, incorporators, creditors, and claimants but shall not be binding upon any party who has not received notice of the hearing if the court had directed that notice be given to such party. Ark. Code Ann. § 4-26-1106.

Venue will be the county in which the corporation maintained its principal place of business on the date of dissolution or, if it had no such principal place of business, in the county wherein its registered office is located; otherwise the venue shall be Pulaski County. Ark. Code Ann. § 4-26-1106.

After liquidation has been completed, the court shall enter a decree dissolving the corporation and the dissolution will be certified to the Secretary of State and the county clerk. Ark. Code Ann. § 4-26-1108.

## **Uniform Arbitration Act**

### **Jurisdiction**

A court of this state having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate. An agreement to arbitrate providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award pursuant to the Uniform Arbitration Act. Ark. Code Ann. § 16-108-226.

### **Venue**

A motion for judicial relief under Ark. Code Ann. § 16-108-205 must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this state, in the court of any county in this state. All subsequent motions must be made in the court hearing the initial motion unless the court otherwise directs. Ark. Code Ann. § 16-108-227.

### **Motions to Compel or Stay**

The court shall order arbitration when, upon a person's motion showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the refusing party either does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an

enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

If a party makes a motion to the court to order arbitration, the court shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration. Likewise, if the court orders arbitration, the court shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim. Ark. Code Ann. § 16-108-207.

### **Appointment of Arbitrators**

If the parties agree on a method for appointing an arbitrator, that method must be followed unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an appointed arbitrator fails, the court, on motion of a party to the arbitration proceeding, shall appoint a neutral arbitrator, who shall have all the powers of an arbitrator designated in the agreement. Ark. Code Ann. § 16-108-211.

### **Confirmation of an Award**

After a party to an arbitration proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award, at which time the court shall issue a confirming order unless grounds are urged for vacating, modifying, or correcting the award under Ark. Code Ann. § 16-108-220, Ark. Code Ann. § 16-108-224 or Ark. Code Ann. § 16-108-223. Ark. Code Ann. § 16-108-222.

In Arkansas, arbitration is strongly favored by public policy and is looked upon with approval by courts as a less expensive and expeditious means of settling litigation and relieving congested court dockets. The decision of the arbitration board on all questions of law and fact is conclusive, and the award shall be confirmed unless grounds are established to support vacating or

modifying the award. *McLeroy v. Waller*, 21 Ark. App. 292, 731 S.W.2d 789 (1987).

### **Vacating an Award**

Upon a motion, the court shall vacate an award made in the arbitration proceeding if:

The award was procured by corruption, fraud, or other undue means;

There was evident partiality by an arbitrator appointed as a neutral arbitrator, corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Ark. Code Ann. § 16-108-215 so as to prejudice substantially the rights of a party to the arbitration proceeding;

An arbitrator exceeded his or her powers;

There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Ark. Code Ann. § 16-108-215(c) not later than the beginning of the arbitration hearing;

Or the arbitration was conducted without proper notice of the initiation of an arbitration as required in Ark. Code Ann. § 16-108-209 so as to prejudice substantially the rights of a party to the arbitration proceeding.

Ark. Code Ann. § 16-108-223.

The motion to vacate must be made within ninety days of the delivery of the copy of the award to the applicant. However, if the application claims corruption, fraud, or undue means, it must be made within ninety days after grounds are or should have been known.

The court may order rehearing before new arbitrators if there was corruption, fraud, undue means, partiality, or misconduct. Otherwise, the court may order rehearing before the arbitrators who made the award or their appointed successors.

The court shall confirm the award if the application to vacate is denied and there is no motion pending to modify or correct. Ark. Code Ann. § 16-108-223.

An award should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or misfeasance or malfeasance. Moreover, the illegality must appear on the face of the award. Even a gross mistake of fact will not vitiate an award unless the mistakes are apparent on the face of the award. *200 Garrison Associates Ltd. P'ship v. Crawford Const. Co., Inc.*, 53 Ark. App. 7, 918 S.W.2d 195 (1996).

*See Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001) (the arbitrators' failure to record a ruling did not amount to statutory grounds for vacating, modifying, or correcting the award, nor was it an act in excess of the arbitrators' jurisdiction).

### **Modification or Correction of an Award**

The court shall modify or correct the award upon a timely motion (ninety days) if:

There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted. Ark. Code Ann. § 16-108-224.

## Recovery of Personal Property

### Replevin

When a party claims a right of possession of property in the possession of another, the party may apply by petition to the circuit court or the district court for issuance of an order of delivery of the property. If the petition recites facts which, if established by proof, support the existence of a right of possession in the petitioner, an order shall be issued, directing the party against whom the order of delivery is sought to appear before the judge and show cause why the order of delivery should not be entered and the property seized and delivered to the petitioner. Ark. Code Ann. § 18-60-804.

The order shall inform the party against whom it is directed that civil and criminal penalties may be assessed if the property is willfully damaged, concealed, or removed from the court's jurisdiction, or if the party refuses to release the property to the officer designated to serve the order of delivery. Ark. Code Ann. § 18-60-805.

If at the hearing, the court determines that there are facts supporting the existence of a right of possession in the petitioner, an order of delivery shall issue. Ark. Code Ann. § 18-60-806.

The order will be executed by the sheriff. Ark. Code Ann. §§ 18-60-811 – 813.

The petitioner may alternatively file for immediate delivery by filing an affidavit with the court clerk in order to obtain an order secured by bond. Ark. Code Ann. §§ 18-60-810 – 822.

Damages may be recovered in actions for replevin. For a more thoughtful discussion, see 1 Arkansas Law of Damages § 14:4 (5th ed.).

Replevin actions seeking property valued at less than the jurisdictional amount commence in district court. Upon a determination that the property is more valuable, the district court should transfer the action to circuit court. *Bonnell v. Smith*, 322 Ark. 141, 908 S.W.2d 74 (1995).

The jurisdictional amount is currently \$5,000 for the recovery of personal property. District court has concurrent jurisdiction with circuit court in actions for the recovery of personal property where the value of the property does not exceed the jurisdictional amount. Administrative Order No. 18.

### **Unpaid Seller's Lien**

The seller of property may bring an action to recover money for an unpaid purchase. Such property may not be scheduled or exempt from seizure on attachment or sale on execution.

The complaint must be verified describing the property and stating its value.

An order, which may be a part of the summons, may direct the sheriff to hold the property.

A bond for retention of the property may be made by the vendee.

When it appears that the property has been disposed of or concealed, the vendee may be compelled to appear. Failure to appear is punishable by contempt. Ark. Code Ann. § 16-118-104.

### **Lis Pendens**

In a suit affecting title or a lien on real or personal property, the plaintiff should file a notice of the pendency of the suit with the recorder of deeds of the county in which the property to be affected is located in order to give constructive notice of the pendency of the suit to bona fide purchasers or mortgagees of the affected property. Ark. Code Ann. § 16-59-101.

The notice should set out the title of the cause of action, the general object of the action, a correct and full description of the property, the names of the parties, and the style of the case. Ark. Code Ann. § 16-59-102.

A properly authenticated copy of the record shall be evidence of the notice and filing in court. Ark. Code Ann. § 16-59-107.

## **Election Contests**

A right of action is conferred on any candidate to contest the certification of nomination or the certificate of vote as made by the appropriate officials in any election by bringing an action in the circuit court of the county in which the certification of nomination or certificate of vote is made or in the Pulaski County Circuit Court when the office of United States Senator or any state office is involved. The complaint shall be verified by affidavit and filed within twenty days of the certification. The complaint shall be answered within twenty days. Ark. Code Ann. § 7-5-801.

The action shall be given precedence and be speedily determined. Ark. Code Ann. § 7-5-802. Special judges may be appointed where the regular judge is unable to dispose of the case within ten days. Ark. Code Ann. § 7-5-803.

The election contest shall be tried by the circuit judge in open court without a jury. An appeal may be taken from the judgment. However, the appeal shall not operate as a stay until reversed. Ark. Code Ann. § 7-5-804.

Any contest of state legislative offices shall be in accordance with applicable procedure. Ark. Code Ann. § 7-5-805.

A grand jury may be convened if election illegalities are alleged and subsequent trials may be held. Ark. Code Ann. § 7-5-807.

## **Actions on Bond**

Arkansas Code Annotated §§ 16-107-201 – 208 govern actions on bonds. The statutes provide the procedures by which suit may be brought against those required by law to give bond. In the case of an official bond, the suit is brought in the name of the state. Ark. Code Ann. § 16-107-205.

In the complaint, the plaintiff is to set out the conditions of bond and as many breaches as he or she thinks proper.

When the action is pending, the defendant may, at any time before judgment is rendered, pay to the plaintiff or bring into court the principal sum and interest due

on the bond, with the costs, and at which point the action shall be discontinued. Ark. Code Ann. § 16-107-202.

Upon the trial of the action if the jury finds that any of the breaches are true, they shall assess the damages occasioned by the breach, in addition to their finding. Ark. Code Ann. § 16-107-203. If the jury finds that any assignment of breaches is not true, this finding shall be a bar to any other or further suit. Ark. Code Ann. § 16-107-204.

If judgment is recovered on any such bond, the judgment shall be rendered for the sum of money due, according to the condition, with interest and costs, and execution shall issue thereon accordingly. Ark. Code Ann. § 16-107-202.

Whenever further breaches occur, the plaintiff shall have a *scire facias* upon the judgment. Ark. Code Ann. § 16-107-204. A *scire facias* is a judicial writ used to enforce the execution of a judgment. 30 Am. Jur. 2d Executions, Etc. § 15. The writ outlines the breaches alleged and commands the defendant to appear and show cause why an execution should not be had upon the judgment for the amount of damages sustained by the further breaches. If the plaintiff recovers, judgment shall be rendered to collect the amount of damages assessed and costs. Ark. Code Ann. § 16-107-204. [Note: Common bonds include bonds for construction projects on public buildings, governmental officers, guardians and personal representatives, and itinerant merchants and often involve a contract of suretyship. See 1 Arkansas Law of Damages § 17:11 (5th ed.) for a more thorough overview of this process.]

## **Contempt**

The court has the power to punish for criminal contempt the following acts:

Disorderly, contemptuous, or insolent behavior committed during the court's sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority;

Any breach of the peace, noise, or disturbance directly tending to interrupt its proceedings;

Willful disobedience of any process or order lawfully issued or made by it;

Resistance willfully offered by any person to the lawful order or process of the court; and

The contumacious and unlawful refusal of any person to be sworn as a witness and when so sworn a similar refusal to answer any legal and proper questions. Ark. Code Ann. § 16-10-108.

Punishment for contempt is a Class C misdemeanor. Ark. Code Ann. § 16-10-108; *but see Morris v. State*, 2017 Ark. 157, 518 S.W.3d 70 (holding that a judge's power to punish for criminal contempt is not limited by Ark. Code Ann. § 16-10-108).

Any court of record may summarily punish any contempt committed in its view and presence. Other contempt may be punished only after notice of the accusation and after party charged has had opportunity to make his defense. The substance of the offense must be set out in the order or warrant of commitment whenever a person is committed. Ark. Code Ann. § 16-10-108.

Ark. Const. Art. VII, § 26 provides that the General Assembly shall have the power to regulate by law the punishment of contempt not committed in the presence or hearing of the courts, or in disobedience of process.

The power to punish for contempt is inherent in courts. *Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 7 (1993) (the attorney's actions in disobeying the circuit court's order fell within the inherent powers of the circuit court to punish).

*See also Perroni v. State*, 358 Ark. 17, 186 S.W.3d 206 (2004) (circuit judge did not err in holding the attorney in criminal contempt for failing to appear at the jury trial of one of the attorney's clients); *Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002) (abuse of discretion in using criminal contempt as a penalty for the failure to pay Rule 11 sanctions); and *Johnson v. Johnson*, 343 Ark. 186, 33 S.W.3d 492 (2000) (prosecutor's writ of certiorari denied as to contempt citation but granted as to punishment after judge incarcerated petitioners for criminal contempt in refusing to proceed with a scheduled criminal trial motion for continuance was denied).

See also Terry Crabtree, Contempt Law in Arkansas, 51 Ark. L. Rev. 1 (1998) (exploring contempt in Arkansas and direct versus indirect contempt, criminal versus civil contempt, and contempt penalties).

### **Relevant Case Law**

The mootness doctrine does not bar a direct appeal from a defendant's criminal-contempt conviction, despite the fact that he has already served his sentence.

*Thompson v. State*, 2016 Ark. 383, 503 S.W.3d 62.

The rules of civil procedure do not apply in a criminal contempt proceeding.

Therefore, service by mail pursuant to Rule 5 of the Rules of Civil Procedure is not sufficient notice to defendant of the show cause order that was issued in his case.

*Thompson v. State*, 2016 Ark. 383, 503 S.W.3d 62.

### **Agreed Cases**

Parties to a question that might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends and present a submission of the case to any court that would have jurisdiction if an action had been brought.

It must appear by affidavit that the controversy is real, and the proceedings are in good faith to determine the rights of the parties.

The court shall, upon submission of the case, hear and determine the case and render judgment as if an action were pending.

The case, the submission, and the judgment shall constitute the record.

The judgment rendered shall be with costs, may be enforced, and shall be subject to reversal, unless otherwise provided in the submission. Ark. Code Ann. § 16-118-101.

### **Change of Name**

Upon the application of any person within the jurisdiction of the court, the circuit court shall have power, upon good reasons shown, to alter or change the name of the person.

The application shall be by petition, in writing, embodying the reasons for the application.

When allowed, the petition shall by order of the court be spread upon the record, together with the decree of the court. Ark. Code Ann. § 9-2-101.

### **Removing Disability of Minors**

Circuit courts may authorize any minor, who is over age sixteen and a county resident, as if he has reached majority, to transact business in general and any particular business specified in like manner and with the same effect as if such act or thing were done by a person who had attained majority. Every act done by a person so authorized shall have the same force and effect in law and equity as if done by a person of full age.

Circuit courts may also remove the disability of any nonresident minor over sixteen for purposes of conveying or encumbering any real property he owns within the jurisdiction. Ark. Code Ann. § 9-26-104.

## **Seizure & Forfeiture**

### **Firearm / Motor Vehicle Seizure & Forfeiture**

Arkansas Code Annotated § 5-73-130 outlines:

The procedures to be followed for seizure and forfeiture of firearms when unlawfully possessed by individuals under 18 years of age; and

The procedures to be followed for seizure and forfeiture of a motor vehicle when a felon or individual under 18 years of age unlawfully possessed a firearm in the vehicle.

### **Uniform Controlled Substances Act**

Arkansas Code Annotated § 5-64-505 was revised in 2021. The statute outlines the procedure to be utilized when the State is attempting to seize and forfeit certain

property that is associated with criminal conduct involving manufacturing, distribution, or possession of controlled substances.

The statute:

Notes that the process is not applicable when the criminal conduct involves only misdemeanor possession of a Schedule III, Schedule IV, Schedule V, or Schedule VI controlled substances;

Outlines the types of property that is subject to seizure and forfeiture; and

Articulates applicable presumptions and burdens of proof.

Ark. Code Ann. § 5-64-505.

## **Extradition**

### **The Uniform Criminal Extradition Act**

It is the duty of the Governor to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state. Ark. Code Ann. § 16-94-202.

The demand for the extradition must be in writing and accompanied by a copy of an indictment or information supported by an affidavit together with a copy of any warrant which was issued thereon. Ark. Code Ann. § 16-94-203.

A warrant of extradition may be issued when the documents show that:

the accused was present in the demanding state at the time of the commission of the alleged crime,

and thereafter fled from the state;

the accused is now in this state;

and he or she is lawfully charged by indictment or information supported by affidavit and sufficient facts. Ark. Code Ann. § 16-94-205.

Other procedures of the Uniform Criminal Extradition Act can be found in Ark. Code Ann. §§ 16-94-201 – 231.

The prospective extraditee may have a right to bail. For a thorough discussion of these issues, see 13 A.L.R.5th 118 (1993).

### **Arrest Warrant Issued by the Court**

A judge shall issue a warrant for the arrest of a person who is charged by:

The sworn statement of a credible person in Arkansas that a person has committed a crime in another state; or

The complaint upon affidavit of a credible person in another state that the accused has been charged with a crime in such other state and has fled from justice in that state. Ark. Code Ann. § 16-94-213.

The magistrate before whom the person is brought shall hold a hearing and if it appears that:

Such person is the person charged;

Such person probably committed the crime;

And such person has fled from justice;

The judge shall commit such person to jail for a time specified in the warrant,

Unless such person posts bail.

Unless the offense charged is punishable by death or life imprisonment in the state of commission, the magistrate shall admit such person to bail in such sum as he deems proper by bond or undertaking, with sufficient sureties.

Ark. Code Ann. § 16-94-216.

### **Arrest Warrant Issued by Governor**

A fugitive desiring to test the legality of a Governor's warrant shall be taken before a court of record. Notice of a hearing is to be given to the prosecutor of the county and the agent of the demanding state. Ark. Code Ann. § 16-94-210.

### **Waiver of Extradition**

If a fugitive agrees to waive extradition, he should be brought before a judge who informs him of:

The charge against him; his right to the issuance and service of a warrant of extradition;

And his right to petition for a writ of *habeas corpus*. Ark. Code Ann. §§ 16-94-103 & 16-94-210.

### **Authority of Asylum State Court**

Once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state. *Michigan v. Doran*, 439 U.S. 282 (1978).

## **Equity**

### **Preliminary Injunctions & Temporary Restraining Orders**

**Notice.** A preliminary injunction may only be issued on notice to the adverse party. However, the court may issue a temporary restraining order without written or oral notice to the adverse party or his attorney when specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition, and the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required. Ark. R. Civ. P. 65.

**Content.** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state

why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record.

**Duration.** The order expires at the time after entry-not to exceed fourteen days-that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

**Hearing.** If a temporary restraining order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

**Motion to Dissolve.** On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

Ark. R. Civ. P. 65.

**Preliminary Injunction Hearing.** Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. The court must preserve any party's right to a jury trial. Ark. R. Civ. P. 65(a)(2).

**Security.** The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. Neither the state of Arkansas, its officers, nor its agencies are required to give security. Ark. R. Civ. P. 65(c).

**Contents.** Every order granting an injunction and every restraining order must:

State the reasons why it issued;

State its terms specifically; and

Describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.

Ark. R. Civ. P. 65(d).

**Persons Bound.** The order binds only the following who receive actual notice of it by personal service or otherwise:

The parties;

The parties' officers, agents, servants, employees, and attorneys; and

Other persons who are in active concert or participation with the parties and the parties' officers, agents, servants, employees, and attorneys.

Ark. R. Civ. P. 65(d).

**Standard.** In determining whether to issue a preliminary injunction pursuant to Rule 65, the trial court must consider two things:

Whether irreparable harm will result in the absence of an injunction or restraining order, and

Whether the moving party has demonstrated a likelihood of success on the merits. *Baptist Health v. Murphy*, 365 Ark. 115, 226 S.W.3d 800, (2006).

### **Quiet Title**

Any person claiming to own land that is wild or improved or land that is in the actual possession of himself or herself, or those claiming under him or her, may have his or her title to the land confirmed and quieted. Ark. Code Ann. § 18-60-501.

A claimant shall file in the circuit clerk's office of the county in which the land is situated a petition describing the land and stating facts that show a *prima facie* right and title to the land in himself and that there is no adverse occupant. Ark. Code Ann. § 18-60-502(a).

If the petitioner has knowledge of any other person who has, or claims to have, interest in the lands, the petitioner shall so state, and the person or persons shall be summoned as defendants in the case. Ark. Code Ann. § 18-60-502(b).

The petitioner may embrace in his petition as many tracts of land as he sees proper so long as they all lie in the county. Ark. Code Ann. § 18-60-502(c).

Upon the filing of the petition, the clerk of the court shall publish a notice of the filing of the petition on the same day of each week, for four weeks in a newspaper published in the county, if there is one, and if not, then in a newspaper having a circulation in the county. Ark. Code Ann. § 18-60-503(a).

The petition shall describe the land and call upon all persons who claim any interest in the land or lien thereon to appear in court and show cause why the title of the petitioner should not be confirmed. Ark. Code Ann. § 18-60-503(a).

After proof of publication that the notice has been filed, the court shall require the petitioner to prove all the allegations of the petition. Ark. Code Ann. § 18-60-505(a).

A cotenant or tenant-in-common not in possession, and whose whereabouts are unknown, is conclusively deemed to have waived and abandoned to the cotenant or tenant-in-common the surface rights to property if no written demand for rents, profits, or possession has been made in twenty years. Ark. Code Ann. § 18-11-105.

If a petitioner alleges that his title papers or the record thereof has been lost or destroyed, the court shall have the power to require new title papers to be executed if the party required to execute them has been duly summoned in the cause. Ark. Code Ann. § 18-60-507.

If the court is satisfied as to the truth of the facts set out in the petition, it shall render a decree establishing and quieting the petitioner's title against all persons, except the decree in the cause shall not bar or affect the rights of any person who:

Claims through, under, or by virtue of any contract with the petitioner;

Was an adverse occupant of the land at the time the petition was filed;

Within seven years preceding had paid the taxes on the land; or

Is a remainderman, unless the person was made a defendant in the petition and personally summoned to answer it.

Ark. Code Ann. § 18-60-508(b).

The decree must describe the boundary line with sufficient specificity that it may be identified solely by reference to the decree. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997).

Any person may appear within 3 years and set aside the decree if he offers a meritorious defense. Every person having the disability of infancy, lunacy, or idiocy, and those claiming under them, may set aside the decree at any time within 3 years after the removal of their disability. Ark. Code Ann. § 18-60-510.

### **Relevant Case Law**

In suits to quiet title, the plaintiff is not entitled to recover unless he is currently in possession, his title claim to title is equitable in nature, or, having legal title, the land is wild and unoccupied. *St. Louis Refrigerator & Wooden Gutter Co. v. Thornton*, 74 Ark. 383, 86 S.W. 852 (1905).

A plaintiff may not maintain a suit to quiet title to property against a defendant who is in possession of the property. *Eades v. Joslin*, 219 Ark. 688, 244 S.W.2d 623 (1951).

Where land is wild and unimproved it is considered in constructive possession of person holding legal title. *Hensley v. Phillips*, 215 Ark. 543, 221 S.W.2d 412 (1949).

A *prima facie* case to quiet title requires a showing that the plaintiff has legal title to the property and is in possession. *Potlatch Corp. v. Triplett*, 70 Ark. App. 205, 16 S.W.3d 279 (2000).

### **Quieting Title – Public Sales**

Purchasers, who have acquired title by purchase at a sale held by the sheriff, may protect themselves from eviction by proceeding in the manner provided to quiet title, described in Ark. Code Ann. § 18-60-601.

A petition for confirmation shall be filed with the clerk of the circuit court. The petitioner, if he or she is acquainted with the lands, shall file with his or her petition his or her affidavit, or the affidavit of some person who is acquainted with the lands, showing that:

There is no person in actual possession of the lands claiming title adverse to the petitioner,

Proof that taxes owed on the lands were either paid,

Settled, or

Released shall be filed with the petition and,

In the case of levee or drainage improvement districts,

Proof of payment,

Settlement, or

Release of all delinquent taxes. Ark. Code Ann. § 18-60-602.

*See Schuman v. Certain Lands*, 223 Ark. 85, 264 S.W.2d 413 (1954) (section does not apply to an action for confirmation of title to undivided interests in mineral rights); *Pearman v. Pearman*, 144 Ark. 528, 222 S.W. 1064 (1920) (plaintiff cannot maintain a suit to confirm a tax title to land held adversely by defendant).

Purchaser, or heirs and legal representatives of purchasers, at all sales that have been or may be made, may, when lands are not made redeemable by laws of this state applicable to sales, or, if redeemable, at any time after the expiration of the time allowed for the redemption, publish a notice. The notice shall:

Be published four weeks in succession in a newspaper published in the county where the lands lie, if there is a newspaper published in the county or, if not, in the nearest newspaper having a bona fide circulation in the county;

Call on all persons who can set up any right to the lands so purchased in consequence of any informality or any irregularity connected with the sale to show cause why the sale so made should not be confirmed; and

State the authority under which the sale took place and give the description of the land purchased and the nature of the title by which it is held.

Ark. Code Ann. §18-60-603(a).

The last notice in the newspaper shall be at least twenty days before the application for confirmation is submitted to the court. Ark. Code Ann. §18-60-603(b).

Proof of the publication of the notice shall be made in the same manner as proof of publication of notices in other circuit court causes. Ark. Code Ann. § 18-60-603(c).

The clerk of the court shall notify any delinquent tax owner or owners at their last known address by registered mail at least twenty days before the application for confirmation is submitted to the court. Ark. Code Ann. § 18-60-603(d).

If the deed or deeds are in proper legal form and properly executed,

If the tax receipts show payment of the taxes,

And if the evidence shows that no one is in possession adverse to the petitioner,

And if no one has appeared to challenge the petitioner,

The petition shall be taken as confessed and the court shall render final decrees confirming the sale. Ark. Code Ann. § 18-60-604.

In case any person or persons claiming title to the land opposed confirmation of sale, then the court shall try the validity of the sale and if valid, confirm it; but if the sale has been made contrary to law, the court shall annul it. Ark. Code Ann. § 18-60-605.

On the trial of the cause, the petitioner shall exhibit to the court the tax receipts showing the payment of the taxes for at least three successive years and, in the case of lands acquired from levee and drainage improvement districts, all delinquent

taxes that have been due; the deed or deeds under which he claims title, or the record thereof, or a certified copy from the record; and oral or written proof by one or more witnesses acquainted with the lands showing that no one is in possession claiming adverse to the petitioner. The name of the witness so sworn shall be preserved in the decree. Ark. Code Ann. § 18-60-606(a).

A sheriff's or land commissioner's deed, given in the usual form, without witnesses, shall be taken and considered by the court as sufficient evidence of the authority under which the sale was made, the description of the land, and the purchase price. Ark. Code Ann. § 18-60-606(b).

There should be no confirmation of the sale of any lands that are in actual possession of any person claiming title adverse to the petitioner, nor shall there be any confirmation of the sale of lands unless the petitioner, or his grantor or those under whom he claims title, has paid the taxes on the lands for at least two years after the expiration of the right of redemption, the payment of taxes to be three consecutive years immediately prior to the application to confirm. Ark. Code Ann. § 18-60-607(a).

The judgment of the court confirming the sale shall operate as a complete bar against any and all persons who may thereafter claim the land in consequence of informality or illegality in the proceedings. Ark. Code Ann. § 18-60-608(a).

The decree shall not be valid for any purpose as against the owner of the land, his heirs or assigns, who was, at the time of the decree rendered, in actual possession of it, unless he is made a party to the action by personal service of notice. Ark. Code Ann. § 18-60-608(b).

When no opposition is made to the confirmation of the sale, the costs attending the proceedings shall be paid by the party praying for confirmation. Where opposition is made, the costs shall be borne by the party against whom judgment is rendered. Ark. Code Ann. § 18-60-610.

### **Adverse Possession**

To prove the common-law elements of adverse possession,

A claimant must show that he has been in possession of the property continuously for more than seven years and that his possession has been visible,

Notorious, distinct,

Exclusive,

Hostile,

And with the intent to hold against the true owner. *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005).

It is ordinarily sufficient proof of adverse possession that the claimant's acts of ownership are of such a nature as one would exercise over his own property and would not exercise over the land of another. *Id.*

## **Easements**

**Prescriptive.** A prescriptive easement may be created only by the adverse use of privilege with the knowledge of the person against whom the easement is claimed, or by use so open, notorious, and uninterrupted that knowledge will be presumed, and the use must be exercised under a claim of right adverse to the owner and acquiesced to by him. *Kelley v. Westover*, 56 Ark. App. 56, 938 S.W.2d 235 (1997).

An easement by prescription is established by a showing by a preponderance of the evidence that one's use has been adverse to the true owner and under a claim of right for the statutory period. *Owners Ass'n of Foxcroft Woods, Inc. v. Foxglen Associates*, 346 Ark. 354, 57 S.W.3d 187 (2001).

Overt activity on the part of the user is necessary to make it clear to the owner of the property that an adverse use and claim are being exerted. Mere permissive use of an easement cannot ripen into an adverse claim without clear action, which places the owner on notice. *Id.*

*See also Gazaway v. Pugh*, 69 Ark. App. 297, 12 S.W.3d 662 (2000) (finding that a public prescriptive easement existed on a gravel road).

**Appurtenant or In Gross.** Easements appurtenant run with the land and easements in gross are personal to the grantors. An easement appurtenant serves a parcel of land called the dominant tenement. The property on which the easement is

imposed is the servient tenement. *Wilson v. Brown*, 320 Ark. 240, 897 S.W.2d 546 (1995).

The person who asserts an easement has the burden of proving the existence of the easement. *Riffle v. Worthen*, 327 Ark. 470, 939 S.W.2d 294 (1997).

An easement in gross does not have a servient tenement because it benefits a person or an entity, not the land. When the deed in question does not specify whether the right of ingress and egress is appurtenant or in gross, the court must interpret the deed, giving primary consideration to the intent of the grantor. *Id.*

**Of Necessity or By Implication.** To establish easement of necessity, plaintiffs have burden of proving:

Unity of title in the sense that same person or entity once held title to both tracts,

That unity of title was severed by conveyance of one tract,

That easement is necessary so that owner of dominant tenement may use his land, and

That the necessity existed both at time of severance of title and at time easement is exercised.

*Riffle v. Worthen*, 327 Ark. 470, 939 S.W.2d 294 (1997).

Degree of necessity required for easement of necessity must be more than mere convenience. *Id.*

Joint ownership of one of two tracts of land does not meet unity of title requirement for an easement of necessity. *Id.*

*See also Black v. Steenwyk*, 333 Ark. 629, 970 S.W.2d 280 (1998) (use of the road prior to division of the property into the two parcels in question, combined with the absence of alternatives to the use of the road to reach a house on the landowner's parcel, created an easement by implication).

*See also R & T Properties, LLC v. Reyna*, 76 Ark. App. 198, 61 S.W.3d 229 (2001) (owner of farmland had adequate alternate method of ingress and egress to property, via placement of culvert in ditch, and thus easement over road through residential property was not necessary).

## **Restrictive Covenants**

By statute, “restrictive covenant” means a restriction on the use or development of real property regardless of whether the restriction is created by a covenant in a deed or bill of assurance, or by any other instrument. Ark. Code Ann. § 18-12-103.

An instrument creating a restrictive covenant is not effective to restrict the use or development of real property unless the instrument purporting to restrict the use or development of the real property is executed by the owners of the real property and recorded in the office of the recorder of the county in which the property is located. *Id.*

*See McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988) (where statute requiring that restricted covenants be executed by the “owners” of the real property, it was sufficient that bills of assurance were executed by the owners of the subdivisions involved, and it was not required that mineral owners join in the execution or filing of the bills of assurance).

Generally, courts do not favor restrictions upon the use of land, and if there is a restriction on the use of land, it must be clearly apparent. *Holmesley v. Walk*, 72 Ark. App. 433, 39 S.W.3d 463 (2001).

The general rule governing the interpretation, application, and enforcement of restrictive covenants is the intention of the parties as shown by the covenant. *Barber v. Watson*, 330 Ark. 250, 953 S.W.2d 579 (1997).

Where the language of the restrictive covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed, so long as the meaning does not defeat the plain and obvious purpose of the restriction. *Id.*

Strict rules of construction shall not be applied in such a way as to defeat the plain and obvious purpose of the restriction. *Id.*

Where there is uncertainty in the language by which a grantor in a deed attempts to restrict the use of realty, freedom from restraint should be decreed; the restrictive covenant will be unenforceable. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996).

*See also Holmesley v. Walk*, 72 Ark. App. 433, 39 S.W.3d 463 (2001) (parties who are fully aware of restrictive covenants, and who choose to rely on a mistaken assumption that they were acting legally and properly, do so at their own risk).

## **Receivership**

**Appointment.** A receiver may be appointed for any lawful purpose when such appointment shall be deemed necessary and proper. The receiver shall give bond, with sufficient security, in an amount to be approved by the court, for the benefit of all persons in interest. The receiver shall likewise take an oath to faithfully perform the duties reposed in him by the court. Ark. R. Civ. P. 66(a).

**Reports.** The receiver shall make a report of his proceedings and actions every six months or at such other times as directed by the court. All moneys or property collected by the receiver shall be accounted for and deposited into court or otherwise be subject to the orders of the court. Ark. R. Civ. P. 66(b).

**Employment of Others.** The receiver shall have power to employ an attorney, an accountant, or such other persons as may be necessary to conduct the business or affairs entrusted to the receiver. The wages or fees paid by the receiver shall be paid as an expense from the assets collected by him. Ark. R. Civ. P. 66(c).

**Removal.** Receivers may be removed at any time by the court for good cause. Ark. R. Civ. P. 66(d).

**Dismissal of Action.** No action wherein a receiver has been appointed shall be dismissed except by order of the court. Ark. R. Civ. P. 66(e).

## **Relevant Case Law**

A receiver ordinarily will only be appointed when it can be established to the satisfaction of a court that the appointment is necessary to save property at issue

from injury or threatened loss or destruction. *Dunaway v. Garland Cnty. Fair & Livestock Show Ass'n, Inc.*, 97 Ark. App. 181, 245 S.W.3d 678 (2006).

Situations warranting receivers include when it is in the best interests of both parties, where waste is occurring, where cotenant wrongfully assumes exclusive possession of common property, or mismanages common property so as to cause its loss, or where preservation of subject matter of the suit requires it. *Chapin v. Stuckey*, 286 Ark. 359, 692 S.W.2d 609 (1985).

### **Mechanics' and Materialmen's Liens**

Mechanics' and materialmen's liens shall be enforced by foreclosure, and the property ordered sold subject to the lien of the prior encumbrance on the real estate. Ark. Code Ann. § 18-44-110.

The materialmen's lien attaches to the improvement and enjoys priority over all prior encumbrances on the real estate except those given for the purpose of funding the construction. *Simmons First Bank of Arkansas v. Bob Callahan Servs., Inc.*, 340 Ark. 692, 13 S.W.3d 570 (2000).

Actions on mechanics' and materialmen's liens must be commenced within fifteen months after the lien is filed and prosecuted without unnecessary delay. Ark. Code Ann. § 18-44-119. [Note: The notice provisions of Ark. Code Ann. § 18-44-115 are to be strictly construed. *Books-A-Million v. Ark. Paint & Spec.*, 340 Ark. 467, 10 S.W.3d 857 (2000).]

The proceedings are the same as in ordinary civil actions, but the petition shall allege the facts necessary for securing a lien and shall contain a description of the property to be charged with the lien. Ark. Code Ann. § 18-44-122.

All parties to the contract and all interested persons may be made parties, but those not made parties shall not be bound by the outcome. Ark. Code Ann. § 18-44-123.

The court shall determine the amount of the indebtedness that may not exceed the amount demanded plus interest and costs. Ark. Code Ann. § 18-44-127.

## **Equitable Liens**

An equitable lien is defined as a right, not existing at law, to have specific property applied in whole or in part to payment of a particular debt or class of debts. The court can fashion the terms of the equitable lien to the particular fact situation. An equitable lien is an extraordinary remedy.

*See* Howard W. Brill, Equity and the Restitutionary Remedies: Constructive Trust, Equitable Lien, and Subrogation, 1992 Ark. L. Notes 1, (1992)(thorough overview of equitable liens in Arkansas law).

“An equitable lien is not an estate or property in the thing itself, nor is it a right to recover the thing; that is, it is not a right that may be the basis of a possessory action. It is merely a charge on property for the purpose of security, and it is ancillary to and separate from the debt itself. It is neither a debt nor a right of property, but merely a remedy for a debt.” An equitable lien does not divest the debtor of title or possession. 51 Am. Jur. 2d Liens § 31.

### **Case Law Examples**

The vendor of land has an equitable lien on land for the unpaid purchase price that is valid against both the purchaser and subsequent purchasers with notice. *Back v. Union Life Insurance Co.*, 5 Ark. App. 176, 634 S.W.2d 150 (1982).

An equitable lien is created in favor of the seller of personal property on the property. *Borengasser v. Chatwell*, 207 Ark. 608, 182 S.W.2d 389 (1944).

Merely lending money for the purchase of property does not create an equitable lien in favor of the lender. *Lowery v. Lowery*, 251 Ark. 613, 473 S.W.2d 431 (1971).

## **Equitable Defenses**

### **Unclean Hands**

The purpose of the doctrine of unclean hands is to protect the interest of the public on the grounds of public policy and to protect the integrity of the court. The court should be reluctant to expend energy to unravel the affairs of those parties whose confused state or unfortunate position arises from their own improper activities.

A party may be barred from equitable relief under the doctrine if he intentionally engaged in illegal, fraudulent, or unconscionable conduct directly related to the transaction that is the subject of the controversy and which was of such magnitude that it persuades the court in its equitable discretion to deny relief.

Howard W. Brill, The Maxims of Equity, 1993 Ark. L. Notes 29, (1993).

Only a defendant who has been injured by the conduct can raise the unclean-hands defense. *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987).

The unclean-hands maxim bars relief to those guilty of improper conduct in the matter as to which they seek relief. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001).

Public policy may override the defense of unclean hands. *Hood v. Hood*, 206 Ark. 1057, 178 S.W.2d 670 (1944).

### **Laches**

Laches is an unreasonable delay by the plaintiff in prosecuting a claim or protecting a right that the plaintiff knew or should have known and under the circumstances causes prejudice to the defendant.

It is based on the equitable principle that an unreasonable delay by the party seeking relief precludes recovery when the circumstances are such as to make it inequitable or unjust for the party to seek relief. The laches defense requires a detrimental change in the position of the one asserting the doctrine, as well as an unreasonable delay by the one asserting his or her rights against whom laches is invoked. In addition, the application of the doctrine to each case depends on its particular circumstances. The issue of laches is one of fact. *Royal Oaks Vista, L.L.C. v. Maddox*, 372 Ark. 119, 271 S.W.3d 479 (2008).

It is also based on the assumption that the party to whom laches is imputed has knowledge of his rights and the opportunity to assert them, that by reason of his delay some adverse party has good reason to believe those rights

are worthless or have been abandoned, and that because of a change of conditions during this delay it would be unjust to the latter to permit him to assert them. *Self v. Self*, 319 Ark. 632, 893 S.W.2d 775 (1995).

Laches requires a demonstration of prejudice to the party alleging it as a defense, resulting from a plaintiff's delay in pursuing a claim. *Goforth v. Smith*, 338 Ark. 65, 991 S.W.2d 579 (1999).

*See also Duchac v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999) (equitable doctrine of laches could not be successfully invoked to defeat the right of a city to enforce its ordinances).

### **Equitable Estoppel**

A party who by his acts, declarations, or admissions, or by his failure to act or speak under circumstances where he should do so, either with design or willful disregard of others, induces or misleads another to conduct or dealings which would not have been entered upon, but for such misleading influence, will not be allowed to assert his right to the detriment of the person so misled. *Kearney v. Shelter Ins. Co.*, 71 Ark. App. 302, 29 S.W.3d 747 (2000).

The doctrine of equitable estoppel has four requirements:

the party to be estopped must know the facts;

the party to be estopped must intend that his or her conduct be acted on or must so act that the party asserting the estoppel had a right to believe it was so intended;

the latter must be ignorant of the true facts; and

the latter must rely on the former's conduct to his or her injury. *Cavaliere v. Skelton*, 73 Ark. App. 188, 40 S.W.3d 844 (2001).

Estoppel involves both parties; the party claiming estoppel must prove that he relied in good faith on some act by the other party and that in reliance on that act he changed his position to his detriment. *Undem v. First National Bank*, 46 Ark. App. 158, 879 SW.2d 451 (1994).

Estoppel is applicable as an issue of fact to be decided by the trier of fact.

*Taylor v. Taylor*, 2009 Ark. App. 605, 343 S.W.3d 335.

### **Case Law Examples**

*Smith v. Parker*, 67 Ark. App. 221, 998 S.W.2d 1 (1999) (lessor's wife was estopped from claiming that lease of homestead property was void due to lack of her signature on lease)

*Chitwood v. Chitwood*, 92 Ark. App. 129, 211 S.W.3d 547 (2005) (equitable estoppel barred mother's attempts to collect child support from father; mother knew that agreement she had with father, in which father was to give up his parental rights and stop making child support payments, was not enforceable and that the child support obligations would continue to accrue, mother did not contact father about paying child support or about visitation after receiving letter from father stating that he was surrendering his parental rights and terminating child support payments per mother's request, and father testified that it was his belief that the agreement relinquishing his parental rights and stopping child support payments was enforceable).

*Howard Bldg. Ctr. v. Thornton*, 282 Ark. 1, 665 S.W.2d 870 (1984) (materialman was estopped from enforcing materialman's lien against owners by entering into secret agreement with contractor whereby all payments made to materialman by contractor would be applied to past-due accounts without regard to account to which money rightfully should have been applied).

## **IV. Juveniles**

### **Prosecutorial Discretion**

Under Ark. Code Ann. § 9-27-318(c)(2), the prosecutor has the discretion to file in either juvenile division or criminal division when a juvenile, who is **fourteen or fifteen** at the time of the alleged conduct, is charged with the following crimes:

Capital murder, Ark. Code Ann. § 5-10-101;

Murder in the first degree, Ark. Code Ann. § 5-10-102;

Kidnapping, Ark. Code Ann. § 5-11-102;

Aggravated robbery, Ark. Code Ann. § 5-12-103;

Rape, Ark. Code Ann. § 5-14-103;

Battery in the first degree, Ark. Code Ann. § 5-13-201; and

Terroristic act, Ark. Code Ann. § 5-13-310;

Or when a juvenile, who is **sixteen** at the time of the alleged conduct, is charged with any felony.

The Supreme Court of Arkansas has held that the state cannot appeal a transfer order to juvenile court. The state's ability to appeal is strictly limited to the circumstances described in Rule 3 of the Rules of Appellate Procedure - Criminal, which does not provide that the state may bring an interlocutory appeal from a juvenile-transfer order. *State v. A.G.*, 2011 Ark. 244, 383 S.W.3d 317.

### **Charging as an Adult or EJJ**

Under Ark. Code Ann. § 9-27-318(b), the state may file a motion in juvenile division to transfer a case to criminal division or designate a case as an extended juvenile jurisdiction offender case when a case involves a juvenile who is **fourteen or fifteen** years old when he engages in conduct that, if committed by an adult, would be:

Murder in the second degree, Ark. Code Ann. § 5-10-103;

Battery in the second degree, Ark. Code Ann. § 5-13-202(a)(2), (3) or (4);

Possession of a handgun on school property, Ark. Code Ann. § 5-73-119(a)(2)(A);

Aggravated assault, Ark. Code Ann. § 5-13-204;

Unlawful discharge of a firearm from a vehicle, Ark. Code Ann. § 5-74-107;

Any felony committed while armed with a firearm;

Soliciting a minor to join a criminal street gang, Ark. Code Ann. § 5-74-203;

Criminal use of prohibited weapons, Ark. Code Ann. § 5-73-104;

First-degree escape, Ark. Code Ann. § 5-54-110;

Second-degree escape, Ark. Code Ann. § 5-54-111; or

Felony attempt, solicitation, or conspiracy to commit any of the following:

Capital murder, Ark. Code Ann. § 5-10-101;

Murder in the first degree, Ark. Code Ann. § 5-10-102;

Murder in the second degree, Ark. Code Ann. § 5-10-103;

Kidnapping, Ark. Code Ann. § 5-11-102;

Aggravated robbery, Ark. Code Ann. § 5-12-103;

Rape, Ark. Code Ann. § 5-14-103;

Battery in the first degree, Ark. Code Ann. § 5-13-201;

First-degree escape, Ark. Code Ann. § 5-54-110; and

Second-degree escape, Ark. Code Ann. § 5-54-111.

Or when a juvenile is at least **fourteen** years old when he engages in conduct that constitutes a felony under Ark. Code Ann. § 5-73-119(a);

Or when a juvenile is at least **fourteen** years old when he engages in conduct that, if committed by an adult, constitutes a felony and who has, within the preceding two years, three times been adjudicated as a delinquent juvenile

for acts that would have constituted felonies if they had been committed by an adult.

### **Delinquency**

If a juvenile, who is **fourteen or fifteen** years old, is found guilty in criminal division of an offense other than an offense listed in subsection (b) or (c)(2) of Ark. Code Ann. § 9-27-318, the judge shall enter a juvenile delinquency disposition under Ark. Code Ann. § 9-27-330. Ark. Code Ann. § 9-27-318(j).

*See* Ark. Code Ann. § 9-27-330 for possible dispositions following a delinquency determination.

If a prosecuting attorney can file charges in the criminal division for an act allegedly committed by a juvenile, the state may file any other criminal charges that arise out of the same act or course of conduct in the same criminal division court case if, after a hearing before the juvenile division, a transfer is so ordered. Ark. Code Ann. § 9-27-318(d).

### **Transfer Hearings**

Upon the motion of the court or any party, the judge of the division of the court in which a delinquency petition or criminal charges have been filed shall conduct a hearing to determine whether to retain jurisdiction or to transfer the case to another division. Ark. Code Ann. § 9-27-318.

The juvenile division or the criminal division shall conduct a transfer hearing within thirty days, if the juvenile is detained, and no longer than ninety days from the date of the motion to transfer. Ark. Code Ann. § 9-27-318.

In making the decision to retain jurisdiction or to transfer the case, the court shall consider and make written findings on all the following factors:

The seriousness of the alleged offense and whether the protection of society requires prosecution in criminal division;

Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;

Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;

The culpability of the juvenile, including the level of planning and participation in the alleged offense;

The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;

The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;

Whether there are facilities or programs available to the court that are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction;

Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

Any other factors deemed relevant by the court.

Ark. Code Ann. § 9-27-318(g).

Upon a finding by clear and convincing evidence that a juvenile should be transferred to another division, the court shall enter an order to that effect. Ark. Code Ann. § 9-27-318.

Upon a finding by the criminal division that a juvenile, who is between the ages of fourteen and seventeen years old and charged with the crimes in subdivision (c)(2) of Ark. Code Ann. §9-27-318 should be transferred to

juvenile division, the criminal division may enter an order to transfer as an extended juvenile jurisdiction case. Ark. Code Ann. § 9-27-318.

The court is required to make written findings on all the transfer factors. Ark. Code Ann. § 9-27-318(h)(1).

If the case is transferred to another division, any bail or appearance bond given for the appearance of the juvenile shall continue in effect in the division to which the case is transferred. Ark. Code Ann. § 9-27-318(k).

### **Relevant Case Law**

The use of violence in the commission of a serious offense is a factor sufficient for the criminal division of the circuit court to retain jurisdiction. However, absent a finding that violence was employed, the seriousness of the offense alone is not a sufficient basis to refuse a transfer. *Ponder v. State*, 330 Ark. 43, 953 S.W.2d 555 (1997).

It is of no consequence that the defendant may not have personally used a weapon. The defendant's association with the use of a weapon in the course of crime is sufficient to satisfy the violence criterion. *Thompson v. State*, 330 Ark. 746, 958 S.W.2d 1 (1997).

There must be some evidence to substantiate the serious and violent nature of the charges contained in the information. *Id.*

In *Witherspoon v. State*, 74 Ark. App. 151, 46 S.W. 3d 549 (2001), the juvenile appealed the criminal division of the circuit court's denial of the juvenile's motion to transfer his case involving a charge of capital murder and first-degree battery to the juvenile division of the circuit court. Appellant argued that the circuit court considered improper evidence, including hearsay and a confession that was not voluntarily, knowingly, and intelligently given. The court of appeals found that even if the hearsay statements should not have been admitted, appellant was not prejudiced because there was sufficient testimony to establish the serious and violent nature of the crimes. The appeals court also held that it was not an error for the circuit court to

consider the allegedly involuntary confession at the transfer hearing. Transfer hearings are held for the purpose of determining jurisdiction and the statute does not suggest that the trial court should consider motions to suppress at these hearings. *Id.*

After an order to transfer has been entered, the court no longer has jurisdiction to set aside that order. The criminal division will lose its jurisdiction once the case has been transferred to the juvenile division. *C.H. v. State*, 2010 Ark. 279, 365 S.W.3d 879.

### **Sentencing**

The United States Supreme Court has held that mandatory life without parole sentences for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

Accordingly, the Arkansas Supreme Court has invalidated the previously mandatory language found in Ark. Code Ann. § 5-10-101 as applied to juveniles and held that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. *Whiteside v. State*, 2013 Ark. 176, 426 S.W.3d 917.

## **V. Pro Se Litigants & Indigent Defendants**

### **Pro Se Civil Litigants**

An individual has a right to represent himself in a civil matter. *Stewart v. Hall*, 198 Ark. 493, 129 S.W.2d 238 (1939).

A corporation *may* represent itself through a licensed attorney in connection with its own business or affairs. But a corporation may *not* represent itself through an employee who is a licensed attorney while acting as administrator, executor, guardian or other fiduciary, on the theory that the corporation is not representing itself in connection with its own affairs. *Ark. Bar Assn. v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954); *see also* Ark. Code Ann. § 16-22-211.

### ***In Forma Pauperis***

Rule 72 of the Arkansas Rules of Civil Procedure requires that the applicant petition for leave to proceed *in forma pauperis*, verified by an affidavit in a form approved by the court. The court may, by order, allow the petition if there is a satisfactory showing of a colorable cause of action.

A colorable cause of action that is required to support a petition to proceed *in forma pauperis* is a claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law or a reasonable and logical extension of modification of current law.

*Boles v. Huckabee*, 340 Ark. 410, 12 S.W.3d 201 (2000).

Suits *in forma pauperis* are not permitted for slander, libel, or malicious prosecution.

An *In Forma Pauperis* Affidavit and Petition can be found in Rule 72 of the Arkansas Rules of Civil Procedure.

### **Limited Scope Representation**

Rule 87 of the Arkansas Rules of Civil Procedure permits an attorney to provide limited scope representation to a person involved in a court proceeding

The attorney's role may be limited as set forth in a notice of limited scope representation filed and served prior to or simultaneously with the initiation of a proceeding or initiation of representation, as applicable.

Such notice shall not be required in matters where an attorney's representation consists solely of the drafting of pleadings, motions, or other papers for an otherwise self-represented person.

An attorney may draft or help to draft a pleading, motion, or other paper filed by an otherwise self-represented person. The attorney shall include a notation at the end of the prepared document stating: "This document was prepared with the assistance of [insert name of attorney], a licensed

Arkansas lawyer, pursuant to Arkansas Rule of Professional Conduct 1.2(c).”

The attorney need not sign that pleading, motion, or other paper.

An attorney who provides drafting assistance to an otherwise self-represented person may rely on the self-represented person’s representation of facts, unless the attorney has reason to believe that such a representation is false or materially insufficient.

The attorney’s role terminates without the necessity of leave of court upon the attorney’s filing a notice of completion of limited scope representation with a certification of service on the client.

Service on an attorney providing limited scope representation is required only for matters within the scope of the representation as set forth in the notice.

Ark. R. Civ. P. 87.

### **Criminal Defendants**

Rule 8.2 of the Arkansas Rules of Criminal Procedure requires that a judicial officer determine whether the defendant is indigent and, if so, appoint counsel to represent him or her at the first appearance, unless the defendant knowingly and intelligently waives the appointment of counsel.

The court is not required to appoint counsel if the indigent defendant is charged with a misdemeanor and the court has determined that under no circumstances will incarceration be imposed as a part of any punishment.

A suspended or probationary sentence to incarceration shall be considered a sentence to incarceration if revocation of the suspended or probationary sentence may result in the incarceration of the indigent without the opportunity to contest guilt of the offense for which incarceration is imposed.

Ark. R. Crim. P. 8.2 (a).

A suspended or probationary sentence shall be considered a sentence to incarceration if revocation of the suspended or probationary sentence may result in incarceration. Ark. R. Crim. P. 8.2 (b).

An accused's desire for, and ability to retain, counsel should be determined by a judicial officer before the first appearance, whenever practicable. Ark. R. Crim. P. 8.2 (a). [Note for post-conviction: If a post-conviction petition on which the petitioner was represented by counsel is denied, counsel shall continue to represent the petitioner for an appeal to the Supreme Court, unless relieved as counsel by the circuit court or the Supreme Court. If no hearing was held or the petitioner proceeded pro se at the hearing, the circuit court may at its discretion appoint counsel for an appeal upon proper motion by the petitioner. Ark. R. Crim. P. 37.3 (b).]

### **Appointment of Public Defender**

Any person charged with an offense punishable by imprisonment who desires to be represented by an appointed attorney shall file with the court in which the person is charged a written certificate of indigency.

The certificate of indigency shall be in a form approved by the Arkansas Public Defender Commission and shall be provided by the court in which the person is charged.

The certificate of indigency shall be executed under oath by the person charged with the offense and shall state in bold print that a false statement is punishable as a Class D felony.

The court shall conduct a preliminary review of the person's certificate of indigency, and if the court makes the preliminary determination that the person is or may be indigent based upon the person's stating he or she faces substantial financial hardship, the court shall appoint the public defender to represent the person.

Ark. Code Ann. § 16-87-213

“Substantial financial hardship” means that a person's current or future financial situation is uncertain or precarious and is presumed if the person's financial situation includes without limitation one (1) or more of the following:

(A) Receipt of public assistance such as:

(i) Food stamps;

(ii) Temporary Assistance for Needy Families;

(iii) Medicaid;

(iv) Disability insurance;

(v) Public housing; or

(vi) Supplemental Security Income benefits;

(B) Earning less than two hundred percent (200%) of the federal poverty guidelines, as they existed on January 1, 2021;

(C) Being incarcerated; or

(D) Being admitted to a residential mental health facility.

Ark. Code Ann. § 16-87-201.

If the court determines that the person qualifies for the appointment of an attorney by being indigent or partially indigent, the court shall appoint the trial public defender to represent the person before the court.

The court shall not appoint an attorney prior to review of the submitted certificate of indigency.

If the court does not find the person indigent after a preliminary review of the person's certificate of indigency, the court shall then evaluate if the person qualifies as indigent using the following factors:

(A) The seriousness of the charges being faced;

- (B) The person's monthly expenses;
- (C) Local private counsel rates;
- (D) The person's income or available funds from any other source, including public assistance, to which the person is entitled;
- (E) Property owned by the person or in which he or she has an economic interest;
- (F) The person's outstanding financial obligations;
- (G) The existence, number, and ages of any dependents;
- (H) The person's employment and job training history; and
- (I) The person's highest level of formal education attained.

At the time of appointment of an attorney, the court immediately shall assess a fee of not less than ten dollars nor more than four hundred dollars to be paid to the commission in order to defray the costs of the public defender system. The fee may be waived if the court finds such an assessment to be too burdensome.

The appointing court may at any time review and redetermine whether or not a person is indigent and qualifies for the appointment of an attorney.

The court may at any time request, and upon request the Department of Finance and Administration shall provide, an indigent person's past three years of income tax returns in order for the court to confirm or review a determination of indigency.

Ark. Code Ann. § 16-87-213.

### **Relevant Case Law**

A defendant in a criminal case has a constitutional right to counsel or self-representation. *Faretta v. California*, 422 U.S. 806 (1975).

However, a defendant who has employed counsel or accepted the appointment of counsel may be found to have waived the right of self-representation. *Monts v. Lessenberry*, 305 Ark. 202, 806 S.W.2d 379 (1991). Where a defendant has an attorney, but desires some participation in the trial, that is to be resolved by the sound discretion of the trial judge. *Mosby v. State*, 249 Ark. 17, 457 S.W.2d 836 (1970).

The trial judge is required to inquire of a defendant and the record must affirmatively show that:

The waiver of counsel is unequivocal and timely;

The waiver is knowingly and intelligently made; and

The defendant has not engaged in conduct that would prevent a fair and orderly trial.

*Deere v. State*, 301 Ark. 505, 785 S.W.2d 31 (1990); *see also Ivory v. State*, 2017 Ark. App. 269, 520 S.W.3d 729, which has several helpful colloquies that can be utilized to determine if a defendant has knowingly and intelligently waived his right to counsel and properly asserted his right to self-representation.

The right of counsel extends to matters relating to revocation of probation. *Brooks v. State*, 36 Ark. App. 40, 819 S.W.2d 288 (1991).

There exists a reasonable presumption against a waiver of an attorney. *Brewer v. Williams*, 430 U.S. 387 (1977).

The burden is on the state to show that the waiver was voluntarily and intelligently made. Therefore, it is impermissible to presume waiver from a silent record. *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967).

The trial court was held not to have refused to allow appellant to proceed pro se where appellant never made an unequivocal request to waive counsel. *Collins v. State*, 338 Ark. 1, 991 S.W.2d 541 (1999).

The trial court erred in forcing the appellant to be represented by counsel and refusing to allow him to appear pro se. The trial court failed to conduct the proper inquiry into the appellant's request to proceed pro se, and the case was reversed and remanded for a new trial. *Pierce v. State*, 362 Ark. 491, 209 S.W.3d 364 (2005).

To admonish a defendant that he must accept the consequences of self-representation is not alone sufficient. *Gibson v. State*, 298 Ark. 43, 764 S.W.2d 617 (1989).

A defendant will not be permitted to manipulate the court under the guise of refusing an attorney then demanding an attorney. *Wade v. State*, 290 Ark. 16, 716 S.W.2d 194 (1986).

Because the trial court allowed standby counsel to remain in the case, it did not make even a limited inquiry into the appellant's understanding of the legal process before permitting the appellant to represent himself, which was clearly error. Although the appellant attempted to proceed pro se, when it came to the actual presentation of the appellant's case, the appellant relinquished full discretion to standby counsel as to how to conduct significant trial procedures and responsibilities during the trial, and the appellant's conviction was affirmed. *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001).

A circuit court has the jurisdiction to deny counsel's motion to withdraw from representing an indigent defendant in a criminal case. *Simpson v. Pulaski County Circuit Court*, 320 Ark. 468, 899 S.W.2d 50 (1995).

Appellant's court-appointed trial counsel was allowed to withdraw from an appeal where appellant's ex-wife and siblings provided funds to hire private counsel, despite the fact that a two-volume trial transcript had been provided to appellant at the state's expense. The trial court found that the appellant was still indigent. Appellant's ex-wife and siblings had no obligation to the state to pay the cost of the transcript. *Brewer v. State*, 66 Ark. App. 324, 992 S.W.2d 140 (1999).

You may want to direct pro se litigants and indigent defendants to the Arkansas Access to Justice website, where they can find free sample legal forms, or to the Center for Arkansas Legal Services and Legal Aid of Arkansas where they can find free legal information and find out how to apply for free legal aid.

## **VI. Civil Procedure**

### **Parties**

#### **Real Party in Interest**

Every action shall be brought in the name of the real party in interest.

The following parties may sue in their own name without joining the party for whose benefit the action is being brought: an executor, administrator, guardian (conservator), bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or the state or any officer thereof or any person authorized by statute to do so.

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.

Ratification, joinder, or substitution by or of the real party in interest, after objection, shall have same effect as if commencement of action had been in name of real party in interest. Ark. R. Civ. P. 17.

#### **Raising an Objection to Real Party in Interest**

An objection that plaintiff is not a real party in interest may be raised by:

Affirmative defense in answer under Ark. R. Civ. P. 8(c);

Preliminary motion when dismissal may result because real party in interest cannot be joined or substituted; and

As a defense under Ark. R. Civ. P. 12(b).

If objection is not made with reasonable promptness, the court may conclude that the defense is waived.

Dismissal for failure to join real party in interest is not on the merits.

Ark. R. Civ. P. 12.

### **Joinder of Necessary Parties**

Necessary parties shall be joined by order of court and are defined as persons:

Subject to service of process;

Claiming an interest in the subject of the action; and

In such a position that disposition of the matter in his absence may:

Impair or impede his ability to protect that interest;

Leave other parties in substantial risk of incurring inconsistent obligations as a result of his claimed interest; or

Deny complete relief to those who are already parties.

If a necessary party has not been joined, the court shall order that he be made a party. If he should join as a plaintiff, but refuses to do so, he may be made a defendant; or, in a proper case, an involuntary plaintiff.

If the necessary party is not a resident of the county in which the action is brought, he may be joined as a defendant and served in another county.

Judgment shall not be rendered against him if:

No other defendant is a resident of the county where the action was commenced; or

Judgment is discontinued, dismissed, or rendered in favor of resident defendants; and

Necessary party makes timely objection to court's jurisdiction.

Ark. R. Civ. P. 19(a).

## **Failure to Join Indispensable Party**

If a necessary party cannot be joined, the court shall determine if such party is an indispensable party considering such factors as:

Prejudice to person and parties resulting from a judgment without joining indispensable party;

What relief can be embraced in the judgment to lessen or avoid such prejudice;

Adequacy of any judgment that can be molded to have no effect on indispensable party; and

Existence of adequate remedy for plaintiff if action is dismissed for nonjoinder.

If the party is indispensable, the action shall be dismissed. Ark. R. Civ. 19(b).

When reviewing a dismissal for failure to join an indispensable party, the reviewing court treats facts alleged in complaint as true and views them in light most favorable to party who filed the complaint. *Wilmans v. Sears, Roebuck and Co.*, 355 Ark. 668, 144 S.W.3d 245 (2004).

## **Permissive Joinder of Parties**

Persons may join in an action as **plaintiffs** if they assert a right to relief jointly, severally or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact in the action is common to all such persons.

Persons may be joined as **defendants** in an action if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

A plaintiff or defendant need not be interested in obtaining all the relief demanded.

The court may award judgment for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities. Ark. R. Civ. P. 20(a).

### **Separate Trials When Joinder is Improper**

The court may order separate trials or make other orders to prevent delay or prejudice when a person is joined against whom a party has no claim or who asserts no claim and such joinder results in embarrassment, delay, or expense. Ark. R. Civ. P. 20(b).

### **Misjoinder and Nonjoinder of Parties**

The court may order any party added or dropped at any stage of the action on the motion of a party, or on its own initiative.

Misjoinder is not a ground for dismissal.

Any claim may be severed and proceedings regarding it held separately.

Ark. R. Civ. P. 21.

### **Interpleader**

A plaintiff may require any other person with a claim arising from the same occurrence or transaction to interplead if failure to do so may expose the plaintiff to additional liability.

No objection to the joinder may be made on the ground that:

The claims or the title upon which the claims depend do not have a common origin or are not identical, but are adverse to or independent of one another; or

The plaintiff avers no liability in whole or part to any or all claimants.

A defendant exposed to similar liability may require such joinder by way of cross-claim, third-party complaint or counterclaim.

Mandatory interpleader supplements, and does not limit, permissive joinder.

Ark. R. Civ. P. 22.

### **Intervention as a Matter of Right**

Any person, upon timely application, may intervene if:

A statute confers an unconditional right to do so; or

The applicant:

Claims an interest in the subject of the action;

Disposition of the action may impair or impede applicant's ability to protect that interest; and

Has an interest that is not adequately represented by existing parties.

Ark. R. Civ. P. 24(a).

### **Permissive Intervention**

Any person, upon timely application, may be permitted to intervene if:

A statute confers a conditional right to do so; or

The applicant's claim or defense has a question of law or fact in common with the main action.

Ark. R. Civ. P. 24(b).

### **Intervention Procedure**

A motion to intervene shall:

Be served by the intervenor on the parties;

State the grounds therefor; and

Be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

If the constitutionality of a statute affecting the public interest is drawn into question, the court may require notification of the Attorney General.

Ark. R. Civ. P. 24(c).

**Relevant Statutes:**

Partition: Ark. Code Ann. § 18-60-408.

Lease of mineral rights: Ark. Code Ann. § 15-56-303.

Oil and gas leasehold rights: Ark. Code Ann. § 15-73-404.

Workmen's Compensation Carrier: Ark. Code Ann. § 11-9-410.

In any proceeding which involves the validity of a municipal ordinance or franchise, the municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard. Ark. Code Ann. § 16-111-111.

**Special Parties: Infants and Incompetents**

Whenever an infant or incompetent person has a guardian, the guardian must sue or defend on behalf of the infant or incompetent person.

If an infant or incompetent person does not have a duly appointed guardian, he may sue by his next friend or by a guardian ad litem.

If an infant or incompetent is not represented in an action, the court shall appoint a guardian ad litem or make such other orders as necessary to the infant or incompetent.

No judgment shall be rendered against an infant or incompetent until after a defense by a guardian or guardian ad litem, who shall be appointed by the court upon application of any interested party.

Ark. R. Civ. P. 17(b).

## Substitution of Parties

### Death of a Party

The action will not abate upon the death of a party if there are other plaintiffs or defendants, as the case may be, to which the claims or liability survives.

If a party dies, and the claim does not abate, a motion to substitute another party may be made by any party or by the successor in interest of the deceased party;

Substitution may be ordered without notice or on such notice as the court may require. The action may be dismissed as to the deceased party if the motion for substitution is not made within ninety days after the death is known to the parties.

If **plaintiff** dies, the personal representative shall be substituted unless the claim of decedent has passed to heirs or devisees, whereupon the heirs or devisees may be substituted.

If **defendant** dies, the personal representative shall be substituted. However, where the subject of the action is recovery of real property or an interest therein, the court may substitute either heirs, devisees, or a personal representative.

The court may appoint and substitute a special administrator with powers limited to the pending litigation unless there is a general personal representative, who can be made subject to the court's jurisdiction. When a general personal representative qualifies after the court has appointed and substituted a special administrator, the court shall, upon motion of any party or the personal representative, substitute the former.

Ark. R. Civ. P. 25(a).

### **Incompetency**

Upon motion alleging incompetency of a party, the court may allow the action to be continued by or against the guardian of the incompetent.

Ark. R. Civ. P. 25(b).

### **Transfer of Interest**

Upon transfer of interest in the subject of the action, the action may be continued by or against the original party. However, upon motion, the court may direct that the transferee be substituted or joined with the original party.

Ark. R. Civ. P. 25(c).

### **Public Officers; Death or Separation from Office**

The successor to a public officer who dies or otherwise ceases to hold office is automatically substituted in any action in which the predecessor is officially a party. The action does not abate.

Any misnomer of substituted party that doesn't affect the substantial rights of the parties is disregarded. Failure to enter such an order does not affect substitution.

When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added. Ark. R. Civ. P. 25(d).

### **Limitations on Rule 25**

The provisions of Ark. R. Civ. P. 25 shall not allow a claim to be maintained that is otherwise barred by limitations or non-claim; or be determinative of whether a claim survives the death of a party.

Ark. R. Civ. P. 25(e).

## **Survival of Actions**

Any action for wrongful damage to the person or property of the plaintiff survives to the executor or administrator of the plaintiff (except libel, slander, or loss of consortium) upon the death of plaintiff. *Miller v. Nuckolls*, 76 Ark. 485, 89 S.W. 88 (1905).

An action for wrongful death shall survive the death of such person, and such action shall be brought by the personal representative of the deceased or, if no personal representative, the heirs of the deceased. Ark. Code Ann. §§ 16-62-101 – 102.

### **Other Relevant Statutes:**

Joint and several contract liability: Ark. Code Ann. § 16-61-111.

Actions by sureties: Ark. Code Ann. § 16-107-306.

Gambling losses: Ark. Code Ann. § 16-118-103.

Deaths in coal mines: Ark. Code Ann. § 11-7-302.

Employee railroad death: Ark. Code Ann. § 23-12-503.

## **Class Actions**

### **Prerequisites**

One or more members of a class may sue or be sued as representative parties on behalf of all only if:

The class is so numerous that joinder of all members is impracticable,

There are questions of law or fact common to the class,

The claims or defenses of the representative parties are typical of the claims or defenses of the class, and

The representative parties and their counsel will fairly and adequately protect the interests of the class.

The court must also find that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The court shall determine by conditional or unconditional order the appropriateness of the action as soon as practicable. An order certifying a class action must define the class and the class claims, issues, or defenses.

Ark. R. Civ. P. 23(a) & (b).

### **Notice**

The court must direct notice to each member of the class. The notice must concisely and clearly state in plain, easily understood language:

The nature of the action;

The definition of the class;

The class claims, issues, or defenses;

That a class member may enter an appearance and participate in person or through counsel;

That the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and

The binding effect of a class judgment on class members.

Ark. R. Civ. P. 23(c).

### **Orders**

At any stage of the proceedings, the court may issue orders:

Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action;

Imposing conditions on the representative parties or on intervenors;

Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

Dividing the class into subclasses, treating each subclass as a class, and construing and applying the provisions of this rule accordingly; and

Dealing with similar procedural matters.

Ark. R. Civ. P. 23(d).

### **Dismissal or Compromise**

Court must approve dismissal or compromise.

The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

The court may approve any such resolution that would bind class members only after a hearing and on a finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

The parties seeking approval of a settlement, voluntary dismissal, or compromise must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

The court may not refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval.

An objection may be withdrawn only with the court's approval.

Ark. R. Civ. P. 23(e).

#### **Relevant Rules**

Derivative actions by shareholders: Ark. R. Civ. P. 23.1.

Member of an unincorporated association as a class: Ark. R. Civ. 23.2.

## **Commencement of Proceedings**

### **Complaint**

A civil action is commenced by filing a complaint with the clerk of the court.

The clerk shall note on the complaint the precise time and date of filing.

Ark. R. Civ. P. 3.

### **Time Computation**

In computing any period of time prescribed or allowed, the day of the act, event, or default shall not be included.

The last day of the period shall be included, unless a Saturday, Sunday, or legal holiday, in which event, the period ends on the next day that the clerk's office is open.

When the period of time prescribed or allowed is less than fourteen days, intermediate Saturdays, Sundays, or legal holidays are not counted.

Ark. R. Civ. P. 6(a).

### **Time Enlargement**

The court, for good cause and with or without motion or notice, may extend time prior to the expiration of the period previously prescribed.

The court, upon motion, may permit an act to be done after the expiration of the period previously prescribed where the failure to act was the result of mistake, inadvertence, surprise, excusable neglect, or other just cause.

The court may **not** extend time to:

Move to have a verdict and judgment thereon set aside Ark. R. Civ. P. 50(b);

Move to amend findings of fact or make additional findings Ark. R. Civ. P. 52(b);

Move for a new trial Ark. R. Civ. P. 59(b);

File opposing affidavits to a motion for new trial supported by affidavits Ark. R. Civ. P. 59(d);

Enter an order on its own initiative granting a new trial Ark. R. Civ. P. 59(e);

Modify, set aside, or vacate a judgment after the expiration of ninety days from the filing thereof Ark. R. Civ. P. 60(b); or

Obtain service of summons Ark. R. Civ. P. 4(i).

Ark. R. Civ. P. 6(b).

### **Time for Motions & Affidavits**

Notice of a hearing on a written motion shall be served on the opposing party not later than twenty days before the time specified for the hearing.

The party opposing the motion shall serve a response within ten days after service of the motion.

The movant shall then have five days after service of the response in which to serve a reply.

Ark. R. Civ. P. 6(c).

### **Time After Service by Mail**

Three days are added to any prescribed period to do some act after service of any notice or paper by mail, commercial delivery company, or electronic transmission, including e-mail. This does not apply to an answer or pre-answer motion when service of the summons and complaint is by mail or commercial delivery pursuant to Ark. R. Civ. P. 4.;

Ark. R. Civ. P. 6(d).

### **Summons**

Upon the filing of the complaint, the clerk shall issue a summons. Ark. R. Civ. P. 4(a).

The summons shall:

Be styled in the name of the court;

Be dated by the clerk;

Be signed by the clerk;

Be under the seal of the court;

Contain the names of the parties;

Be directed to the defendant;

State the address of the defendant to be served, if known;

State the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff;

State the time within which the defendant is required to appear, file a pleading and defend; and

Inform the defendant that failure to do so will result in the entry of judgment against him for the relief demanded in the complaint.

Ark. R. Civ. P. 4(b).

## **Service**

### **In General**

Service of process must be made on a defendant within 120 days after the filing of the complaint.

However, the court, on written motion and a showing of good cause, may extend the time for service if the motion is made within 120 days of the filing of the suit or within the time period established by a previous extension. To be effective, an order granting an extension must be entered within 30 days after the motion to extend is filed, by the end of the 120-day period, or by the end of the period established by the previous extension, whichever date is later.

If service is not complete within 120 days after the filing of the complaint or within the time authorize by an extension, the action shall be dismissed as to that defendant without prejudice on motion or on the court's initiative.

If service is by mail or by commercial delivery company, service shall be deemed to have been made on the date that the process was accepted or refused.

These provisions do not apply to service in a foreign country pursuant or to complaints filed against unknown tortfeasors.

Ark. R. Civ. P. 4(i).

The following persons are authorized to serve process:

The sheriff of the county, where the service is to be made, or his deputy, unless the sheriff is a party to the action;

Any person appointed pursuant to Admin. Order No. 20 for the purpose of serving summons by either the court in which the action is filed or a court in the county in which service is to be made;

Any person authorized to serve process under the law of the place outside this state where service is made; or

The plaintiff's attorney or the plaintiff if service is by mail or commercial delivery.

Ark. R. Civ. P. 4(c).

To be appointed to serve process under Admin. Order No. 20, the person must meet the minimum qualifications, file an application with the circuit clerk, and attach an affidavit stating that they meet the minimum qualifications. The circuit judge will then determine whether further inquiry is needed. If the person is qualified, the judge shall issue an order of appointment, to be filed by the clerk and a certified copy given to the person and to the county sheriff. The person should then be added to the list of appointed civil process servers in the county.

A uniform petition and order for appointment to serve legal process can be found on the Supreme Court's website.

A copy of the summons and complaint shall be served together.

### **Personal Service Inside Arkansas**

**Natural Persons.** If the defendant is a natural person at least 18 years of age or emancipated by court order, by:

Delivering a copy of the process to the defendant personally, or if he or she refuses to receive it after the process server makes his or her purpose clear, by leaving the papers in close proximity to the defendant;

Leaving the process with any member of the defendant's family at least 18 years of age at a place where the defendant resides; or

Delivering the process to an agent authorized by appointment or by law to receive service of summons on the defendant's behalf.

**Minors.** If a defendant is less than 18 years of age and has not been emancipated by court order, by:

Delivering the process to the defendant's father, mother, or guardian or,

If there be none in the state, to any person at least 18 years of age in whose care or control the minor may be or with whom the minor resides.

**Incapacitated Persons.** If a plenary, limited, or temporary guardian has been appointed for an incapacitated person, or if a conservator has been appointed for a person who by reason of advanced age or physical disability is unable to manage his or her property, service shall be on the person and the guardian or conservator.

**Incarcerated Persons.** Service on a person incarcerated in any jail, penitentiary, or other correctional facility in this state shall be on the administrator of the institution, who shall promptly deliver the process to the incarcerated person. A copy of the process shall also be sent to the incarcerated person by first-class mail and marked as "legal mail" and, unless the court otherwise directs, to his or her spouse, if any.

**Corporations.** Service on any corporation, including nonprofit corporations, professional corporations, and cooperatives, shall be on its registered agent for service of process, or the agent's secretary or assistant; any officer of the corporation, or the officer's secretary or assistant; a managing or general agent of the corporation, or the

agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

**Limited Liability Companies.** Service on a limited liability company shall be on its registered agent for service of process, or the agent's secretary or assistant; a manager of a limited liability company in which management is vested in managers rather than members, or the manager's secretary or assistant; a member of a limited liability company in which management is vested in the members or in which management is vested in managers and there are no managers, or that member's secretary or assistant; a managing or general agent of the limited liability company, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

**Partnerships.** Service on any type of partnership, including a general partnership, a limited liability partnership, a limited partnership, and a limited liability limited partnership, shall be on any general partner or his or her secretary or assistant; the partnership's registered agent for service of process, or the agent's secretary or assistant; a managing or general agent of the partnership, or the agent's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

**Unincorporated Associations.** Service on an unincorporated association subject to suit under its own name, except a partnership, shall be on its registered agent for service of process, or the agent's secretary or assistant; any manager of the association, or the manager's secretary or assistant; any agent authorized by appointment or by law to receive service of process; or as provided by an applicable statute.

**Defendant Class Actions.** Service on a defendant class shall be on each of the parties named as class representatives in the same manner as if each representative were sued in a separate action.

**Trusts.** Service on a trust shall be on a trustee of the trust, on the trustee's secretary or assistant, or as provided by statute.

**The United States.** Service on the United States or any of its agencies, officers, or employees shall be as authorized by the Federal Rules of Civil Procedure or by other federal law.

**States and State Agencies.** Service on a state or any of its agencies, departments, boards, or commissions subject to suit shall be on the chief executive officer, director, or chairman, any other person designated by appointment or by an applicable statute to receive service of process, or on the Attorney General of the state if service is accompanied by an affidavit of a party or the party's attorney that the officer or designated person is unknown or cannot be located.

**Municipal Corporations.** Service on a municipal corporation shall be on the mayor, city manager, city administrator, or city clerk.

**Counties.** Service on a county shall be on the county judge, county administrator, county clerk, or circuit clerk if no county clerk has been elected.

**School Districts.** Service on a school district shall be on the president of the board of directors, or the superintendent of schools.

**Other Political Subdivisions.** Service on any political subdivision, special district, or quasi-municipal agency not listed in this subdivision shall be on any officer, director, chairman, or manager.

**Public Officers or Employees.** Service on an officer or employee of a government entity, acting in an official capacity, shall be on the officer or employee and by mailing a copy of the process to an official

on whom service, as applicable, and a copy to the Attorney General if a state officer or employee is sued.

Ark. R. Civ. P. 4(f).

**Alternative Methods of Service.** Process may also be served on any defendant except the United States and any of its agencies, officers, or employees by:

**Mail.** The plaintiff or an attorney of record for the plaintiff shall serve process by mail as follows:

Sending certified mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee. The addressee must be a natural person specified by name, and the agent of the addressee must be authorized in accordance with U.S. Postal Service regulations. Notwithstanding the foregoing, service on the registered agent of a corporation or other organization may be made by certified mail with a return receipt requested.

If delivery of mailed process is refused, the plaintiff or attorney making service, promptly on receipt of notice of the refusal, shall mail to the defendant by first-class mail a copy of the process and a notice that despite the refusal the case will proceed and that judgment by default may be entered for the relief demanded in the complaint unless the defendant appears to defend the suit.

Sending first-class mail, postage prepaid addressed to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to a form adopted by the Supreme Court and a return envelope, postage prepaid, addressed to the sender.

If no acknowledgment of service is received by the sender within 20 days after the date of mailing, service of process shall be made in a manner other than by mail or by commercial delivery company.

Ark. R. Civ. P. 4(g)(1).

**Commercial Delivery Company.** The plaintiff or an attorney of record for the plaintiff shall serve process by:

Addressing the documents to the person to be served and delivered by a commercial delivery company that (1) obtains signatures of recipients, (2) maintains permanent records of actual delivery, and (3) has been approved by the circuit court in which the action is filed or in the county where service is to be made.

The process must be delivered to the defendant or an agent authorized to receive service of process on behalf of the defendant. The signature of the defendant or agent must be obtained.

If delivery of process is refused, the plaintiff or attorney making the service, promptly on receipt of notice of the refusal, shall mail to the defendant by first class mail a copy of the process and a notice that despite the refusal the case will proceed and that judgment by default may be entered for the relief demanded in the complaint unless the defendant appears to defend the suit.

Ark. R. Civ. P. 4(g)(2).

**Service by Warning Order.** If the plaintiff seeks a judgment that affects or may affect the rights of persons who need not be subject personally to the jurisdiction of the court, service may be by warning order issued by the clerk.

On the filing by the plaintiff or his or her attorney of an affidavit showing that, after diligent inquiry, the identity or whereabouts of the defendant remains unknown, the clerk shall issue a warning order to

be published in a newspaper of general circulation or posted at the courthouse.

The warning order shall state the caption of the pleadings; briefly describe the nature of the action and the relief sought; include, if applicable, a description of the property or other res to be affected by the judgment; and warn the defendant or interested person to appear within 30 days from the date of first publication of the warning order or face entry of judgment by default or be otherwise barred from asserting his or her interest.

The party seeking judgment shall cause the warning order to be published weekly for two consecutive weeks in a newspaper having general circulation in the county where the action is filed and to be sent, with a copy of the complaint, to the defendant or interested person at his or her last known address by certified mail as provided.

“Newspaper” means a printed publication in the English language of no less than four pages that has been disseminated without interruption at least once a week for the preceding 12 months in the county where the action has been filed, holds a second-class mailing permit, has at least 50-percent paid circulation, and devotes an average of 40 percent of its space to news and information of interest to the general public.

Proof of publication shall be by affidavit of the editor, proprietor, or business manager of the newspaper, with a copy of the published notice attached, stating the dates on which the notice appeared.

If the party seeking judgment has been granted leave to proceed as an indigent without prepayment of costs, the clerk shall conspicuously post the warning order for a continuous period of 30 days at the courthouse or courthouses of the county where the action is filed. The party seeking judgment shall cause the warning order and a copy of

the complaint to be sent to the defendant or interested person at his or her last known address by certified mail as provided in paragraph (1)(A)(i) of this subdivision. Newspaper publication of the warning order is not required. Proof of posting shall be by a letter or other statement signed by the clerk stating the location and dates on which the warning order was posted.

Ark. R. Civ. P. 4(g)(3).

**Service as Directed by Court Order.** On motion without notice and after a showing by affidavit or other proof as the court may require that, despite diligent effort, service cannot be made by the methods authorized by this rule, the court may order service by any method or combination of methods reasonably calculated to apprise the defendant of the action, including service by warning order.

Ark. R. Civ. P. 4(g)(4).

#### **Service Outside of Arkansas**

Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give apprise the defendant of the action, may be made:

By personal delivery in the same manner prescribed for service within this state;

In any manner prescribed by the law of the place in which service is made in an action in any of its courts of general jurisdiction;

By mail or commercial delivery company as described in Ark. R. Civ. P. 4;

As directed by the foreign authority in response to a letter rogatory or pursuant to the provisions of any treaty or

convention pertaining to the service of a document in a foreign county; or

By any method or combination of methods as directed by order of the court on motion, without notice and after a showing by affidavit or other proof as the court may require that, despite diligent effort, service cannot be made by the methods authorized by Ark. R. Civ. P. 4;

Ark. R. Civ. P. 4 (h).

### **Proof of Service**

The person effecting service shall make proof of service to the clerk within the time during which the person served must respond to the summons. Failure to make proof of service, however, shall not affect the validity of service.

Proof of service may be made by executing a certificate of service contained in the same document as the summons.

If service is made by a person other than a sheriff or his or her deputy, the certificate shall be sworn. If service has been by mail or commercial delivery company, the person making service shall attach a return receipt, envelope, affidavit, acknowledgment, or other writing required by subdivision 4(g)(1) and (2) of Ark. R. Civ. P. 4.

If service is made by warning order, proof of service shall be made as provided in subdivision (g)(3) of Ark. R. Civ. P. 4.

Proof of service in a foreign country, if effected pursuant to the provisions of a treaty or convention as provided in subdivision (h)(4) of Ark. R. Civ. P. 4, shall be made in accordance with the applicable treaty or convention.

Ark. R. Civ. P. 4(d).

## **Service of Pleadings Filed Subsequent to the Complaint**

### **When Required**

Every pleading filed subsequent to the complaint shall be served on all parties, except one to be heard ex parte or unless the court orders otherwise because of numerous parties.

It is not necessary to serve parties in default for failure to appear; except when the pleading asserts new or additional claims for relief, in which event it shall be served pursuant to Ark. R. Civ. P. 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

Ark. R. Civ. P. 5(a).

### **How Made**

When a party is represented by an attorney, service shall be upon the attorney unless the court orders otherwise.

Service upon the attorney or party shall be by personally delivering a copy, mailing it to the last known address, or if no address is known, leaving it with the clerk of the court.

"Delivery" means handing it to the attorney or to the party; by leaving it at his office with his clerk or other person in charge thereof; or, if the office is closed or the person has no office, leaving it at his dwelling house or usual place of abode with some person residing therein who is at least fourteen years of age.

Service by mail is presumptively complete upon mailing, and service by commercial delivery company is presumptively complete upon depositing the papers with the company. Service by electronic

transmission is complete upon transmission but is not effective if it does not reach the person to be served.

Ark. R. Civ. P. 5(b).

### **Proof of Service**

Every pleading or document required to be served upon a party or his attorney shall contain a statement that it is served in accord and follows the requirements of Ark. R. Civ. P. 5.

Ark. R. Civ. P. 5(e).

### **Relevant Statutes**

Secretary of State: Ark. Code Ann. § 16-58-120.

Non-resident or absent motorist: Ark. Code Ann. § 16-58-121.

Owner or officer of watercraft: Ark. Code Ann. § 16-58-123.

Banks: Ark. Code Ann. § 23-48-327.

Insurance company: Ark. Code Ann. §§ 16-58-129; 23-63-301; 23-72-120.

Refusal to accept mailed process: Ark. Code Ann. § 16-58-132.

Service on corporations: Ark. Code Ann. §§ 16-58-124 - 127.

Uniform Interstate and International Procedure Act: Ark. Code Ann. § 16-4-102.

Nonprofit corporations: Ark. Code Ann. § 4-28-214.

Limited partnership: Ark. Code Ann. § 4-47-114.

Securities Act: Ark. Code Ann. § 23-42-107.

Railroad tort action: Ark. Code Ann. § 23-12-905.

## **Filing of Pleadings Subsequent to Complaint**

Pleadings shall be filed either before service or within a reasonable time thereafter with the clerk of the court who shall note the date and time of filing. Ark. R. Civ. P. 5(c).

A judge may permit pleadings to be filed with him whereupon he shall note thereon the date and time of filing and transmit them to the clerk of the court. Ark. R. Civ. P. 5(d).

## **Confidential Information & Redaction of Pleadings**

Confidential information shall not be included as part of a case record unless the confidential information is necessary and relevant to the case.

“Confidential” means that the contents of a court record may not be disclosed unless permitted by law. “Confidential” shall also mean that the existence of a court record may not be disclosed. Admin. Order No. 19 § III(A)(11).

A “case record” is any document, information, data, or other item created, collected, received, or maintained by a court, court agency, or clerk of court in connection with a judicial proceeding. Admin. Order No. 19 § III(A)(2).

The following information in case records is excluded from public access and is confidential absent a court order to the contrary; however, if the information is disclosed in open court and is part of a verbatim transcript of court proceedings or included in trial transcript source materials, the information is not excluded from public access:

Information that is excluded from public access pursuant to federal law;

Information that is excluded from public access pursuant to the Arkansas Code Annotated;

Information that is excluded from public access by order or rule of court;

Social Security numbers;

Account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers;

Information about cases expunged or sealed pursuant to Ark. Code Ann. §§ 16-90-1401 et seq.;

Notes, communications, and deliberative materials regarding decisions of judges, jurors, court staff, and judicial agencies; and

All home and business addresses of petitioners who request anonymity when seeking a domestic order of protection.

Admin. Order No, 19 § VII(A).

If including confidential information in a case record is necessary and relevant to the case, the confidential information shall be redacted from the case record to which public access is granted.

The point in the case record at which the redaction is made shall be indicated by striking through the redacted material with an opaque black mark or by inserting some explanatory notation in brackets, such as: [Information Redacted], [I.R.], [Confidential], or [Subject To Protective Order].

If an entire document is redacted, then the name of the document (with the number of pages redacted specified) should be noted in the publicly available court file and the entire document should be filed under seal.

The requirement that the redaction be indicated in case records shall not apply to court records rendered confidential by expungement or other legal authority that expressly prohibits disclosure of the existence of a record.

An un-redacted copy of the case record with the confidential information included shall be filed with the court under seal. The un-redacted copy of the case record shall be retained by the court as part of the court record of the case.

It is the responsibility of the attorney for a party represented by counsel and the responsibility of a party unrepresented by counsel to ensure that confidential information is omitted or redacted from all case records that they submit to a court.

It is the responsibility of the court, court agency, or clerk of court to ensure that confidential information is omitted or redacted from all case records, including orders, judgments, and decrees, that they create.

Ark. R. Civ. P. 5(c).

### **Joinder of Causes of Action**

Any party may join all his claims against adverse party, either independently or alternatively, when asserting an original claim, counterclaim, cross-claim or third-party claim. Ark. R. Civ. P. 13(a) and 18(a).

Actions usually cognizable only in succession may be joined. Ark. R. Civ. P. 18(c).

Relief may be granted in accord with relative substantive rights of parties. Ark. R. Civ. P. 18(c).

### **Severance & Transfer of Claims**

Any claim against a party may be severed and proceeded with separately.

If the court determines that the action, or a particular claim, should in the interest of justice or judicial economy be heard in another division, the court may transfer it to that division.

Ark. R. Civ. P. 18(b).

### **Third-Party Practice**

A defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to defendant for all or part of plaintiff's claim against defendant.

The defendant shall file the third-party complaint within ten days after filing his answer without leave of court, or with leave of court and notice to all parties if later than ten days after filing his answer.

The third-party defendant shall make defenses to the third-party plaintiff's claim(s) as provided in Ark. R. Civ. P. 12. He may also make counterclaims and cross-claims against other third-party defendants as provided in Ark. R. Civ. P. 13.

The third-party defendant may assert against the plaintiff any of the third-party plaintiff's defenses against the plaintiff, and any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of plaintiff's claim against the third-party plaintiff.

Plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of plaintiff's claim against third-party plaintiff.

After plaintiff asserts a claim as provided, the third-party defendant shall assert defenses as provided in Ark. R. Civ. P. 12 and counterclaims and cross-claims as provided in Ark. R. Civ. P. 13.

Any party may move to strike a third-party claim or for its severance or separate trial.

A third-party defendant may similarly proceed under this rule against another person who is not a party to the action but who may be liable to him for all or part of the claim against him.

When a counterclaim is asserted against a plaintiff, he may, under proper circumstances, cause a third party to be brought into the action.

Ark. R. Civ. P. 14.

# Pleadings

## Form of Pleadings

### **Caption; Names of Parties; Contact Information**

Every pleading shall have a caption setting forth the name of the court, the title of the action, the case number and a designation as in Ark. R. Civ. P. 7 (a).

In a complaint, the title of the action shall include the names of all the parties. In all other pleadings, the title shall include at least the name of the first party with an indication that there are other parties.

To the extent the following information is available, all pleadings shall contain the name, bar number, mailing address, telephone number, fax number and email address of the attorney signing the pleading, or of the party if self-represented.

Ark. R. Civ. P. 10 (a).

### **Statements of Claim & Defense**

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances.

A paragraph may be referred to by number in all succeeding pleadings. Each claim founded on a separate transaction or occurrence shall be in a separate count.

Each defense other than denials shall be in a separate defense.

Ark. R. Civ. P. 10 (b).

Statements should be direct and stated in ordinary and concise language. Ark. R. Civ. P. 8 (e).

### **Adoption by Reference**

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A

copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. Ark. R. Civ. P. 10 (c).

### **Required Exhibits**

A copy of a writing upon which a claim or defense is based shall be attached as an exhibit to the appropriate pleading (unless good cause for its absence is shown). Ark. R. Civ. P. 10(d). [NOTE: It is the intent of Ark. R. Civ. P. 10 that exhibits should be attached in all but exceptional cases. "Good cause" for not attaching is determined by the court. (Ark. R. Civ. P. 10, Rep. Note 4).]

### **Signing**

Except as provided in Ark. R. Civ. P. 87, every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his or her individual name. A party who is not represented by an attorney shall sign his or her pleading, motion, or other paper.

No pleading need be verified or accompanied by an affidavit unless required by the Arkansas Rules of Civil Procedure.

The signature of an attorney or party certifies that:

The pleading, motion, or other paper is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

The claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

The factual contentions have evidentiary support;

The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information;

When a party's claim or affirmative defense may only be established in whole or in part by expert testimony, the party has consulted with at least one expert, or has learned in discovery of the opinion of at least one expert, who

Is believed to be competent under Ark. R. Evid. 702 to express an opinion in the action and

Concludes on the basis of the available information that there is a reasonable basis to assert the claim or affirmative defense; and

The pleading, motion, or other paper complies with the requirements of Ark. R. Civ. P. 5(c)(2) regarding redaction of confidential information from case records submitted to the court.

Ark. R. Civ. P. 11(b).

### **Failure to comply with Rule & Sanctions**

If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon any attorney or party who violated this rule an appropriate sanction.

Sanctions that may be imposed for violations of this rule include, but are not limited to:

An order dismissing a claim or action;

An order striking a pleading or motion;

An order entering judgment by default;

An order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee;

An order to pay a penalty to the court;

An order awarding damages attributable to the delay or misconduct;

An order referring an attorney to the Supreme Court Committee on Professional Conduct or the appropriate disciplinary body of another state.

The court's order imposing a sanction shall describe the sanctioned conduct and explain the basis for the sanction. If a monetary sanction is imposed, the order shall explain how it was determined.

The court shall not impose a monetary sanction against a represented party for violating Ark. R. Civ. P. 11 (b)(2) on its own initiative, unless it issued a show-cause order under Ark. R. Civ. P. 11 (c)(6) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

A motion for sanctions shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate Ark. R. Civ. P. 11(b). It shall be served as provided in Ark. R. Civ. P. 5 but shall not be filed with or presented to the court unless, within twenty-one days after service of the motion, or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

On its own initiative, the court may order an attorney or party to show cause why conduct specifically described in the order has not violated Ark. R. Civ. P. 11 (b). The order shall afford the attorney or party a reasonable time to respond, but not less than fourteen days.

Ark. R. Civ. P. 11(c).

### **Claim for Relief**

A claim shall contain:

A statement of the grounds for venue and jurisdiction (unless already established);

A statement of facts showing entitlement to relief; and

A demand for the relief to which entitled.

A claim may contain:

Claim for relief in the alternative;

Two or more claims (when permitted by Ark. R. Civ. P. 18), provided that each claim shall be set forth in separate, numbered counts.

Claims for unliquidated damages must specify amount or recovery is limited to an amount less than that required for federal diversity jurisdiction, unless language of demand indicates a larger amount.

Ark. R. Civ. P. 8(a).

### **Denials**

Defenses to each claim shall be stated in ordinary and concise language.

Admission or denial of each averment shall be made.

If a party is without sufficient knowledge or information regarding an averment, a statement to that effect shall constitute a denial.

Denials shall fairly meet substance of averments denied.

A party may specify what part of an averment is true and deny the remainder.

When a party intends in good faith to deny all averments, including the court's jurisdiction, a general denial may be made.

A party shall set forth all of his defenses, legal and equitable.

Ark R. Civ. P. 8(b).

### **Affirmative Defenses**

When a party responds to a complaint or other claim, the following shall be affirmatively set forth:

Accord and satisfaction;

Arbitration and award;

Comparative fault;

Discharge in bankruptcy;

Duress;

Estoppel;

Exclusiveness of Workmen's Compensation remedy;

Failure of consideration;

Fraud;

Illegality;

Injury by fellow servant;

Laches;

License;

Payment;

Release;

Res judicata;

Set-off;

Statute of frauds;

Statute of limitations;

Waiver; and

Any other matter constituting an avoidance or affirmative defense.

Where mistakenly designated the court may treat a counterclaim as a defense or a defense as a counterclaim as justice requires.

An averment (other than the amount of damage) in a pleading, to which a responsive pleading is required, is deemed admitted unless denied.

An averment in a pleading to which no responsive pleading is required is deemed denied.

Ark. R. Civ. P. 8.

## **Counterclaims**

### **Compulsory**

Any existing claim against the opposing party shall be stated if it arises out of the same transaction or occurrence and its adjudication does not require third parties over whom the court cannot acquire jurisdiction.

A claim need not be stated if at the time the action was commenced the claim was the subject of another pending action, or the suit was brought by attachment or other process whereby the court could not render a personal judgment on that claim, and the pleader is not stating counterclaim under

Ark. R. Civ. P. 13(a).

**Permissive**

Any cause of action against the opposing party may be stated even though it did not arise out of the same transaction or occurrence. Ark. R. Civ. P. 13(b).

**Exceeding Opposing Claim**

A counterclaim may exceed the amount or seek different relief than claimed in pleading of opposing party. Ark. R. Civ. P. 13(c).

**Omitted Counterclaims**

An omitted counterclaim may be asserted by amended or supplemental pleading subject to Ark. R. Civ. P. 15.

Ark. R. Civ. P. 13(e).

**Joinder of Additional Parties**

Joinder of additional parties as may be required by a counterclaim shall be made in accordance with Ark. R. Civ. P. 19 and 20.

Ark. R. Civ. P. 13(g).

**Separate Trials & Judgments**

If the court orders separate trials as provided in Ark. R. Civ. P. 42(b), judgment on a counterclaim may be rendered in accordance with the terms of Ark. R. Civ. P. 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of. Ark. R. Civ. P. 13(h).

**Cross-Claims****Against Co-Party**

A party may assert an independent claim against a co-party when such claim arose out of the same transaction or occurrence of the original claim or counterclaim, or relates to any property that is the subject matter of the original action.

The pleader may allege cross-defendant is liable for all or part of any claim asserted against the pleader. Ark. R. Civ. P. 13(f).

### **Joinder of Additional Parties**

Joinder of additional parties as may be required by a cross-claim shall be made in accordance with Ark. R. Civ. P. 19 and 20.

Ark. R. Civ. P.13(g).

### **Separate Trials & Judgments**

If the court orders separate trials as provided in Ark. R. Civ. P. 42(b), judgment on a cross-claim may be rendered in accordance with the terms of Ark. R. Civ. P. 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of. Ark. R. Civ. P. 13(h).

## **Amendments**

### **To Pleadings**

Amendments to pleadings may be made at any time without leave of court unless, upon motion, the court finds it would cause prejudice or undue delay (whereupon, the court may strike the amended pleading or grant a continuance).

Unless the court orders otherwise, a responsive pleading to an amended pleading shall be made with the longer of the time remaining for response to the original pleading, or twenty days after service of the amended pleading. Ark. R. Civ. P. 15(a).

### **To Conform with Evidence**

Issues not raised by the pleadings but tried with express or implied consent of the parties shall be treated as if raised by the pleadings.

Upon motion of a party at any time, even after judgment, amendments may be made to conform the pleadings to the evidence and raise issues interjected by the evidence.

The court has discretion to permit amendment of the pleadings over an objection that an issue raised is not within the scope of the pleadings.

The court may grant a continuance to the party opposing the amendment.

Ark. R. Civ. P. 15(b).

### **Relation Back**

An amendment relates back to the original pleading when it arises out of the same conduct, transaction, or occurrence.

An amendment changing the party against whom a claim is made relates back if:

It arises out of the same conduct, transaction, or occurrence;  
and

Within the statute of limitations period, the party:

Had such notice of the action that maintaining a  
defense on the merits is not prejudiced; and

Knew or should have known that the action would have  
been brought against him, but for a mistake in identity.

Ark. R. Civ. P. 15(c).

### **Supplemental Pleadings**

Supplemental pleadings may be made at any time without leave of court unless, upon motion, the court finds it would cause prejudice or undue delay (whereupon, the court may strike the amended pleading or grant a continuance).

Unless the court orders otherwise, a responsive pleading to a supplemental pleading shall be made with the longer of the time remaining for response to

the original pleading, or twenty days after service of the supplemental pleading. Ark. R. Civ. P. 15(d).

## **Defenses**

### **When Presented**

The time for answering the complaint is as follows:

Resident defendant – thirty days after service;

Nonresident defendant – thirty days after service;

Defendant served under Ark. R. Civ. P. 4(g)(3) or (4) – thirty days after first publication (but even failing to so answer, may appear and defend at any time prior to judgment and, upon imposing substantial defense, may obtain time to prepare for trial);

Party served with a counterclaim or cross-claim – thirty days after service.

Incarcerated defendant – sixty days after service.

The court may, on motion, extend time for any responsive pleading.

Times for filing responsive pleading are altered by filing of a motion as follows:

After action by court on motion under Ark. R. Civ. P. 12 - ten days after notice of action;

After more definite statement filed pursuant to granting of motion for same - ten days after service of the more definite statement.

Ark. R. Civ. P. 12(a).

## How Presented

Where responsive pleading is required, every defense shall be asserted therein, except the following defenses which may be asserted by motion:

Lack of jurisdiction over the subject matter;

Lack of jurisdiction over the person;

Improper venue;

Insufficiency of process;

Insufficiency of service of process;

Failure to state facts upon which relief can be granted;

Failure to join a party under Ark. R. Civ. P. 19; and

Pendency of another action between the same parties arising out of the same transaction or occurrence.

The motion shall be made before pleading if a further pleading is permitted.

Defenses or objections are not waived by being joined with others in the responsive pleading or motion.

When a responsive pleading to a claim is not required, any defense in law or fact to that claim may be asserted at trial.

When a motion asserts a failure to state facts upon which relief can be granted and the court permits matters outside the pleading to be heard, the motion shall be treated as a motion for summary judgment under Ark. R. Civ. P. 56, and parties shall be given reasonable opportunity to present all pertinent material.

Ark. R. Civ. P. 12(b).

### **Preliminary Hearings on Defenses**

Unless the court orders deference until trial, the following matters, upon application of any party, shall be heard and determined before trial:

Any defenses specifically mentioned in Ark. R. Civ. P. 12(b), whether raised by pleading or motion; and

A motion for judgment on the pleadings under Ark. R. Civ. P. 12(c).

Ark. R. Civ. P. 12(d).

### **Waiver or Preservation**

A defense of lack of jurisdiction, improper venue, insufficiency of process, insufficiency of service of process, or pendency of another action between same parties arising out of same transaction or occurrence is waived if it is:

Omitted from a motion made under Ark. R. Civ. P. 12(g); or

Neither made by motion under Ark. R. Civ. P. 12, nor included in the original responsive pleading.

A defense of failure to state facts upon which relief can be granted, a defense of failure to join a party indispensable under Ark. R. Civ. P. 19, and an objection of failure to state a legal defense to a claim, although not made by motion or pleading under Ark. R. Civ. P. 12, may be made in any pleading permitted or ordered under Ark. R. Civ. P. 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Whenever it appears that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Ark. R. Civ. P. 12(h).

## **Consolidation**

A movant under Ark. R. Civ. P. 12 may join with it any other motions provided for in Ark. R. Civ. P. 12 and then available to him.

A movant who omits a defense or objection that may be raised by motion under Ark. R. Civ. P. 12 may not raise such defense or objection by motion, except for:

Defense of failure to state facts upon which relief can be granted;

Defense of failure to join indispensable party under Ark. R. Civ. P. 19; and

Objection of failure to state a legal defense to a claim.

Ark. R. Civ. P. 12(g).

## **Motion for Judgment on the Pleadings**

A party may move for judgment on the pleadings after pleadings are closed; but within such time as to not delay trial.

If the court permits matters outside the pleadings to be heard, the motion shall be treated as a motion for summary judgment under Ark. R. Civ. P. 56, and parties shall be given reasonable opportunity to present all pertinent material.

Ark. R. Civ. P. 12(c).

## **Motion for a More Definite Statement**

A party may move for a more definite statement, before interposing a responsive pleading, when the pleading requiring a response is so vague or ambiguous that it is unreasonable to require a responsive pleading. The motion shall point out the defects and the details desired.

If there is no compliance with the court's order granting the motion within ten days after notice of the order (or such other time as the court may fix), the court may strike the pleading or make such other orders as is deemed just.

Ark. R. Civ. P. 12(e).

### **Motion to Strike**

The court may strike from any pleading any insufficient defense or redundant, immaterial, impertinent, or scandalous matter. Ark. R. Civ. P. 12(f).

## **Discovery**

### **Scope of Discovery**

Parties may obtain discovery regarding:

Any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of any books, documents, or other tangible things and the identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at the trial of any cause;

Liability insurance agreements;

Material prepared for trial by any party or party's representative, upon a showing of substantial need and inability to obtain evidence without undue hardship (does not include mental impressions, conclusions, opinions, or legal theories of party's representative);

Statements of party or other person previously made if it is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim

recital of an oral statement by the person making it and contemporaneously recorded.

The identity of expert witnesses as well as subject of testimony and grounds therefore; and

Reports of physical or mental examinations conducted by other experts as well as other facts or opinions upon showing of exceptional circumstances making discovery by other means impractical.

Ark. R. Civ. P. 26(b).

## **Depositions**

### **In General**

Depositions may be oral (Ark. R. Civ. P. 30), on written questions (Ark. R. Civ. P. 31) or taken to perpetuate testimony. (Ark. R. Civ. P. 27).

Depositions shall be taken before a person authorized to administer oaths; or designated by court. Ark. R. Civ. P. 28(a).

Depositions shall be taken in a foreign state or country before a person either authorized to administer oaths in said jurisdiction or by a person either commissioned by the court or by letter of request. A commission shall be issued upon application and notice, upon terms that are just and appropriate, and with designation by name or descriptive title. Ark. R. Civ. P. 28(b).

A party desiring to take a deposition for use in a judicial proceeding in a foreign jurisdiction must produce a letter rogatory to a judge of the circuit court in the county where the witness or person in possession of the thing to be produced is located. The court shall issue a subpoena requiring the witness to attend at a specified time and place for examination. In case of failure of the witness to attend or refusal to be sworn or to testify or to produce the document or thing requested, the court may find the witness in contempt. Ark. R. Civ. P. 28(c).

## **Oral Examination**

A deposition may be taken without leave of court after the expiration of thirty days after service of the summons and complaint on the defendant. Leave of court is also not required within thirty days if the defendant has sought discovery or if special notice has been given, including a statement of supporting facts to the effect that the deponent is about to leave the state or country making examination at a proper time impossible. Ark. R. Civ. P. 30.

A prisoner may be subpoenaed for examination with leave of court. Ark. R. Civ. P. 30(a).

The court may, for cause, lengthen or shorten the time to take a deposition or produce documents. Ark. R. Civ. P. 30(a) and (b)(5).

The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound and visual, or stenographic means. Ark. R. Civ. P. 30(b)(3).

Evidence objected to during the examination shall be taken subject to objections. A lawyer shall not instruct a witness not to answer unless privileged information is sought, or to enforce a limitation on evidence imposed by the court. Ark. R. Civ. P. 30(c) and (d).

The court may order a party giving notice of examination to pay reasonable expenses and attorney's fees incurred by adverse party in attending examination, when party giving notice fails to attend the examination or fails to subpoena the deponent. Ark. R. Civ. P. 30(g).

## **Written Questions**

Depositions upon written questions may be served after commencement of action. Leave of court is not necessary unless a prisoner is to be subpoenaed.

Unless altered by the court, the time for service of questions is:

Cross questions within fourteen days of direct questions;  
Redirect questions within seven days of cross questions; and  
Recross questions within seven days of redirect questions.

Ark. R. Civ. P. 31(a).

### **To Perpetuate Testimony**

Testimony of a witness may be perpetuated for use in a subsequent action upon the filing of a verified petition requesting an order to perpetuate testimony. The petition must show:

That the petitioner expects to be a party to an action cognizable in a court in this state but is presently unable to bring it;

The subject matter of action and petitioner's interest therein;

The facts to be established and reasons for perpetuating testimony;

The names or a description of persons petitioner expects will be adverse parties and their addresses if known; and

The names and addresses of the persons to be examined and the substance of each witness's testimony. Ark. R. Civ. P. 27(a)(1).

The petitioner must serve those named in the petition at least twenty days before the date of the hearing. If service cannot be made after due diligence, the court may order service by publication. The court shall appoint counsel for persons not served in the manner provided in Ark. R. Civ. P. 4. If any expected adverse party is a minor or incompetent, the provisions of Ark. R. Civ. P. 17(b) apply. Ark. R. Civ. P. 27(a)(2).

The court shall order perpetuation of the testimony if it is satisfied that it may prevent a failure or delay or justice. The order shall designate the persons whose depositions may be taken and specify the

subject matter of the examination and whether the deposition shall be taken upon oral examination or written interrogatories. Ark. R. Civ. P. 27(a)(3).

### **Use at Trial**

Any part or all of a deposition may be used at trial or a hearing or an interlocutory proceeding as though the witness were present and testifying, subject to the rules of evidence, as long as the adverse party was present or represented at the taking of the deposition or at least had reasonable notice thereof. Ark. R. Civ. P. 32(a)(1).

The deposition of a witness may be used by any party for any purpose if the court finds:

That the witness is dead;

That the witness is out of state or at a greater distance than one hundred miles from the courthouse;

That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

That such exceptional circumstances exist as to make it desirable, in the interest of justice. Ark. R. Civ. P. 32(a)(3).

When an action has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter.

A deposition previously taken may also be used as permitted by the Arkansas Rules of Evidence, *e.g.*, for impeachment purposes. Ark. R. Civ. P. 32(a)(4).

## Objections

Objections to the deposition may be made on the same grounds as if the witness were present.

However, objections to notice of examination are waived unless they are made in writing and promptly served on the adverse party. Ark. R. Civ. P. 32(d)(1).

Objections to qualifications of the examining officer are waived unless made before the deposition was taken or as soon as the disqualification becomes known or could have been discovered with reasonable diligence. Ark. R. Civ. P. 32(d)(2).

Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are waived if the objection is one that might have been cured if presented at that time. Ark. R. Civ. P. 32(d)(3)(A).

The following objections, based on errors occurring at the oral examination, are waived unless a seasonable objection thereto is made at the deposition:

Form of question;

Manner of taking deposition;

Form of answers;

Oath or affirmation;

Conduct of parties; and

Other avoidable errors. Ark. R. Civ. P. 32(d)(3)(B).

Objections to the form of written questions are waived unless served in writing upon propounding party within the time allowed for succeeding cross or other questions and within five days of service of the last authorized questions. Ark. R. Civ. P. 32(d)(3)(C).

Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, or filed are waived unless a motion to suppress is made with reasonable promptness after the error is discovered or discoverable. Ark. R. Civ. P. 32(d)(4).

### **Interrogatories**

Without leave of court, interrogatories may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Interrogatories shall be answered separately and fully, in writing, under oath, and signed by the person answering. Objections shall be stated with the reasons for the objection and signed by the attorney objecting. The party shall answer to the extent the interrogatory is not objectionable.

Answers or objections shall be served:

By any party within thirty days after service of interrogatories;

By defendant within forty-five days after service of summons and complaint, or within thirty days after service of interrogatories, whichever is longer; or

Within such time as the court allows.

Interrogatories may relate to any matters which can be inquired into under Ark. R. Civ. P 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory that involves an opinion or contention about a fact or the application of law to a fact is not necessarily objectionable, but the court may delay an answer until after designated discovery has been completed or until a pretrial conference or another later time.

Where compilation or examination of records is necessary to answer an interrogatory and the burden is as great for one party as the other, the answering party may merely open their records to the serving party.

Ark. R. Civ. P. 33.

### **Production of Documents**

A party may serve another with a request:

To produce documents for inspection and reproduction;

To produce any tangible thing for testing, copying, inspection, or sampling; or

To permit entry on land or property for inspection, measurement, surveying, photographing, testing, or sampling. Ark. R. Civ. P. 34(a).

The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

The request shall set forth the items to be inspected and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and, manner of making the inspection and performing the related acts.

A written response shall be served:

By any party within thirty days of service of request;

By defendant within forty-five days after service of summons and complaint, or within thirty days of service of request, whichever is longer; or

Within such time as permitted by the court.

The response shall permit inspection as to each item or category. The party may object as to specified items or parts of categories, with the reasons for the objection stated and allowing inspection of the remaining parts.

The party submitting the request may move for an order under Ark. R. Civ. P. 37(a) with respect to any objection to or other failure to respond or failure to permit inspection as requested.

An independent action against a nonparty for production of documents and things or permission to enter land is not precluded by this rule.

A party who produces documents for inspection shall organize and label them to correspond with the categories in the production request or produce them as kept in the usual course of business.

Ark. R. Civ. P. 34.

### **Physical or Mental Examination**

When the mental or physical condition of a party, or a person in the custody of a party, is in controversy, the court may order the party to submit to an examination or to produce the person in the party's custody or legal control for examination.

The order shall issue only on motion for good cause shown and upon notice to the person to be examined and to all parties. It shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

The party examined or to whom order is made is entitled to a copy of the report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, and all earlier reports of examinations of the same condition.

After delivery, the party causing the examination shall be entitled, upon request to receive the same.

If the physician fails or refuses to make a report, the court may exclude his or her testimony at trial.

By requesting and obtaining a report of the examination or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

A party who relies upon his or her physical, mental, or emotional condition as an element of his or her claim or defense shall execute an authorization to allow such other party to obtain copies of his or her medical records. They shall do so within thirty days of the request unless a shorter or longer time is agreed to or ordered by the court.

A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than:

The furnishing of medical records, and

Communications in the context of formal discovery procedures.

“Medical records” means any writing, document, or electronically stored information pertaining to or created as a result of treatment, diagnosis, or examination of a patient.

Ark. R. Civ. P. 35.

### **Requests for Admission**

For purposes of a pending action, a party may serve on another party a written request to admit the truth of any matters within the scope of Ark. R. Civ. P. 26(b). The request may be served without leave of court on the plaintiff any time after commencement of the action, or on any other party after service of summons and complaint on that party. The request shall:

Set forth separately matters to be admitted that relate to statements or opinions of fact;

Describe any documents the genuineness of which is questioned; and

Attach copies of documents unless otherwise furnished or made available for inspection and copying.

The answer shall be written and signed by the party or their attorney. It shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.

A denial shall fairly meet the substance of the requested admission.

The answer shall only qualify the answer or admit only part of the matter if good faith so requires.

The answer shall only give lack of information or knowledge as a reason for failure to answer if it is stated that a reasonable inquiry has been made and available information is insufficient to enable an answer to be made.

Objections shall be written and signed and give the reasons for the objection. An objection shall not solely be based on the ground that the admission presents a genuine issue of fact for trial. The party may deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. If the objection is not justified, the court shall order the answer served.

If the answer does not comply with the requirements of Ark. R. Civ. P. 36, the court may order the matter admitted or order an amended answer.

The court may, also determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial.

An admission conclusively establishes a matter unless the court grants a motion for withdrawal or amendment of admission.

An admission may be amended under Ark. R. Civ. P. 16 when the presentation of the merits of the action will be served thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense.

Requests for admissions must be filed in a separate document and shall not be combined with interrogatories, document production requests, or any other material.

Ark. R. Civ. P. 36.

### **Protective Orders**

On the motion of a party seeking discovery or examination and for good cause shown, the court may make orders justly required to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

The movant should state that they have conferred with or attempted to confer with the other party in good faith in an effort to resolve the dispute without court action.

The order may:

Preclude discovery;

Permit discovery on specified terms and conditions;

Permit discovery only by a method other than that chosen;

Limit the scope of discovery;

Preclude discovery of certain things;

Designate only certain persons to be present at examination;

Require a deposition to be sealed and opened only by court order;

Preclude or limit disclosure of confidential research, development, or commercial information; or

Require simultaneous filing of specified documents or information in sealed envelopes to be opened only as court directs.

If a motion for a protective order is denied, in whole or part, the court may order discovery on such terms and conditions as are just. Ark. R. Civ. P. 26(c).

With regard to depositions on oral examination – either party or deponent may move to terminate or limit examination, at any time during examination, upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.

Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. Ark. R. Civ. P. 30(d)(4).

### **Sanctions**

A party may apply for an order compelling discovery. The application must be made to the court in which the action is pending or, on matters relating to a deposition, to the court in the place where the deposition is being taken. It shall include a statement that the party has attempted in good faith to resolve the issue without court action. The party may complete or adjourn the examination before he applies for an order. Reasonable notice must be given to all parties. Ark. R. Civ. P. 37(a).

A party may move for an order compelling discovery on the following grounds:

Deponent fails to answer a question under Ark. R. Civ. P. 30 or 31;

Corporation, business association, or governmental agency fails to make a designation under Ark. R. Civ. P. 30(b)(6), 31(a);

Party fails to answer interrogatories under Ark. R. Civ. P. 33;

Party fails to permit inspection requested under Ark. R. Civ. P. 34; or

Party's answers are evasive or incomplete. Ark. R. Civ. P. 37(a).

If the motion is granted, the court shall, after an opportunity for a hearing, require the party or deponent whose conduct necessitated the motion (or their attorney) to pay reasonable expenses and attorney's fees incurred in obtaining the order, unless however, the court finds:

That the movant did not make a good faith effort to obtain the discovery without court action;

That the opposing party's response or objection was substantially justified; or

That other circumstances make an award of expenses unjust.

If the motion is denied, the court may enter any protective order authorized under Ark. R. Civ. P. 26(c). With opportunity for hearing, the court may also order the moving party, attorney, or both to pay the costs incurred in opposing the motion, unless it finds that the motion was justified or that an award of expenses would be unjust. Ark. R. Civ. P. 37(a).

If the motion is granted in part and denied in part, costs shall be apportioned as justice so requires.

Upon failure to comply with the order to permit discovery, the court in the district in which the deposition is taken may find deponent in contempt for failure to be sworn or failure to answer. Ark. R. Civ. P. 37(b).

The court in which the action is pending may make an order:

Establishing facts involved or other designated facts;

Forbidding deponent an opportunity to oppose or support designated claim or defense;

Prohibiting introduction of designated matter in evidence;

Striking pleadings or facts of pleadings;

Staying further proceedings until discovery permitted;

Dismissing action or proceeding or part thereof;

Rendering default judgment; or

In lieu of or in addition to foregoing:

Finding deponent in contempt for failure to permit any discovery except a mental or physical examination; or

Requiring payment of costs incurred in obtaining order unless failure to permit discovery is justified or award unjust.

Ark. R. Civ. P. 37(b).

Upon a failure to admit or deny a request to admit if the genuineness of the document or the truth of the matter in question is later proved, the party making the request may apply for an order requiring the other party to pay the reasonable expenses incurred in making that proof. Such an order shall be made unless:

Request to admit was objectionable under Ark. R. Civ. P. 36(a);

Admission was of no substantial importance in the proceedings;

Adverse party had reasonable grounds to believe that he might prevail in objection; or

Adverse party demonstrates good reason for failure to answer.

Ark. R. Civ. P. 37(c).

If party deponent or designated officer upon proper notice of deposition or other discovery fails to:

Appear for examination;

Serve answer or objection to interrogatories; or

Serve written response to request for inspection of property;

The court in which the action is pending may upon motion make an order:

Establishing facts;

Forbidding opportunity to oppose or support certain claims;

Prohibiting introduction of certain evidence;

Dismissing the action or proceeding or any part thereof;

Entering a default judgment against the disobedient party; or

In lieu of or in addition to above, awarding costs against adverse party, his attorney or both unless the failure is justified or such award unjust.

The failure to act may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided in Ark. R. Civ. P. 26(c).

Ark. R. Civ. P. 37(d).

Expenses may not be awarded against the state except as provided by law.

Ark. R. Civ. P. 37(f).

### **Electronic Discovery**

The parties may agree to pursue electronic discovery, or the court may order electronic discovery on motion for good cause shown. Any such agreement or motion shall be made within one hundred twenty days after the date that the complaint was filed. The court may extend or reopen this period for good cause. Ark. R. Civ. P. 26.1(b).

Within thirty days of an agreement or order to engage in electronic discovery, the parties shall confer. At this conference, the parties shall discuss and plan for the following issues:

Any issues relating to preservation of discoverable information;

The form in which each type of the information will be produced;

The period within which the information will be produced;

The method for asserting or preserving claims of privilege or of protection of the information such as trial-preparation materials, including the manner in which such claims may be asserted after production;

The method for asserting or preserving confidentiality and proprietary status of information relating to a party or a person not a party to the proceeding;

Whether allocation among the parties of the expense of production is appropriate; and,

Any other issue relating to the discovery of electronically stored information.

Following the planning conference, the parties shall:

Develop a proposed plan relating to discovery of the information; and

Not later than fourteen days after the conference, submit to the court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

Ark. R. Civ. P. 26.1(c).

The court may issue an order governing the discovery of electronically stored information pursuant to:

A motion by a party seeking discovery of the information or by a party or person from which discovery of the information is sought;

A stipulation of the parties and of any person not a party from which discovery of the information is sought, or

The court's own motion, after reasonable notice to, and an opportunity to be heard from, the parties and any person not a party from which discovery of the information is sought.

An order governing discovery of electronically stored information may address:

Whether discovery of information is reasonably likely to be sought in the proceedings;

Preservation of the information;

The form in which each type of the information is to be produced;

The time within which the information is to be produced;

The permissible scope of discovery of the information;

The method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;

The method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;

Allocation of the expense of production; and

Any other issue relating to the discovery of the information.

Ark. R. Civ. P. 26.1(d).

Absent exceptional circumstances, the court may not impose sanctions on a party for failure to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system. Ark. R. Civ. P. 26.1(e).

A party may serve on any other party a request for production of electronically stored information and for permission to inspect, copy, test, or

sample the information. A party on which a request to produce electronically stored information has been served shall, in a timely manner, serve a response on the requesting party. The response must state, with respect to each item or category in the request:

That inspection, copying, testing, or sampling of the information will be permitted as requested; or

Any objection to the request and the reasons for the objection.

Ark. R. Civ. P. 26.1(f).

Unless the parties otherwise agree or the court otherwise orders:

The responding party shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably useful;

If necessary, the responding party shall also produce any specialized software, material, or information not ordinarily available so that the requesting party can access and use the information in its ordinarily maintained form; and

A party need not produce the same electronically stored information in more than one form. Ark. R. Civ. P. 26.1(g).

A party may object to discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. In its objection, the party shall identify the reason for such undue burden or expense.

On motion to compel discovery or for a protective order relating to the discovery of electronically stored information, a party objecting bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

The court may order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or

expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

If the court orders discovery of electronically stored information, it may set conditions for discovery of the information, including allocation of the expense of discovery.

The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that:

It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;

The discovery sought is unreasonably cumulative or duplicative;

The party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. Ark. R. Civ. P. 26.1(h).

A claim of privilege or protection after production of electronic data shall be governed by Ark. R. Civ. P. 26(b)(5) unless the application of that rule is modified by agreement of the parties or by order of the court. Ark. R. Civ. P. 26.1(i).

A subpoena may require that electronically stored information be produced and that the party serving the subpoena or person acting on the party's request be permitted to inspect, copy, test, or sample the information.

A party serving a subpoena requiring production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

An order of the court requiring compliance with a subpoena for electronically stored information must provide protection to a person that is neither a party nor a party's officer from undue burden or expense resulting from compliance. Ark. R. Civ. P. 26.1(j).

### **Pre-Trial Conference**

A pretrial conference may be held at the discretion of the court. The attorneys for all parties shall appear at the conference to consider:

Simplification of issues;

Necessity or desirability of amending pleadings;

Possibility of obtaining admissions of fact and documents to avoid unnecessary proof;

Limiting number of expert witnesses;

Advisability of preliminary reference of issues to master;

Such other matters as may aid in the disposition of the action; and

The possibility of settlement or the use of extrajudicial procedures, including mediation, to resolve the dispute.

At the conclusion of the conference, the court shall make an order:

Reciting the action(s) taken;

Specifying the amendments allowed to the pleadings;

Reciting the agreements made by the parties; and

Limiting the issues for trial to those not disposed of by admissions or agreements of counsel.

The order controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration. The court may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Ark. R. Civ. P. 16.

There is a sample Scheduling Order in the Appendix on page 128.

## **Adjudication Without Trial**

### **Summary of Challenges to Pleadings**

A motion for judgment on the pleadings may be made after the pleadings are closed and within such a time as not to delay trial. Such a motion can be made by any party. The motion shall be treated as one for summary judgment and disposed of as provided in Ark. R. Civ. P. 56, meaning that all parties are to be given a reasonable opportunity to present all material pertinent to such a motion. Ark. R. Civ. P. 12(c).

Unless waived (*See* Ark. R. Civ. P. 12(h)), a party may object by motion or in responsive pleadings to:

Subject-matter jurisdiction;

Jurisdiction of the person;

Venue;

Sufficiency of process;

Sufficiency of service of process;

Failure to state facts upon which relief can be granted;

Failure to join a necessary party; or

Another action between the same parties arising out of the same transaction or occurrence is pending.

Other defenses must be asserted in the responsive pleadings.

Ark. R. Civ. P. 12(b).

A party may assert the following defenses in a motion for a judgment on the pleadings:

Failure to state facts upon which relief can be granted,

Failure to join a party indispensable under Ark. R. Civ. P. 19, and

Failure to state a legal defense. Ark. R. Civ. P. 12(h)(2).

A preliminary hearing may be conducted upon application of any party, unless deferred until trial by the court, to determine the motion for judgment on the pleadings or any of the defenses listed in Ark. R. Civ. P. 12(b).

Ark. R. Civ. P. 12(d).

A motion for a more definite statement may be made before responsive pleadings are filed, pointing out the defects in the pleadings and the details desired. If the motion is granted, the order of the court must be complied with within ten days or such time as the court fixes, or the court may strike the pleading. Ark. R. Civ. P. 12(e).

A motion to strike may be made before responsive pleadings are filed, or within thirty days after service of the pleading, or upon the court's own initiative at any time, by which the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Ark. R. Civ. P. 12(f).

## **Dismissal**

### **Voluntary Dismissal**

An action may be dismissed by the plaintiff voluntarily without prejudice to further action unless the case has been finally submitted to the court or jury, or the plaintiff has once before voluntarily dismissed an action based upon

the same claim (unless all parties agree by written stipulation that such dismissal is without prejudice).

Despite a voluntary dismissal by the plaintiff, the defendant may proceed with a counterclaim or set-off if it has been previously presented. Ark. R. Civ. P. 41(a).

### **Involuntary Dismissal**

Upon the court's own motion or on motion of defendant, an action may be dismissed for failure to prosecute, failure to comply with the Rules of Civil Procedure, or failure to comply with an order of court.

Involuntary dismissal is without prejudice unless the action has been previously dismissed, voluntarily or involuntarily. Ark. R. Civ. P. 41(b).

The court may order plaintiff to pay the costs of a prior dismissed action upon plaintiff's filing a new action on the same cause against the same defendant and may stay proceedings until plaintiff complies. Ark. R. Civ. P. 41(d).

The provisions of Ark. R. Civ. P. 41 are equally applicable to the dismissal of counter, cross, or third-party claims. Ark. R. Civ. P. 41(c).

### **Offer of Judgment**

More than ten days before trial, a party defending against a claim may serve an adverse party with an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.

Judgment shall be entered if, within ten days after service, the adverse party accepts offer in writing, and either party files the offer and notice of acceptance together with proof of service.

An offer not accepted shall be considered withdrawn and is inadmissible in evidence except in a proceeding to determine costs.

If the final judgment obtained (exclusive of interest) is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

An offer made but not accepted does not preclude a subsequent offer.

When liability has been determined by trial, but the amount of damages is to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial, if it is served not less than ten days prior to the further proceedings.

Ark. R. Civ. P. 68.

### **Default Judgment**

When a party against whom relief is sought has failed to plead or otherwise defend, the court may enter a default judgment in the kind and amount prayed for in the demand for judgment (as long as the defaulting party is not an infant or incompetent). Ark. R. Civ. P. 55(a).

A hearing or a jury trial may be conducted if necessary, to:

Take an account;

Determine damages;

Establish the truth of an averment; or

Investigate any other matter.

If defendant or his representative has appeared, written notice must be given at least three days prior to hearing. Ark. R. Civ. P. 55(b).

The court may set aside default judgment upon showing of:

Mistake, inadvertence surprise, or excusable neglect;

Judgment is void;

Fraud, misrepresentation, or other misconduct of adverse party; or

Any other reason justifying relief. Ark. R. Civ. P. 55(c).

If the case has been removed to federal court and thereafter remanded, no judgment by default shall be entered if the party filed an answer or a motion permitted by Rule 12 in the federal court during removal. Ark. R. Civ. P. 55(f).

### **Default Judgment with Service by Mail or Warning Order**

When a defendant is served by a warning order, default judgment shall not be taken unless an affidavit has been filed stating thirty days have elapsed since the first publication of the warning order. The affidavit shall be accompanied by the required proof of publication or posting of the warning order. If a defendant or other interested person is known to the party seeking judgment or to his or her attorney, the affidavit shall also state that 30 days have elapsed since a letter enclosing a copy of the warning order and the complaint was mailed to the defendant or other interested person. Ark. R. Civ. P. 4(g)(3).

### **Summary Judgment**

A party seeking to recover upon a claim, counterclaim, or cross-claim may move, with or without supporting affidavits, for summary judgment twenty days after the action has commenced or after service of a motion for summary judgment by the adverse party. The party must file any such motion no later than forty-five days before any scheduled trial date (absent leave of court for good cause shown). Ark. R. Civ. P. 56(a).

The adverse party shall serve his/her response and supporting materials, if any, within twenty-one days after the motion is served. The moving party may reply within fourteen days after service of response. Unless the court orders otherwise, no party shall file supporting materials after the time for serving a reply. Ark. R. Civ. P. 56(b) & (c)(1).

The court may hold a hearing on the motion not less than *seven* days after the time for serving a reply (or less, for good cause shown). Ark. R. Civ. P. 56(c)(1).

Affidavits in support of or in opposition to the motion shall:

Be based upon personal knowledge;

State facts admissible in evidence;

Show that affiant is competent to testify to matters contained;

Have attached sworn or certified copies of all documents referred to;  
and

State specific facts showing the existence of a genuine issue of fact,  
rather than a mere denial by the pleadings.

The court may permit affidavits to be supplemented by depositions, answers to interrogatories, and further affidavits. Ark. R. Civ. P. 56(e).

If for specified reasons an affidavit with regard to essential facts cannot be obtained, the court may refuse the application, permit more time to obtain affidavits for discovery, or make such other order as is just. Ark. R. Civ. P. 56(f).

If affidavits are made in bad faith or for the purpose of delay, the court shall order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. Ark. R. Civ. P. 56(g).

“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion.” Ark. R. Civ. P. 56(c)(2).

A partial summary judgment, interlocutory in character, may be rendered on any issue in the case, including liability.

If summary judgment is not rendered upon the whole case or for all the relief prayed, the court shall conduct a hearing to ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.

Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Ark. R. Civ. P. 56(d).

## **Mediation**

### **Alternative Dispute Resolution Processes**

Dispute resolution processes include, but are not limited to, negotiation, mediation, conciliation, arbitration, private judging, moderated settlement conferences, med-arb, fact finding, mini-trials, and summary jury trials. Ark Code Ann. §16-7-201.

### **Authority to Order Mediation**

Arkansas Code Annotated § 16-7-202 gives appellate and circuit courts the authority to order any civil, probate, domestic relations, or juvenile case to mediation.

### **Continuance**

It is the duty of each trial and appellate court to encourage the settlement of cases and controversies pending before it by suggesting the referral of a case or controversy to an appropriate dispute resolution process agreeable to the parties.

On motion of all the parties, the court must make such an order of reference and continue the case or controversy pending the outcome of the selected dispute resolution process. Ark. Code Ann §16-7-202.

### **Dispensation of Order to Mediate**

A party may move to dispense with the referral to mediation for good cause show. Ark. Code Ann §16-7-202.

“Good cause shown” shall include, but not be limited to, a party’s inability to pay the costs of mediation. Ark. Code Ann §16-7-202.

### **Selection of Mediator**

When a case is ordered to mediation, the parties may:

- (1) Choose an appropriate mediator from a roster provided by the Arkansas Alternative Dispute Resolution Commission of those mediators who meet the Commission's requirement guidelines for that type of case; or
- (2) Select a mediator not on the Commission's roster, if approved by the court.

Ark. Code Ann. §16-7-202.

### **Regulation of Mediators**

The Arkansas Alternative Dispute Resolution Commission is responsible for the regulation of mediators who are eligible to mediate court ordered cases. If the parties use a mediator who is not on the Commission’ roster, that mediator is not bound by ethical rules or subject to discipline by the ADR Commission.

The ADR Commission is housed and staffed within the Administrative Office of the Courts.

Ark. Code Ann. §16-7-201 et. seq.

In order to be certified and included on the ADR Commission's roster, mediators must meet education, training, practical experience, and good moral character requirements. The requirements differ depending on the category of certification. There are four categories of certification which correspond to the types of cases that may be ordered to mediation by the circuit court: civil, probate, domestic relations, and juvenile.

All certified mediators must adhere to ethical rules.

Ark. Code Ann. §16-7-201 et. seq.

### **Confidentiality**

A communication relating to the subject matter of any civil or criminal dispute made by a participant in a dispute resolution process, whether before or after the institution of formal judicial proceedings, is confidential and is not subject to disclosure and may not be used as evidence against a participant in any judicial or administrative proceeding.

Any record or writing made at a dispute resolution process is confidential and the participants or third party or parties facilitating the process shall not be required to testify in any proceeding related to or arising out of the dispute or subject to process requiring disclosure or production of information or data related to or arising out of the dispute.

Ark. Code Ann. § 16-7-206.

#### **Exceptions:**

If there are other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

Ark. Code Ann. § 16-7-206.

### **Mediator's Report to the Court**

The mediator is prohibited from providing an assessment, evaluation, recommendation, finding, or other communication regarding the mediation to the court.

The mediator may file a mediator's report with the court stating

- (1) whether or not the mediation occurred or has terminated;
- (2) whether a settlement was reached; and
- (3) who attended the mediation.

### **Relevant Caselaw**

The requirement of confidentiality set out in Ark. Code Ann. § 16-7-206 does not prevent the court from knowing the subject matter of the mediation. *Smyth v. Smyth*, 2019 Ark. App. 12.

Addresses discoverability of confidential mediated settlement agreement. *Wynne-Ark, Inc. D/B/A Kelleys' Restaurant v. Richard Baugh Construction*, 2020 Ark. App. 140.

There is no law prescribing a waiver of the right to a jury trial as a sanction for failing to comply with a court's order to mediate. *Bandy v. Vick*, 2020 Ark. 334.

### **Limitations of Actions**

The expiration of the statutory period for a particular action before a suit is commenced is a bar to further action. The statute of limitations is an affirmative defense that must be set forth in responsive pleading. Ark. R. Civ. P. 8(c).

The statutory period generally begins running when the cause of action accrues. *Williams v. Edmonson*, 257 Ark. 837, 520 S.W.2d 260 (1975).

The statutory period is tolled by:

Properly commencing an action by filing a complaint with the clerk of the proper court.

When the identity of the tortfeasor is unknown, upon affidavit of the fact designating tortfeasor as "John Doe" (Ark. Code Ann. § 16-56-125);

Military service in time of war and six months after war (Ark. Code Ann. § 16-56-118);

An injunction staying a suit filed within the statutory period (Ark. Code Ann. § 16-56-119);

A disability existing at the time the cause of action accrues, including infancy or incompetency (Ark. Code Ann. § 16-56-116); [NOTE: Once one of these disabilities is removed, plaintiff has three years in which to file suit. If concurrent disabilities exist, all must be removed for the statutory period to run.]

Defendant's leaving the county, absconding or concealing self, or doing any other improper act to prevent the commencement of the action (Ark. Code Ann. § 16-56-120);

Foreign debtor fraudulently absconding to this state to avoid suit (Ark. Code Ann. § 16-56-121).

The statutory period is not tolled by:

A verbal promise or acknowledgment in an action on a contract (Ark. Code Ann. § 16-56-122);

A written acknowledgment or promise by a joint contractor or executor as against the other (Ark. Code Ann. § 16-56-124); or

The endorsement by the payee of payment on a bond. Ark. Code Ann. § 16-56-123.

The statutory period applies to demands by way of set-off whether by plea, notice, or otherwise. Ark. Code Ann. § 16-56-102.

The statutory period does not apply in suits to enforce payment of bills, notes, or evidences of debt issued by bank or moneyed corporation Ark. Code Ann. § 16-56-103.

### **Declaratory Judgments**

The procedure for obtaining a declaratory judgment is outlined in Ark. Code Ann. §§ 16-111-101 et. seq. Courts may declare rights, status, and other legal relations whether or not further relief is or could be claimed. Ark. Code Ann. § 16-111-101.

Such declarations shall be treated as a final judgment. Ark. Code Ann. § 16-111-107.

A person may seek declaratory relief in any proceeding if the judgment will terminate the controversy or remove an uncertainty. Ark. Code Ann. § 16-111-105 and Ark. Code Ann. § 16-111-106.

The issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions. Ark. Code Ann. § 16-111-109.

The right to a jury trial is controlled by Ark. R. Civ. P. 38 and 39.

The court may advance an action for a declaratory judgment on the docket for a speedy hearing. Ark. R. Civ. P. 57.

### **Relevant Statutes**

Declaration of construction and validity: Ark. Code Ann. § 16-111-102.

Powers of fiduciaries: Ark. Code Ann. § 16-111-104.

## **Masters**

### **Appointment & Compensation**

Each court in which an action is pending may appoint a special master. The word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed a master shall be fixed by

the court and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but, when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party. Ark. R. Civ. P. 53(a).

### **Reference**

A reference to a master shall be the exception and not the rule. Reference shall be made only in those cases where there is no right to trial by jury or where such right has been waived. Except in matters of account and difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Ark. R. Civ. P. 53(b); *Hutton v. Savage*, 298 Ark. 256, 769 S.W.2d 394 (1989).

### **Power**

The order of reference to a master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them upon oath. The master shall cause a record to be made of the evidence offered and excluded. Ark. R. Civ. P. 53(c).

## **Proceedings**

**Meetings.** When a reference is made, the clerk shall furnish the master with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the master shall set a time and place for the first meeting of the parties or their attorneys to be held within the time specified by the court or otherwise within a reasonable time after receipt of the order of reference. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

**Witnesses.** The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Ark. R. Civ. P. 45. If without adequate excuse a witness fails to appear to give evidence, he may be punished for a contempt and be subject to the consequences, penalties, and remedies provided in Ark. R. Civ. P. 37 and Ark. R. Civ. P. 45.

**Statement of Accounts.** When matters of accounting are in issue before the master, he may prescribe the form in which the account shall be submitted and in any proper case may receive or require in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs. Ark. R. Civ. P. 53(d).

## **Report**

**Contents and Filing.** The master shall prepare a report upon the matters submitted to him by the order of reference, and, if required to make findings of fact and conclusions of law, he shall set them forth in his report. He shall

file the report with the clerk of the court and unless directed by the order of reference shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall mail to all parties notice of the filing.

**Effect.** The court shall accept the master's findings of fact unless clearly erroneous. Within twenty days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and objections thereto shall be by motion and upon notice as prescribed in Ark. R. Civ. P. 6 (c). The court after hearing may adopt the report or modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

**Stipulation as to Findings.** The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

**Draft Report.** Before filing his report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Ark. R. Civ. P. 53 (e).

## **VII. Criminal Procedure**

### **Arrest**

#### **Sufficiency of Affidavit for Arrest**

A judicial officer may issue a warrant for the arrest of a person if, from affidavit, recorded testimony, or other information, it appears there is reasonable cause to believe an offense has been committed and the person committed it. Ark. R. Crim. P. 7.1.

An affidavit or other documented information in support of an arrest warrant may be transmitted to the issuing judicial officer by facsimile or by other electronic means. Recorded testimony in support of an arrest warrant may be

received by telephone or other electronic means provided the issuing judicial officer first administers an oath by telephone or other electronic means to the person testifying in support of the issuance of the warrant.

Id.

*See* the Criminal Checklists beginning on Appendix page 1.

### **Sufficiency of Arrest Warrant**

Every arrest warrant shall:

Be in writing and in the name of the state;

Be directed to all law enforcement officers in the state;

Be signed by the issuing official with the title of his office and the date of issuance;

Specify the name of the accused or, if his name is unknown, any name or description by which he can be identified with reasonable certainty;

Have attached a copy of the information, if filed, or, if not filed, a copy of any affidavit supporting issuance; and

Command that the accused be arrested and that unless he complies with the terms of release specified in the warrant that he be brought before a judicial officer without unnecessary delay.

The warrant may specify the manner in which it is to be executed and may specify terms of release and requirements for appearance. Ark. R. Crim. P. 7.2.

The judge or magistrate must be satisfied that there are reasonable grounds for believing the charge, either from his or her personal knowledge or from information given to him or her on oath.

The arrest warrant shall name or describe the offense charged and the county in which it was committed. The warrant shall command the officer to arrest

the person named therein as the offender and bring him or her before some judge or magistrate of the county in which the offense was committed. Ark. Code Ann. § 16-81-104.

See the Criminal Checklists beginning on Appendix page 1.

An invalid arrest warrant may call for the suppression of a confession or other evidence but does not entitle a defendant to be discharged from responsibility for the alleged offense. *State v. Richardson*, 373 Ark. 1, 280 S.W.3d 20 (2008).

### **Phone Warrants**

**General Rule.** If the circumstances make it reasonable to dispense with a written affidavit, any judicial officer of this state may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

**Application.** The person who is requesting the warrant shall prepare a document, to be known as a duplicate original warrant and shall read such duplicate original warrant verbatim to the judicial officer.

The judicial officer shall enter verbatim what is so read to such magistrate on a document to be known as an original warrant.

The judicial officer may direct that the warrant be modified.

**Issuance.** If the judicial officer is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the judicial officer shall order the issuance of a warrant by directing the person requesting the warrant to sign the judicial officer's name on the duplicate original warrant.

The judicial officer shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued.

The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

**Recording and Certification of Testimony.** When a caller informs the judicial officer that the purpose of the call is to request a warrant, the judicial officer shall immediately place under oath each person whose testimony forms a basis for the application and each person applying for that warrant.

If a voice recording device is available, the judicial officer shall record by means of the device all of the call after the caller informs the judicial officer that the purpose of the call is to request a warrant.

Otherwise, a stenographic or longhand verbatim record shall be made immediately.

If a voice recording device is used or a stenographic record made, the judicial officer shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court.

If a longhand verbatim record is made, the judicial officer shall file a signed copy with the court.

**Motion to Suppress Precluded.** Absent a finding of bad faith, evidence obtained pursuant to a phoned warrant issued is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

Ark. Code Ann. § 16-82-201.

### **Arrest Without a Warrant**

A law enforcement officer may arrest a person without a warrant if:

The officer has reasonable cause to believe that such person has committed a felony;

The officer has reasonable cause to believe that such person has committed a traffic offense involving death or physical injury to a person, damage to property; or driving a vehicle while intoxicated;

The officer has reasonable cause to believe that such person has committed any violation of law in the officer's presence;

The officer has reasonable cause to believe that such person has committed acts of domestic violence occurring within four hours of arrest (if no physical injury) or within twelve hours of arrest (if physical injury involved)

The officer is otherwise authorized by law. Ark. R. Crim. P. 4.1.

*See also* Ark. Code Ann. § 16-81-106 which says that a law enforcement officer may make an arrest without a warrant where:

A public offense is committed in his or her presence;

He or she has reasonable grounds for believing that the person arrested has committed a felony; or

The officer has probable cause to believe that the person has committed battery upon another person, the officer finds evidence of bodily harm, and the officer reasonably believes that there is danger of violence unless the person alleged to have committed the battery is arrested without delay.

A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony, Ark. R. Crim. P. 4.1, or when he is ordered to by a judicial officer in whose presence a public offense is being committed. Ark. Code Ann. § 16-81-106.

### **Summons for a Misdemeanor Offense**

A judicial officer with the authority to issue an arrest warrant may issue, or authorize the clerk of the court to issue, a criminal summons in lieu thereof

in any case in which a complaint, information, or indictment is filed or returned against a person not already in custody. Ark. R. Crim. P. 6.1.

A prosecuting attorney who files an information or approves the filing of a complaint against a person not already in custody may authorize the clerk of a court Crim. to issue a criminal summons in lieu of an arrest warrant. Ark. R. Crim. P. 6.1.

A summons shall not be issued if:

The offense, or the manner in which it was committed, involved violence to a person or the risk or threat of imminent serious bodily injury; or

It appears that the person charged would not respond to a summons.

Ark. R. Crim. P. 6.1.

In determining whether the defendant would respond to a summons, appropriate considerations include, but are not limited to:

The nature and circumstances of the offense charged;

The weight of the evidence against the person;

Place and length of residence;

Present and past employment;

Family relationship;

Financial circumstances;

Apparent mental condition;

Past criminal record;

Previous record of appearance at court proceedings; and

Any other relevant information.

Ark. R. Crim. P. 6.1.

Warrantless entry into a person's home to effect a warrantless arrest for misdemeanor driving while intoxicated (DWI) is unreasonable. *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999).

*But see Stutte v. State*, 2014 Ark. App. 139, 432 S.W.3d 661 (where there was sufficient evidence of resisting arrest to justify intrusion).

### **DNA Sampling Upon Arrest**

A DNA sample shall be collected from:

An individual who is arrested for any felony offense;

An individual whose first appearance in court is caused by a citation or summons for a felony offense; and

An individual who is already in the custody of a law enforcement agency or a correctional agency and is the subject of a new felony charge when the new felony charge is separate from the charge or charges for which the person was previously arrested or confined and the law enforcement agency or the correctional agency cannot verify that the person's DNA record is stored in the state DNA Data Base or CODIS.

Ark. Code Ann. § 12-12-1006.

DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. *Maryland v. King*, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013).

## **Search & Seizure**

### **Sufficiency of Affidavit**

The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized and shall be supported by one or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances

tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched.

If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained.

An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

An application for a search warrant and the affidavit in support of the search warrant may be transmitted to the issuing judicial officer by facsimile or by other electronic means. Recorded testimony in support of a search warrant may be received by telephone or other electronic means provided the issuing judicial officer first administers an oath by telephone or other electronic means to the person testifying in support of the issuance of the warrant.

The judicial officer may examine the affiants or witnesses. He shall make and keep a fair written summary of the proceedings and the testimony taken before him. The proceedings shall be conducted in secret when appropriate.

If the judicial officer finds that the application meets the requirements of this rule and that, on the basis of the proceedings before him, there is reasonable cause to believe that the search will discover persons or things specified in the application and subject to seizure, he shall issue a search warrant based on his finding and in accordance with the requirements of Ark. R. Crim. P. 13.1. If he does not so find, the judicial officer shall deny the application.

An application for a search warrant and the affidavit in support of the search warrant may be transmitted to the issuing judicial officer by facsimile or by other electronic means. Recorded testimony in support of a search warrant may be received by telephone or other electronic means provided the issuing judicial officer first administers an oath by telephone or other electronic means to the person testifying in support of the issuance of the warrant. After signing a search warrant, the judicial officer issuing the warrant may transmit a copy of the warrant by facsimile or other electronic means to the applicant for the warrant. The original signed search warrant shall be retained by the judicial officer issuing the warrant and shall be filed with the record of the proceeding as provided in Ark. R. Crim. P. 13.4(c).

After signing a search warrant, the judicial officer issuing the warrant may transmit a copy of the warrant by facsimile or other electronic means to the applicant for the warrant. The original signed search warrant shall be retained by the judicial officer issuing the warrant and shall be filed with the record of the proceeding as provided in Ark. R. Crim. P. 13.4(c).

Ark. R. Crim. P. 13.1.

*See* the Criminal Checklists beginning on Appendix page 1.

## **Relevant Case Law**

### **Substantial compliance:**

Although warrant to search defendant's house for controlled substances only described place as “the house occupied by [defendant],” there was substantial compliance with rule requiring that warrant describe location and designation of place to be searched with particularity where affidavit attached to warrant described place with great particularity as “residence is located approximately one quarter mile north of the stop sign where Hwy 229 intersects the Old Oklahoma Road being located just past a rock house on the left, down a gravel driveway, approximately two hundred yards. Said residence being a black and white mobile home with a screen-in porch across the

front and a small fence around the front yard.” *Baxter v. State*, 262 Ark. 303, 556 S.W.2d 428 (1977).

#### **Failure to record testimony:**

The general rule is that unrecorded oral testimony may not be considered, by the trial court or appellate courts, when determining whether there was sufficient probable cause to issue a search warrant. Where there is neither a written affidavit nor sworn, recorded testimony in support of a search warrant, the appellate court will not apply the good-faith exception to uphold the search warrant. Where, however, there is a written affidavit in support of the search warrant that later is ruled deficient, the court will go beyond the four corners of the affidavit and consider unrecorded oral testimony to determine whether the officers executing the search warrant did so in objective good-faith reliance on the judge's having found probable cause to issue the search warrant. Moreover, the court may also consider information known to the executing officers that may or may not have been communicated to the issuing judge. *Moya v. State*, 335 Ark. 193, 981 S.W.2d 521 (1998).

When an officer omits facts from a search warrant affidavit, the evidence will be suppressed if the defendant establishes by a preponderance of the evidence that:

The officer omitted facts knowingly and intentionally, or with reckless disregard; and

The affidavit, if supplemented with the omitted information, is insufficient to establish probable cause. *State v. Rufus*, 338 Ark. 305, 993 S.W.2d 490 (1999).

#### **Sufficiency of Search & Seizure Warrant**

A search warrant shall be dated and describe with particularity:

The identity of the issuing judicial officer and the date and place where application for the warrant was made;

The judicial officer's finding of reasonable cause for issuance of the warrant;

The identity of the person to be searched, and the location and designation of the places to be searched;

The persons or things constituting the object of the search and authorized to be seized; and

The period of time, not to exceed five days after execution of the warrant, within which the warrant is to be returned to the issuing judicial officer.

Ark. R. Crim. P. 13.2.

*See* the Criminal Checklists beginning on Appendix page 1.

### **Nighttime Searches**

Except as hereafter discussed, the search warrant shall provide that it be executed between the hours of 6:00 AM and 8:00 PM, and within a reasonable time, not to exceed sixty days.

To conduct a nighttime search, there must be reasonable cause to believe that:

The place to be searched is difficult of speedy access; or

The objects to be seized are in danger of imminent removal; or

The warrant can only be safely or successfully executed at nighttime.

Ark. R. Crim. P. 13.2.

### **Relevant Statutes and Case Law**

Conclusory statements in search warrant affidavit indicating that place to be searched was “difficult of speedy access” and that warrant could only be safely or successfully executed at night did not provide sufficient factual basis

for warrant authorizing nighttime search of defendant's house. *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991).

Search warrant was deficient under rules of criminal procedure and did not show exigent circumstances warranting a nighttime search in drug case; the portion of the affidavit prepared by the detective that touched on imminent removal stating that the chemicals used to manufacture methamphetamine were volatile and subject to explode or cause a fire and could be a danger to surrounding houses in a residential setting was merely conclusory. *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999).

Affidavit in support of nighttime warrant for defendant's residence was insufficient to justify issuance of warrant, as there were no facts in the affidavit to support a finding that children who lived in the residence, or anyone else, would be safe during the execution of the warrant only if the execution took place in the cover of darkness. However, even though nighttime search warrant for defendant's residence, in which law enforcement officers believed methamphetamine was being manufactured, was invalid, evidence seized in execution of warrant was admissible under good-faith exception to exclusionary rule, as officers acted in good faith in executing warrant; officer testified that diapers found in defendant's garbage, in which items relating to methamphetamine were also found, were "fresh" and that the coffee filters that had been found were wet, indicating they had just been used, and, at the time these discoveries were made, it was the evening hour, which common sense would suggest made it even more likely that children were home. *State v. Tyson*, 2012 Ark. 107, 388 S.W.3d 1.

Absent exigent circumstances or the person's express consent, testing of a person's blood pursuant to Ark. Code Ann. § 5-65-201 et seq. to determine the person's alcohol concentration, controlled substance content, or other intoxicating substance content in his or her blood requires a warrant based on probable cause that the person was operating or in actual physical control of a motorboat on the waters of this state or a motor vehicle while intoxicated. Ark. Code Ann. § 5-65-202.

## **Knock & Announce Rule**

The “knock and announce” requirement of the United States and Arkansas Constitutions applies to parolee, regardless of whether his residence was subject to search on demand. Therefore, when officers fail to knock and announce their presence before entering a parolee's hotel room, without a reasonable basis for the failure, their conduct violates the parolee's protection from unreasonable searches and seizures. *Lane v. State*, 2017 Ark. 34, 513 S.W.3d 230.

Where officers had seen readily accessible weapons during the first search only a few days before, and where the occupants of the house had an unrestricted view of its surroundings, officers acted reasonably in making a no-knock entry to ensure their safety. *Foster v. State*, 66 Ark. App. 183, 991 S.W.2d 135 (1999).

## **Consent Searches – Without a Warrant**

An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search.

The state has the burden of proving by clear and positive evidence that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion.

A search of a dwelling based on consent shall not be valid under this rule unless the person giving the consent was advised of the right to refuse consent.

Ark. R. Crim. P. 11.1.

The consent justifying a search and seizure can only be given, in the case of:

A search of an individual's person, by the individual in question or, if the person is under fourteen years of age, by both the individual and his parent, guardian, or a person in loco parentis;

A search of a vehicle, by the person registered as its owner or in apparent control of its operation or contents at the time consent is given; and

A search of premises, by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent.

Ark. R. Crim. P. 11.2.

A search based on consent shall not exceed, in duration or physical scope, the limits of the consent given. Ark. R. Crim. P. 11.3.

Neither the United States Supreme Court nor the Arkansas Supreme Court has ever held that probable cause or reasonable suspicion is necessary in order for an officer to request consent for a search. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999).

## **Warrant Exceptions**

### **Searches Incident to Arrest**

An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused:

To protect the officer, the accused, or others;

To prevent the escape of the accused;

To furnish appropriate custodial care if the accused is jailed; or

To obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense. Ark. R. Crim. P. 12.1.

The search of an accused prior to his arrival at a police station shall be only as extensive as is reasonably necessary to effect the arrest with all practicable safety, or to prevent escape or the destruction of evidence. Comment to Ark. R. Crim. P. 12.1.

### **Search of Person**

An officer making an arrest and the authorized officials at the police station or other place of detention to which the accused is brought may conduct a search of the accused's garments and personal effects ready to hand, the surface of his body, and the area within his immediate control. Ark. R. Crim. P. 12.2.

### **Search of Body Cavities**

Search of an accused's blood stream, body cavities, and subcutaneous tissues conducted incidental to an arrest may be made only:

If there is a strong probability that it will disclose things subject to seizure and related to the offense for which the individual was arrested; and

If it reasonably appears that the delay consequent upon procurement of a search warrant would probably result in the disappearance or destruction of the objects of the search; and

If it reasonably appears that the search is otherwise reasonable under the circumstances of the case, including the seriousness of the offense and the nature of the invasion of the individual's person; and

If the search is conducted by a physician or a licensed nurse.

Ark. R. Crim. P. 12.3.

### **Search of Vehicle**

A vehicle may be searched at the time of arrest of an accused if:

The accused is in the vehicle;

The accused is in the immediate vicinity of and in apparent control of the vehicle;

There is reasonable cause for the arresting officer to believe that the vehicle contains things connected with the offense for which the arrest is made; or

The search is made contemporaneously with the arrest or as soon thereafter as is reasonably practical.

Ark. R. Crim. P. 12.4.

A vehicle impounded as a consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents. Ark. R. Crim. P. 12.6 (b).

### **Search of Premises**

Search of premises may be made without a warrant if:

It is contemporaneous with the arrest of the accused;

The entry onto the premises was made for the purpose of making the arrest;

The search is limited to the immediate area from which the person may obtain a weapon or in which he may have hidden evidence;

It is apparent that the accused is entitled to occupy all or part of the premises; and

Circumstances give the officer reason to believe that the premises contain things which are:

Subject to seizure;

Connected with the offense for which the arrest is made;  
and

Likely to be removed or destroyed before a search warrant can be obtained and served.

Ark. R. Crim. P. 12.5.

### **Plain-View Doctrine**

The Fourth Amendment does not prohibit warrantless seizure of evidence of crime in plain view, even if discovery of evidence was not inadvertent; although inadvertence is characteristic of most legitimate “plain view” seizures, it is not a necessary condition. *Horton v. California*, 496 U.S. 128 (1990).

The basic test for the “plain view” exception to the prohibition on warrantless searches is whether the officer had a right to be in the position he was when objects fell into his plain view. *Washington v. State*, 42 Ark. App. 188, 856 S.W.2d 631 (1993) (search was not unconstitutional where police officer reached his arm through an opening in the foundation of a snack bar and pool hall to seize a match box and film canister that were in plain view from the interior of the business, and officer saw containers being hidden in floor through window, from a place he was legally entitled to be).

*See also Phillips v. State*, 53 Ark. App. 36, 918 S.W.2d 721 (1996)(cellophane package of marijuana in defendant's wallet was admissible in prosecution for possession of controlled substance where officer approached automobile, which was parked in middle of road, to see if anything was wrong, officer smelled marijuana when defendant rolled down window, defendant admitted to having smoked marijuana earlier in day, and officer noticed cellophane package rolled up in defendant's wallet when defendant was flipping through wallet to find driver's license); and

*Percefull v. State*, 2011 Ark. App. 378, 383 S.W.3d 905 (defendant did not have a reasonable expectation of privacy in the area where police officer was standing when he viewed forty marijuana plants alongside edge of driveway on defendant's property; officer observed the marijuana in plain view while standing on steps that led from defendant's driveway to hog pens located on

hillside behind defendant's house, an area that would have been used by any person responding to defendant's signs advertising that he had "pigs for sale" on his property).

### **Investigatory Stops**

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit

A felony, or

A misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. Ark. R. Crim. P. 3.1.

An officer acting under Ark. R. Crim. P. 3.1 may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint or arrested and charged with an offense (if warranted). Ark. R. Crim. P. 3.1.

Both investigative stops and arrests are seizures under the Fourth Amendment but, while investigative stop must be supported by reasonable and articulable suspicion that criminal activity may be afoot, arrest must be supported by probable cause; in an investigative stop, means employed should be the least intrusive means reasonably available to verify or dispel officer's suspicion in a short period of time, but officer may take such steps as are reasonably necessary to protect his personal safety and maintain status quo so that limited purposes of the stop may be achieved. *United States v. Brown*, 51 F.3d 131 (8th Cir. 1995).

The test to be applied in determining whether an investigatory stop has been made consistent with the mandates of the Fourth Amendment is a balancing

of the nature and quality of the intrusion against the importance of the governmental interests alleged to justify that intrusion, and where felonies or crimes involving a threat to public safety are concerned, the government's interests in solving the crime and promptly detaining the suspect outweighs the individual's right to be free from a brief stop and detention. *Miller v. State*, 21 Ark. App. 10, 727 S.W.2d 393 (1987). See also *Reeves v. State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987) (where court held that investigatory stop of vehicle was both reasonable and warranted, though driver did not commit any traffic violation in officer's presence, and officer's entry into vehicle to check weapon that he had observed protruding from between seats was both reasonable and warranted).

After making a valid investigative stop, police officers must diligently work to confirm or dispel their suspicions in a short period of time. *United States v. Bell*, 183 F.3d 746 (8th Cir. 1999).

Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion to stop an individual. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). Whether a person flees is a relevant factor in determining whether there is reasonable suspicion for an investigatory stop. *Jefferson v. State*, 349 Ark. 236, 76 S.W.3d 850 (2002).

Among the factors to consider in determining whether an officer has grounds to “reasonably suspect” the commission of a criminal offense, warranting an investigatory stop, are: the time of day or night the suspect is observed; the particular streets and area involved; any information received from third persons, whether known or unknown; the suspect's proximity to known criminal conduct; and the incidence of crime in the immediate neighborhood. *Lamb v. State*, 77 Ark. App. 54, 70 S.W.3d 397 (2002).

An investigative stop of a vehicle does not violate the Fourth Amendment where police have a reasonable suspicion that occupant of vehicle is engaged in criminal activity; there is no requirement that there be a traffic violation. *United States v. Briley*, 319 F.3d 360 (8th Cir. 2003).

## **Stop and Frisk**

The Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and frisks him or her without probable cause to arrest, if the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person may be armed and presently dangerous. *Terry v. Ohio*, 392 U.S. 1 (1968).

When an officer is justified in believing that an individual he is investigating at close range is armed and dangerous, a pat-down search may be conducted to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. *Kearse v. State*, 65 Ark. App. 144, 986 S.W.2d 423 (1999).

## **Search Incident to Traffic Stop or Citation**

To make a valid traffic stop, a police officer must have probable cause to believe that a traffic law has been violated. *Burks v. State*, 362 Ark. 558, 210 S.W.3d 62 (2005).

Once an automobile has been stopped, the officer is entitled to conduct an investigation reasonably related in scope to the circumstances that initially prompted the stop. *United States v. McCoy*, 200 F.3d 582 (8th Cir. 2000).

To further detain a defendant following the conclusion of a traffic stop, an officer must develop reasonable suspicion of criminal activity before the legitimate purpose of the traffic stop has ended, and whether there is reasonable suspicion depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating that the person may be involved in criminal activity. *Malone v. State*, 364 Ark. 256, 217 S.W.3d 810 (2005).

Occupants of a vehicle have standing to assert their own Fourth Amendment rights, independent of owner's, to challenge the initial stop or seizure of their person, even though the passenger(s) may not have an expectation of privacy in the search of vehicle. *Dixon v. State*, 327 Ark. 105, 937 S.W.2d 642 (1997).

## Search of a Vehicle

An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:

On a public way or waters or other area open to the public;

In a private area unlawfully entered by the vehicle; or

In a private area lawfully entered by the vehicle, provided that exigent circumstances require immediate detention, search, and seizure to prevent destruction or removal of the things subject to seizure.

If the officer does not find the things subject to seizure by his search of the vehicle, and if:

The things subject to seizure are of such a size and nature that they could be concealed on the person; and

The officer has reason to suspect that one or more of the occupants of the vehicle may have the things subject to seizure so concealed;

Then the officer may search the suspected occupants. [Note: This provision does not apply to individuals traveling as passengers in a vehicle operating as a common carrier.]

Ark. R. Crim. P. 14.1.

A police officer with probable cause to search a car may inspect the passengers' belongings found in the car that are capable of concealing the object of his search. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

The threat to officer safety from issuing a traffic citation is a good deal less than in the case of a custodial arrest. The need to discover and preserve evidence does not exist in a traffic stop because once the person is stopped for

speeding and issued a citation, all evidence necessary to prosecute that offense has been obtained. *Knowles v. Iowa*, 525 U.S. 113 (1998).

Pursuant to a lawful traffic stop, police officer's search of locked toolboxes and a briefcase in the bed of appellant's truck was proper based upon the officer's assertion that he smelled marijuana. *McDaniel v. State*, 337 Ark. 431, 990 S.W.2d 515 (1999).

### **Canine Sniff**

In general, canine sniffs are not "searches" within the meaning of the Fourth Amendment. *United States v. Place*, 462 U.S. 696 (1983).

A canine sniff of a defendant's vehicle is not a "search" that implicates federal or state constitutional rights against unreasonable searches. *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005).

When an officer has reasonable suspicion of criminal activity, he may detain a defendant after the legitimate purpose of a traffic stop has ended to run a drug dog around the outside of a vehicle. *Burks v. State*, 362 Ark. 558, 210 S.W.3d 62 (2005).

### **Pretextual Arrests & Stops**

Pretextual arrests—arrests that would not have occurred but for an ulterior investigative motive—are unreasonable police conduct warranting application of the exclusionary rule. Inquiry into whether arrest was pretextual is a threshold matter to be resolved before inquiring into other bases for suppression. The intrusiveness of an arrest warrants inquiry into an officer's subjective intentions to determine validity of arrest under state constitution. However, so long as an arresting officer's actions are objectively reasonable, there is no Fourth Amendment violation even if the officer's actions are wholly pretextual. *State v. Sullivan*, 348 Ark. 647, 74 S.W.3d 215 (2002).

Pretextual traffic stop of defendant whom police officer suspected of engaging in illegal drug activity, on basis that defendant had broken brake light, did

not violate state Constitution's prohibition against unreasonable searches and seizures. *State v. Harmon*, 353 Ark. 568, 113 S.W.3d 75 (2003).

That traffic stop of defendants' vehicle might have been pretextual did not invalidate subsequent consensual search of vehicle, even though trial court found that one reason for stop was defendants' race. Law enforcement officer had probable cause to make traffic stop for speeding; defendants' vehicle was traveling seventy-four miles per hour in seventy-miles-per-hour zone, which was a violation of speed-limit statute. *Flores v. State*, 87 Ark. App. 327, 194 S.W.3d 207 (2004).

### **Fruit of the Poisonous Tree**

Evidence that is discovered by exploitation of an illegality can be suppressed as "fruit of the poisonous tree." There must be a causal connection between the alleged illegal conduct by the police and the discovery of the evidence that is claimed to be the "fruit" of the illegality. *Hudspeth v. State*, 349 Ark. 315, 78 S.W.3d 99 (2002).

The Arkansas Supreme Court has cited directly from *Wong Sun v. United States*, 371 U.S. 471 (1963), stating "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Summers v. State*, 90 Ark. App. 25, 203 S.W.3d 638 (2005).

The policies of the fruit of the poisonous tree rule do not make any logical distinction between physical and verbal evidence. *Keenom v. State*, 349 Ark. 381, 80 S.W.3d 743 (2002).

The fruit of the poisonous tree doctrine has not been limited to cases in which there has been a Fourth Amendment violation but has also been applied to violations of the Sixth Amendment and the Fifth Amendment. However,

there is a critical difference between a mere defect in the administration of *Miranda* warnings “without more” and police-initiated interrogation conducted after a suspect unambiguously invokes the right to have counsel present during questioning as the latter is a violation of a constitutional right. *Osburn v. State*, 2009 Ark. 390, 326 S.W.3d 771(second confession obtained from defendant one hour and twenty minutes after officers illegally obtained a statement in violation of defendant's previously-invoked right to counsel was subject to suppression in murder prosecution).

### **Motions to Suppress**

Objection to the use of any evidence, on the grounds that it was illegally obtained, shall be made by a motion to suppress evidence.

The phrase “objection to the use of any evidence, on the grounds that it was illegally obtained,” shall include but is not limited to evidence which:

Consists of tangible property obtained by means of an unlawful search and seizure;

Consists of a record of potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping;

Consists of a record or potential testimony reciting or describing a confession or admission of a defendant involuntarily made;

Was obtained as a result of such evidence; or

Consists of the prospective in-court identification of the defendant based on an unlawful pre-trial confrontation. The motion shall be made to the court which is to conduct the trial at which such evidence may be offered in evidence.

The motion to suppress shall be timely filed but not later than ten days before the date set for the trial of the case, except that the court for good cause shown may entertain a motion to suppress at a later time.

Renewal of a motion to suppress which has been denied may be allowed on the ground of newly discovered evidence or as the interests of justice require.

An order granting a motion to suppress prior to trial shall be reviewable on appeal pursuant to Ark. R. App. P.-Crim. 3.

A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:

The importance of the particular interest violated;

The extent of deviation from lawful conduct;

The extent to which the violation was willful;

The extent to which privacy was invaded;

The extent to which exclusion will tend to prevent violations of these rules;

Whether, but for the violation, such evidence would have been discovered; and

The extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.

Ark. R. Crim. P. 16.2.

Motion to suppress evidence should only be granted if the court finds that a substantial violation of the rules has occurred or if the Federal or State Constitutions otherwise require suppression. *Lipovich v. State*, 265 Ark. 55, 576 S.W.2d 720 (1979).

As the proponent of the motion to suppress, the defendant bears the burden of establishing that his rights have been violated. *Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998).

## **Initial Appearance**

### **First Appearance**

At the first appearance of the defendant the judicial officer shall inform defendant of:

The charge against him or her;

The right to say nothing;

The fact that anything he or she says can be used against him or her;

The right to counsel;

The right to communicate with counsel, family, and friends; and

That reasonable means will be provided to communicate with counsel, family, and friends.

Ark. R. Crim. P. 8.3.

At the first appearance of the defendant, the judicial officer shall conduct a pretrial-release inquiry, unless it has already been conducted, and assess relevant pretrial release factors such as:

The defendant's employment status, history, and financial condition;

The nature and extent of his family relationships;

His past and present residence;

His character and reputation;

Persons who agree to assist him in attending court at the proper times;

The nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty;

The defendant's prior criminal record, if any, and, if he previously has been released pending trial, whether he appeared as required;

Any facts indicating the possibility of violations of law if the defendant is released without restrictions; and

Any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction.

Ark. R. Crim. P. 8.5.

The pretrial-release inquiry shall be made in all cases where:

The maximum penalty for the offense charged exceeds one year; and

The prosecuting attorney does not stipulate to release on own recognizance; or

The maximum penalty for the offense charged is less than one year; and

A law enforcement officer gives notice to the judicial officer of intent to oppose release on own recognizance.

In all other cases, the judicial officer may release on own recognizance without a pretrial-release inquiry. It must be presumed that when the maximum penalty is exactly one year an inquiry shall be conducted if the prosecuting attorney does not stipulate or a law enforcement officer gives notice of intent to oppose.

Ark. R. Crim. P. 8.4.

### **Waiver of Appointment of Counsel**

*See Section V on Pro Se Litigants & Indigent Defendants.*

A sample Waiver of Counsel form can be found on Appendix page 131.

### **Time for Filing Formal Charges**

If the defendant is continued in custody subsequent to the first appearance, the prosecuting attorney shall file an indictment or information in a court of competent jurisdiction within sixty days of the defendant's arrest. Failure to file an indictment or information within sixty days shall not be grounds for dismissal of the case against the defendant, but shall, upon motion of the defendant, result in the defendant's release from custody unless the prosecuting attorney establishes good cause for the delay. If good cause is shown, the court shall reconsider bail for the defendant. Ark. R. Crim. P. 8.6.

### **Administrative Order No. 19**

Every pleading, motion, response, order, and other paper filed in a case, and any document attached to any of them, must comply with the protective requirements for confidential information established by Administrative Order 19.

Counsel and unrepresented parties shall follow the redaction and filing procedure established by Arkansas Rule of Civil Procedure 5(c)(2)(A) & (B).

That procedure includes:

Eliminating all unnecessary or irrelevant confidential information;

Redacting all necessary and relevant confidential information; and

Filing an unredacted version under seal.

### **Permitted Conditions of Recognizance Release**

If it is determined that a defendant may be released on personal recognizance or upon an order to appear, the court may impose the following conditions:

Place the defendant under the care of a person or organization agreeing to supervise the defendant and assist the defendant in making required court appearances;

Place the defendant under the supervision of a probation officer or other appropriate official;

Impose reasonable conditions on the defendant's activities, movements, associations, and residences;

Release the defendant to work and require the return to custody at specified times; or

Any other reasonable restriction to insure appearance when required.

Ark. R. Crim. P. 9.1.

### **Special Terms of Release for Certain Offenses**

Unless waived by the court, a person arrested for a violation of:

- a. trafficking of persons, § 5-18-103,
- b. kidnapping, § 5-11-102, or
- c. false imprisonment in the first degree, § 5-11-103, or
- d. an offense that involves the taking of a minor or holding a minor without consent, shall not be granted bail before the person agrees to the following conditions imposed by the arraigning court:
  - (1) An ankle monitor or GPS-enabled tracking device;
  - (2) Restricted movement limited to the person's residence, except in the case of a medical emergency;
  - (3) A restriction on internet access and access to electronic media;
  - (4) An agreement by the defendant to:
    - (A) A no contact order prohibiting direct or indirect contact with the victim or victims of the charged offense;
    - (B) Relinquish all firearms to a third party until the expiration of the no contact order; and
    - (C) Refrain from using an illegal controlled substance;
  - (5) A cash bond or a secured bond requiring the defendant to put up at least fifty percent of the principal bond amount, at the discretion of the court;

- (6) Maintaining regular reporting requirements, at the discretion of the court;  
and
- (7) Obeying a curfew, at the court's discretion.

The court may waive a condition of this section upon a showing that the waiver would not result in an increased risk to the community or an increased risk of flight by the defendant. Absent a waiver by the court, a person who refuses or fails to agree to or adhere to a condition shall not be allowed release on bail until the conclusion of his or her case.

Ark. Code Ann. § 16-84-117.

### **Requirements if Money Bail is Set**

If it is determined that it is necessary to set a money bail to insure the appearance of the defendant, the court shall require:

The execution of an unsecured bond in an amount determined by the court and may require this bond to be signed by other persons;

The execution of an unsecured bond in an amount determined by the court, accompanied by a cash or security deposit equal to ten percent of the bond; or

The execution of a bond in an amount determined by the court and secured by deposit in the full amount of cash, other property or the obligation of qualified sureties.

Ark. R. Crim. P. 9.2.

### **Setting Bail**

In setting the amount of bail to ensure the defendant's appearance, the court should consider:

The defendant's employment status;

The defendant's employment history;

The defendant's financial condition;

The defendant's family ties and relationships;

The defendant's reputation;

The defendant's character;

The defendant's mental condition;

The defendant's past history of response to legal process;

The defendant's past criminal record;

The identity of persons who vouch for defendant;

Insofar as relevant to the risk of fleeing the jurisdiction:

- The nature of the charge;
- The apparent probability of conviction; and
- The likely sentence; and

Any other factors indicating the defendant's roots in the community.

Ark. R. Crim. P. 9.2.

A sample Bond Form can be found on Appendix page 93.

### **Other Relevant Constitutional Provisions, Statutes & Rules**

Release on own recognizance conditions: Ark. R. Crim. P. 9.1.

Release on money bail: Ark. R. Crim. P. 9.2.

Failure to appear: Ark. Code Ann. § 5-54-120.

Taking bail: Ark. Code Ann. §§ 16-84-101, et seq.

Person authorized to take bail: Ark. Code Ann. § 16-84-102.

Bail during trial: Ark. Code Ann. § 16-84-111.

Bail before conviction: Ark. Code Ann. § 16-84-110.

Excessive bail: Ark. Const., Art. 2, § 9.

Forfeiture of bond: Ark. Code Ann. § 16-84-207.

Bail in extradition proceeding: Ark. Code Ann. § 16-94-216.

No bond in capital case where proof is evident: Ark. Const., Art. 2, § 8.

Surrender of defendant: Ark. Code Ann. § 16-84-114.

Responsibility of officer taking bond: Ark. Code Ann. § 16-84-105.

### **Preliminary Hearing**

There is no constitutional right to a preliminary hearing. *Goldsby v. U.S.*, 160 U.S. 70 (1895).

### **Probable Cause Hearing**

The Fourth Amendment to the Constitution of the United States requires that persons arrested without a warrant have a prompt determination of probable cause, but no later than forty-eight hours after arrest. Where there is no determination within that time, the burden shifts to the government to demonstrate a bona fide emergency or other extraordinary circumstances. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

### **Indictments**

An “indictment” is an accusation in writing, found and presented by a grand jury to the court in which they are impaneled, charging a person with the commission of a public offense. Ark. Code Ann. § 16-85-401.

The concurrence of twelve grand jurors is required to find an indictment. When so found, it must be endorsed “a true bill” and signed by the foreman. The names of all witnesses who were examined must be written at the foot of or on the indictment. The indictment must be presented by the foreman of the grand jury to the court, be filed with the clerk, and remain in his or her office as a public record. Ark. Code Ann. § 16-85-402.

The indictment must include the title of the prosecution, the name of the court in which the indictment is presented, and the name of the parties. It must be direct and certain as to the party charged, the offense(s) charged, the county in which they were committed, and the particular circumstances when they are necessary to constitute a complete offense or offenses.

At the defendant's request, the state shall file a bill of particulars setting out the act or acts upon which it relies for conviction. Ark. Code Ann. § 16-85-403.

The indictment is sufficient if it can be understood from the indictment:

That it was found by a grand jury of a county, impaneled in a court having authority to receive the indictment;

That the offense was committed within the jurisdiction of the court and at some time prior to the time of finding the indictment; and

That the act or omission charged as the offense is stated with such a degree of certainty so as to satisfy due process of law.

An error as to the name of the defendant shall not vitiate the indictment or proceedings on the indictment. If the defendant's true name is discovered at any time before execution of the indictment, an entry shall be made on the docket of the court of the defendant's true name, referring to the fact of the defendant's being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the defendant's true name.

The statement in the indictment as to the time at which the offense was committed is not material except as a statement that it was committed before the time of finding the indictment (except where the time is a material ingredient in the offense). Ark. Code Ann. § 16-85-405.

### **Criminal Information & Bill of Particulars**

The bill of particulars shall state the action relied upon by the state in sufficient detail and with sufficient certainty as to apprise the defendant of

the specific crime with which charged, in order to enable him or her to prepare his or her defense.

A supplemental bill of particulars may be required upon order of the trial court if the bill of particulars filed by the prosecuting attorney is not sufficiently definite to apprise the defendant of the specific crime with which he or she is charged.

When a bill of particulars is filed with the clerk, a copy of it shall be furnished to the defendant upon his or her request.

Ark. Code Ann. § 16-85-301.

## **Pleading**

### **Pleas**

There are three kinds of pleas to an indictment or information:

A plea of guilty;

A plea of nolo contendere; or

A plea of not guilty.

Ark. Code Ann. § 16-85-709.

However, the United States Supreme Court in *North Carolina v. Alford*, 400 U.S. 25 (1970) recognized that a defendant may enter a guilty plea and still maintain his or innocence, stating that “[w]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly and understandably consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.” *Id.*

The Supreme Court of Arkansas has likewise recognized that a court may accept a guilty plea from a defendant who maintains his innocence, otherwise known as an *Alford* Plea, provided the court finds an adequate factual basis

for the plea of guilty; typically, a defendant will utilize an *Alford* plea when he intelligently concludes that his interests require entry of a guilty plea in light of strong evidence of actual guilt with the intention of limiting the penalty to be imposed. *Davis v. State*, 366 Ark. 401, 235 S.W.3d 902 (2006).

### **Receiving the Plea**

A defendant shall not be required to plead until he has had an opportunity to retain counsel, or, if he is eligible for the appointment of counsel, until counsel has been appointed, or, in either case, unless he has waived or refused the assistance of counsel. Ark. R. Crim. P. 24.2.

The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally, informing him of and determining that he understands:

The nature of the charge;

The mandatory minimum sentence, if any, on the charge;

The maximum possible sentence on the charge, including that possible from consecutive sentences;

That if the offense charged is one for which a different or additional punishment is authorized because the defendant has previously been convicted of an offense or offenses one or more times, the previous conviction or convictions may be established after the entry of his plea in the present action, thereby subjecting him to such different or additional punishment; and

That if he pleads guilty or nolo contendere he waives his right to a trial by jury and the right to be confronted with the witnesses against him, except in capital cases where the death penalty is sought.

Ark. R. Crim. P. 24.4.

See the Sample Criminal Checklists beginning on page 1 of the Appendix.

The court shall not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. The court shall determine whether the tendered plea is the result of a plea agreement. If it is, the court shall require that the agreement be stated. The court shall also address the defendant personally and determine whether any force or threats, or any promises apart from a plea agreement, were used to induce the plea. Ark. R. Crim. P. 24.5.

The court shall not enter a judgment upon a plea of guilty or nolo contendere without making such inquiry as will establish that there is a factual basis for the plea. Ark. R. Crim. P. 24.6.

The court shall cause a verbatim record of the proceedings at which a defendant enters a plea of guilty or nolo contendere to be made and preserved. Ark. R. Crim. P. 24.7.

### **Conditional Pleas**

With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment,

To review an adverse determination of a pretrial motion to suppress seized evidence or a custodial statement;

To review an adverse determination of a pretrial motion to dismiss a charge because not brought to trial within the time provided in Ark. R. Crim. P. 28.1 (b) or (c); or

To review an adverse determination of a pretrial motion challenging the constitutionality of the statute defining the offense with which the defendant is charged.

Ark. R. Crim. P. 24.3.

The Conditional Plea Form may be found in Rule 24.3 of the Arkansas Rules of Criminal Procedure.

## **Plea Agreements**

In cases in which it appears that it would serve the interest of the public in the effective administration of justice, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He shall engage in plea discussions and reach a plea agreement with the defendant only through defense counsel, except when the defendant has waived or refused his right to be represented by appointed or retained counsel.

Similarly situated defendants shall be afforded equal opportunities for plea discussions and plea agreements.

Ark. R. Crim. P. 25.1.

Defense counsel shall conclude a plea agreement only with the consent of the defendant and shall ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.

Ark. R. Crim. P. 25.2.

The judge shall not participate in plea discussions.

If a plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that the charge or charges will be reduced, that other charges will be dismissed, or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate whether he will concur in the proposed disposition.

If, after the judge has indicated his concurrence with a plea agreement and the defendant has entered a plea of guilty or nolo contendere, but before sentencing, the judge decides that the disposition should not include the charge or sentence concessions contemplated by the agreement, he shall so advise the parties and then in open court call upon the defendant to either affirm or withdraw his plea.

If the parties have not sought the concurrence of the trial judge in a plea agreement or if the judge has declined to indicate whether he will concur in the agreement, he shall advise the defendant in open court at the time the agreement is stated that:

The agreement is not binding on the court; and

If the defendant pleads guilty or nolo contendere, the disposition may be different from that contemplated by the agreement.

Ark. R. Crim. P. 25.3.

### **Plea Withdrawal**

A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right before it has been accepted by the court. A defendant may not withdraw his or her plea of guilty or nolo contendere as a matter of right after it has been accepted by the court; however, before entry of judgment, the court in its discretion may allow the defendant to withdraw his or her plea to correct a manifest injustice if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of his or her motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea. A plea of guilty or nolo contendere may not be withdrawn after entry of judgment.

Withdrawal of a plea of guilty or nolo contendere shall be deemed to be necessary to correct a manifest injustice if the defendant proves to the satisfaction of the court that:

He or she was denied the effective assistance of counsel;

The plea was not entered or ratified by the defendant or a person authorized to do so in his or her behalf;

The plea was involuntary, or was entered without knowledge of the nature of the charge or that the sentence imposed could be imposed;

He or she did not receive the charge or sentence concessions contemplated by a plea agreement and the prosecuting attorney failed to seek or not to oppose the concessions as promised in the plea agreement; or

He or she did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial court had indicated its concurrence and the defendant did not affirm the plea after receiving advice that the court had withdrawn its indicated concurrence and after an opportunity to either affirm or withdraw the plea.

The defendant may move to withdraw his or her plea of guilty or nolo contendere to correct a manifest injustice without alleging that he or she is innocent of the charge to which the plea was entered.

Ark. R. Crim. P. 26.1.

Although defendant has the right to withdraw his guilty plea, he must do so before sentencing or entry of judgment, otherwise his motion will be considered one for post-conviction relief. *Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006).

To be entitled to withdraw guilty plea due to ineffective assistance of counsel, petitioner must show that there is reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. *State v. Herred*, 332 Ark. 241, 964 S.W.2d 391 (1998).

*See also Mangrum v. State*, 70 Ark. App. 46, 14 S.W.3d 889 (2000) (conflict between defendant and his attorney as to whether they should proceed to trial did not constitute ineffective assistance of counsel, such that defendant would be entitled to withdraw unconditional guilty plea).

## **Fitness to Proceed**

**In general.** No person who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect shall be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures. Ark. Code Ann. § 5-2-302.

A court shall not enter a judgment of acquittal on the ground of mental disease or defect against a defendant who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect. Ark. Code Ann. § 5-2-302.

**Notice.** When a defendant intends to put in issue his or her fitness to proceed the defendant shall notify the prosecutor and the court at the earliest practicable time. Ark. Code Ann. § 5-2-304.

**Suspension of proceedings.** The court shall immediately suspend any further proceedings in a prosecution if a defendant's fitness to proceed becomes an issue. Ark. Code Ann. § 5-2-327.

**Fitness to Proceed.** The court shall order a fitness-to-proceed examination if it finds there is a reasonable suspicion that a defendant is not fit to proceed.

**Uniform Examination Order.** The Uniform Fitness to Proceed Examination Order can be found on the Supreme Court's website.

**Procedure.** Upon suspension of further proceedings in the prosecution, the court shall enter an order:

Appointing one or more experts who do not practice in the Arkansas State Hospital to examine the defendant and report on the defendant's mental condition; or

Directing the Director of the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services to provide an

expert who will examine and report upon the defendant's mental condition.

**The Exam.** The examination shall be for a period not exceeding sixty days or such longer period as the Director of the Division of Behavioral Health Services of the Department of Human Services or his or her designee determines to be necessary for the purpose of the examination

The uniform order shall require the prosecuting attorney to provide to the examiner any information relevant to the examination, including without limitation:

The name and address of any attorney involved in the matter; and  
Information about the alleged offense.

The court may require the attorney for the defendant to provide any available information relevant to the examination, including without limitation:

Psychiatric records;

Medical records; or

Records pertaining to treatment of the defendant for substance or alcohol abuse.

During an examination to determine a defendant's fitness to proceed and in any examination report based on that examination, an examiner shall consider:

The capacity of the defendant during criminal proceedings to:

Rationally understand the charges against him or her and the potential consequences of the pending criminal proceedings;

Disclose to the defendant's attorney pertinent facts, events, and states of mind;

Engage in a reasoned choice of legal strategies and options;

Understand the adversarial nature of criminal proceedings;

Exhibit appropriate courtroom behavior; and

Testify;

As supported by current indications and the defendant's personal history, whether the defendant is a person with:

A mental disease or defect; or

An intellectual disability; and

The degree of impairment resulting from the mental disease or defect or intellectual disability, if existent, and the specific impact on the defendant's capacity to engage with the defendant's attorney in an effective manner.

An examiner's opinion on the defendant's fitness to proceed or lack of fitness to proceed may not be based solely on the defendant's refusal to communicate during the examination.

**The Report.** The examination report, which is a public record, shall be filed with the clerk of the court ordering the examination and the clerk shall provide copies of the report to the defendant's attorney and the prosecuting attorney.

The report shall:

Contain an opinion as to whether or not the defendant is fit to proceed and the basis for the opinion;

Contain an opinion as to whether the defendant has a mental disease or defect;

Contain a substantiated diagnosis in the terminology of the American Psychiatric Association's most current edition of the Diagnostic and Statistical Manual of Mental Disorders;

Document that the examiner explained to the defendant:

The purpose of the examination;

The persons to whom the examination report is provided; and

The limits on rules of confidentiality applying to the relationship between the examiner and the defendant; and

Describe, in specific terms:

The procedures, techniques, and tests used in the examination;

The purpose of each procedure, technique, or test; and

The conclusions reached.

The information or lack of information contained in the examiner's report is not intended to limit the introduction of evidence regarding the defendant's fitness to proceed.

Ark. Code Ann. § 5-2-327.

**Subsequent examination.** When the defendant has previously been found fit to proceed, the court may order a second or subsequent examination to determine a defendant's fitness to proceed only if the court:

Finds reasonable cause to believe that new or previously undiscovered evidence calls into question the factual, legal, or scientific basis of the opinion upon which the previous finding of fitness relied;

Finds reasonable cause to believe that the defendant's mental condition has changed; or

Sets forth in the order a factual or legal basis upon which to order another examination.

Ark. Code Ann. § 5-2-327.

Whether a second mental evaluation is necessary is within the trial court's discretion to determine. *Avery v. State*, 93 Ark. App. 112, 217 S.W.3d 162 (2005).

**Commitment.** Upon completion of examination, the court may enter an order providing for further examination of the defendant and may order the defendant into the custody of the Director of the Division of Behavioral Health Services of the Department of Human Services for further examination and observation if the court determines that commitment and further examination are warranted.

Ark. Code Ann. § 5-2-327.

**Restoration or Release.** If the court determines that a defendant lacks fitness to proceed, the proceeding against him or her shall be suspended and the court may commit the defendant to the custody of the Department of Human Services for detention, care, and treatment until restoration of fitness to proceed.

However, if the court is satisfied that the defendant may be released without danger to himself or herself or to the person or property of another, the court may order the defendant's release and the release shall continue at the discretion of the court on conditions the court determines necessary.

A copy of the report filed pursuant to Ark. Code Ann. § 5-2-327 shall be attached to the order of commitment or order of conditional release.

Within a reasonable period of time, but in any case, within ten months of a commitment, the department shall file with the committing court a written report indicating whether the defendant is fit to proceed, or if not, whether:

The defendant's mental disease or defect is of a nature precluding restoration of fitness to proceed; and

The defendant presents a danger to himself or herself or to the person or property of another.

The court shall make a determination within one year of a commitment.

If the court determines that the defendant is fit to proceed, prosecution in ordinary course may commence.

If the defendant lacks fitness to proceed but does not present a danger to himself or herself or to the person or property of another, the court may release the defendant on conditions the court determines to be proper.

If the defendant lacks fitness to proceed and presents a danger to himself or herself or the person or property of another, the court shall order the department to petition for an involuntary admission.

Upon filing of an order finding that the defendant lacks fitness to proceed, the circuit clerk or the probate clerk shall submit a copy of the order to the Arkansas Crime Information Center.

On the court's own motion or upon application of the department, the prosecuting attorney, or the defendant, and after a hearing if a hearing is requested, if the court determines that the defendant has regained fitness to proceed, the criminal proceeding shall be resumed.

However, if the court is of the view that so much time has elapsed since the alleged commission of the offense in question that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.

Ark. Code Ann. § 5-2-310.

**Lack of Criminal Responsibility.** It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged he or she lacked criminal responsibility. Ark. Code Ann. § 5-2-312.

**Notice.** When a defendant intends to raise lack of criminal responsibility as a defense in a prosecution, the defendant shall notify the prosecutor and the court at the earliest practicable time. Ark. Code Ann. § 5-2-304.

**Suspension of proceedings.** The court shall immediately suspend any further proceedings in a prosecution if a defendant files notice that he or she intends to rely upon the defense of lack of criminal responsibility. Ark. Code Ann. § 5-2-328.

**Uniform Examination Order.** The Uniform Order for Criminal Responsibly Exam can be found on the Supreme Court's website.

**Procedure.** Upon suspension of further proceedings in the prosecution, the court may enter an order appointing one or more disinterested experts to examine the defendant with regard to the defense of lack of criminal responsibility.

**The Exam.** The examination shall be for a period not exceeding sixty days or such longer period as the Director of the Division of Behavioral Health Services of the Department of Human Services or his or her designee determines to be necessary for the purpose of the examination

The uniform order shall require the prosecuting attorney to provide to the examiner any information relevant to the examination, including without limitation:

- The name and address of any attorney involved in the matter;
- Information about the alleged offense; and
- Any information about the defendant's background that is determined to be relevant to the examination, including the criminal history of the defendant.

The court may require the attorney for the defendant to provide any available information relevant to the examination, including without limitation:

- Psychiatric records;
- Medical records; or
- Records pertaining to treatment of the defendant for substance or, alcohol abuse.

**The Report.** An examination report shall contain:

A description of the nature of the examination;

An opinion as to whether as the result of a mental disease or defect the defendant at the time of the alleged offense lacked the capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law, an explanation of the examiner's opinion, and the basis of that opinion;

When directed by the circuit court, an opinion as to whether at the time of the alleged offense the defendant lacked the capacity to form a culpable mental state that is required to establish an element of the alleged offense, an explanation of the examiner's opinion, and the basis of that opinion; and

If an examination cannot be conducted because of the unwillingness of the defendant to participate in the examination, an opinion as to whether the unwillingness of the defendant is the result of mental disease or defect.

**Criminal Responsibility and Fitness to Proceed Exams.** An examiner appointed to examine a defendant with regard to a defense of lack of criminal responsibility also may be appointed by the circuit court to examine the defendant with regard to the defendant's fitness to proceed.

However, the examiner must file with the circuit court separate written reports concerning the defendant's fitness to proceed and lack of criminal responsibility.

Unless otherwise, an examiner shall not render an opinion or issue a report on the defendant's lack of criminal responsibility if the examiner believes that the defendant is not fit to proceed until the circuit court issuing the order for an examination into the defendant's lack of criminal responsibility makes a determination as to the defendant's fitness to proceed.

A circuit court shall not order the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services to conduct an examination of a defendant's lack of criminal responsibility if a previous examination into the defendant's fitness to proceed has already determined that the defendant does not have a mental disease or defect unless the requesting party can show reasonable cause to believe:

There is evidence of a mental disease or defect that was not fully considered in the previous examination into the defendant's fitness to proceed; or

That the previous opinion that the defendant does not have a mental disease or defect was based on information or facts later shown to be false or unreliable.

**Subsequent examination.** If a defendant wishes to be examined by an expert of his or her own choosing, the circuit court shall provide the expert with reasonable opportunity to examine the defendant upon a timely request. Ark. Code Ann. § 5-2-328.

**Acquittal.** On the basis of the report filed pursuant to Ark. Code Ann. § 5-2-328 and after a hearing, if a hearing is requested, the court may enter judgment of acquittal on the ground of lack of criminal responsibility if the court is satisfied that the following criteria are met:

The defendant currently has the capacity to understand the proceedings against him or her and to assist effectively in his or her own defense; and

At the time of the conduct charged, the defendant lacked criminal responsibility.

If the defendant did not raise the issue of lack of criminal responsibility as an affirmative defense under Ark. Code Ann. § 5-2-328, then the court is required to make a factual determination that the defendant committed the offense and that he or she lacked criminal responsibility at the time of the commission of the offense.

Ark. Code Ann. § 5-2-313.

When a defendant is acquitted due to the defendant's lack of criminal responsibility, a circuit court is required to determine and to include the determination in the order of acquittal one of the following:

(1) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect;

(2) The offense involved bodily injury to another person or serious damage to the property of another person or involved a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect;

(3) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant remains affected by mental disease or defect; or

(4) The offense did not involve bodily injury to another person or serious damage to the property of another person nor did it involve a substantial risk of bodily injury to another person or serious damage to the property of another person, and that the defendant is no longer affected by mental disease or defect.

If the circuit court enters a determination based on (1) or (3) above, the circuit court shall order the defendant committed to the custody of the Department of Human Services for an examination by a psychiatrist or a licensed psychologist.

If the circuit court enters a determination based on (2) or (4) above, the circuit court shall immediately discharge the defendant.

Ark. Code Ann. § 5-2-314.

**Acquittal followed by commitment.** The department shall file the psychiatric or psychological report with the probate clerk of the circuit court having venue within thirty days following receipt of an order of acquittal. If before thirty days the department makes application to the circuit court for an extension of time to file the psychiatric or psychological report and the circuit court finds there is good cause for the delay, the circuit court may order that additional time be allowed for the department to file the psychiatric or psychological report. A hearing shall be conducted by the circuit court and shall take place not later than ten days following the filing of the psychiatric or psychological report with the circuit court.

If the psychiatric or psychological report is not filed within thirty days following the department's receipt of an order of acquittal or within such additional time as authorized by the circuit court, the circuit court may grant a petition for a writ of *habeas corpus* ordering the release of the defendant under terms and conditions that are reasonable and just for the defendant and societal concerns about the safety of persons and property of others.

A person found not guilty of an offense involving bodily injury to another person or serious damage to the property of another person or involving a substantial risk of bodily injury to another person or serious damage to the property of another person due to the person's lack of criminal responsibility has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another person due to a present mental disease or defect.

With respect to any other offense, the person has the burden of proof by a preponderance of the evidence.

A person acquitted whose mental condition is the subject of a hearing has a right to counsel. If it appears to the circuit court that the person acquitted is in need of counsel, an attorney shall be appointed immediately upon filing of the original petition.

It is the duty of the prosecuting attorney's office in the county where the petition is filed to represent the State of Arkansas at any hearing held pursuant to this section except a hearing pending at the Arkansas State Hospital in Pulaski County.

Ark. Code Ann. § 5-2-314.

**Release of acquittees.** When the Director of the Department of Human Services or his or her designee determines that a person acquitted has recovered from his or her mental disease or defect to such an extent that his or her release or his or her conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to the property of another person, the director shall promptly file an application for discharge or conditional release of the person acquitted with the circuit court that ordered the commitment.

Within twenty days after receiving the application for discharge or conditional release of the person acquitted, the attorney for the state may petition the circuit court for a hearing to determine whether the person acquitted should be released.

If the circuit court finds after a hearing that the person acquitted has recovered from his or her mental disease or defect to such an extent that:

The discharge of the person acquitted would no longer create a substantial risk of bodily injury to another person or serious damage to property of another person, then the circuit court shall order that the person acquitted be immediately discharged; or

The conditional release of the person acquitted under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another person,

Then the circuit court shall order:

That the person acquitted be conditionally released under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been:

Prepared for the person acquitted;

Certified to the circuit court as appropriate by the director of the facility in which the person acquitted is committed; and

Found by the circuit court to be appropriate; and

Explicit conditions of release, including without limitation requirements that:

The person acquitted comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment;

The person acquitted be subject to regularly scheduled personal contact with a compliance monitor for the purpose of verifying compliance with the conditions of release;

Compliance with the conditions of release be documented with the circuit court by the compliance monitor at ninety-day intervals or at such intervals as the circuit court may order; and

Impose the conditions of release for a period of up to five years.

If the circuit court determines that the person acquitted has not met his or her burden of proof under subsection (c) of this section, the person acquitted shall continue to be committed to the custody of the Department of Human Services. Ark. Code Ann. § 5-2-315.

**Conditions.** A person ordered to be in charge of a prescribed regimen of medical, psychiatric, or psychological care or treatment of a person acquitted shall provide:

The prescribed regimen of medical, psychiatric, or psychological care or treatment;

Periodic written documentation to a compliance monitor of compliance with the conditions of release, including, but not limited to, documentation of compliance with the prescribed:

Medication;

Treatment and therapy;

Substance abuse treatment; and

Drug testing; and

Written notice of any failure of the person acquitted to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment to the:

Compliance monitor;

Attorney for the person acquitted;

Attorney for the state; and

Circuit court having jurisdiction.

Written notice shall be provided immediately upon the failure of the person acquitted to comply with a condition of release.

The person acquitted may be detained and shall be taken without unnecessary delay before the circuit court having jurisdiction over him or her.

After a hearing, the circuit court shall determine whether the person acquitted should be remanded to an appropriate facility on the ground that, in light of his or her failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his or her continued release would create a substantial risk of bodily injury to another person or serious damage to property of another person.

At any time after a hearing employing the same criteria, the circuit court may modify or eliminate the prescribed regimen of medical, psychiatric, or psychological care or treatment.

Ark. Code Ann. § 5-2-315.

## **Pre-Trial Matters**

### **Joinder of Offenses**

Two or more offenses may be joined when the offenses are of the same or similar character (even if not part of a single scheme or plan) or when they are based on the same conduct or on a series of connected acts constituting parts of a single scheme or plan. Ark. R. Crim. P. 21.1.

### **Joinder of Defendants**

Two or more defendants may be joined in one information or indictment when:

Each of the defendants is charged with accountability for each offense included, or

When each of the defendants is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy, or

When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged

Were part of a common scheme or plan; or

Were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one charge from proof of others.

Ark. R. Crim. P. 21.2.

### **Consolidation by the Court**

The court may order consolidation of two or more charges if the offenses, and the defendants if there are more than one, could have been joined in a single indictment or information without prejudice to any defendant's rights to move for severance under preceding provisions. Ark. R. Crim. P. 23.1.

### **Relevant Statutes and Rules**

Failure to join related offenses: Ark. R. Crim. P. 21.3.

Failure to prove grounds for joinder of defendants: Ark. R. Crim. P. 22.4.

Method of prosecution when conduct constitutes more than one offense: Ark. Code Ann. § 5-1-110.

Parties to offenses: Ark. Code Ann. §§ 5-2-401 – 406.

Joinder when offense is a misdemeanor: Ark. Code Ann. § 16-89-102.

## **Severance**

### **Timeliness**

A motion for severance must be timely made before trial. Exception: The defendant may make such a motion during or at close of evidence if it's based upon a ground not previously known.

The defendant may renew an overruled pretrial motion upon same grounds before or at the close of evidence.

The prosecution may not make a motion for severance after commencement of trial unless consented to by the defendant.

Ark. R. Crim. P. 22.1.

### **Severance of the Offenses**

The defendant has a right to a severance of the offenses that have been joined for trial solely on the ground that they are of the same or similar character, and they are not part of a single scheme or plan.

The court shall grant a motion for severance either by the prosecution or the defense if before trial, or during trial with consent of defendant, it will promote a fair determination of defendant's guilt or innocence of each offense. Ark. R. Crim. P. 22.2.

### **Severance of the Defendants**

The court shall grant a defendant's motion for severance on the grounds that an out-of-court statement of a co-defendant referring to him or her is inadmissible against him or her unless the prosecution elects not to offer the statement, or deletion of all reference to the moving defendant will eliminate any prejudice to him or her from admission of statement.

The court shall not use a joint trial with dual juries to address the situation of an out-of-court statement of a co-defendant.

Upon a motion of the defendant or prosecution, the court shall grant a severance if before trial, or during trial with the consent of the defendant, it will promote a fair determination of the guilt or innocence of a defendant. The court should consider the defendant's right to a speedy trial and/or potentially prejudicial publicity against the other defendant. Ark. R. Crim. P. 22.3.

### **Severance by the Court**

The court, on its own motion, may order severance of offenses or defendants before trial if a severance could be obtained by a defendant or the prosecution. Ark. R. Crim. P. 23.1.

### **Depositions**

A judge may authorize a defendant to take the deposition of a material witness if it is shown by affidavit that the testimony is material, and there are reasonable grounds to believe that the witness will die, will become mentally incapable of giving testimony or physically incapable of attending the trial, or will become a nonresident of the state. Ark. Code Ann. §§ 16-44-201 – 202.

### **Relevant Statutes and Rules**

Discovery of documents: Ark. Code Ann. §§ 16-44-202; 16-89-115 - 116.

Court may require disclosure: Ark. R. Crim. P. 17.4.

Matters court may require of defendant: Ark. R. Crim. P. 18.1.

Medical and scientific reports: Ark. R. Crim. P. 18.2.

Protective orders: Ark. R. Crim. P. 19.4.

In camera proceedings: Ark. R. Crim. P. 19.6.

Sanctions: Ark. R. Crim. P. 19.7.

## **Videotaped Deposition of Minor Victim of a Sex Crime**

Under Ark. Code Ann. § 16-44-203, in any prosecution for a sexual offense or criminal attempt to commit a sexual offense against a minor, upon motion of the prosecuting attorney and after notice to the opposing counsel, the court may, for good cause shown, order the taking of a videotaped deposition (in chambers) of any alleged victim under the age of seventeen years.

Examination and cross-examination proceed in the same manner as the questioning of witnesses at trial, and the deposition is admissible at the trial in lieu of the testimony of the minor victim.

### **Relevant Statute**

Testimony of victim or witness twelve or under by closed-circuit television, video conference technology, or other technology in a criminal proceeding: Ark. Code Ann. § 16-43-1001. Requires a showing of clear and convincing evidence that testifying in open court would be harmful or detrimental to the child. Court should consider:

- (1) The age and maturity of the child;
- (2) The possible effect that testimony in person may have on the child;
- (3) The extent of the trauma the child has already suffered;
- (4) The nature of the testimony to be given by the child;
- (5) The nature of the offense, including, but not limited to, the use of a firearm or any other deadly weapon during the commission of the crime or the infliction of serious bodily injury upon the victim during the commission of the crime;
- (6)(A) Threats made to the child or the child's family in order to prevent or dissuade the child from attending or giving testimony at any trial or court proceeding or to prevent the child from reporting the alleged offense or from assisting in criminal prosecution.

(B) Threats may include, but are not to be limited to, threats of serious bodily injury to be inflicted on the child or a family member, threats of incarceration or deportation of the child or a family member, or threats of removal of the child from the family or dissolution of the family;

(7) Conduct on the part of the defendant or the defendant's attorney which causes the child to be unable to continue his or her testimony; and

(8) Any other matter which the court considers relevant.

Ark. Code Ann. § 16-43-1001.

### **Rape-Shield Statute**

Arkansas Code Annotated § 16-42-1011 controls the admissibility of evidence of a victim's prior sexual conduct.

The Rape-Shield Statute applies in any criminal prosecution under Ark. Code Ann. §§ 5-14-101 et seq. Ark. Code Ann. §§ 5-18-101 et. seq., or Ark. Code Ann. § 5-26-202, or for criminal attempt to commit, criminal solicitation to commit, or criminal conspiracy to commit an offense defined in any of those sections.

The Rape-Shield Statute precludes admission of:

Opinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person;

Evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, evidence of a person's prior sexual conduct when the person was a victim of human trafficking, which allegations the victim asserts to be true; and

Evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegations.

The Rape-Shield Statute precludes admission of the foregoing evidence by the defendant, either through direct examination of any defense witness or through cross-examination of the victim, or other prosecution witness.

The foregoing evidence may not be used to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.

Notwithstanding the prohibition against admitting the foregoing evidence, evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's prior sexual conduct with the defendant or any other person may be admitted at the trial if:

The relevancy of the evidence is determined subject to certain requirements set forth in Ark. Code Ann. § 16-42-101, including:

A written motion filed by the defendant;

An in-camera hearing held no later than three days before trial (or at a later time for good cause shown);

A written order by the court outlining what evidence may be introduced at trial;

Opportunity for the victim to consult with the prosecutor if the evidence is found to be relevant; and

Opportunity for the state to file an interlocutory appeal.

Attempts by counsel or the defendant to circumvent the provisions of Ark. Code Ann. § 16-42-101 may subject counsel or the defendant to appropriate court sanctions.

## **Omnibus Hearing Order**

Unless the court otherwise directs, all motions, and other requests prior to trial should be reserved for the omnibus hearing and presented orally.

All issues presented at the omnibus hearing may be raised without prior notice either by counsel or by the court.

If discovery, investigation, preparation, or evidentiary hearing, or a formal presentation is necessary for a fair determination of any issue, the omnibus hearing should be continued until all matters are properly disposed of.

Any pretrial motion, request or issue which is not raised at the omnibus hearing shall be deemed waived, unless the party concerned did not have the information necessary to make the motion or request or raise the issue.

Stipulations by any party or his counsel shall be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

A verbatim record or comprehensive summary of the omnibus hearing shall be made and preserved. This record shall include the disclosures made, all rulings and orders of the court, stipulations of the parties, and an identification of other matters determined or pending.

Ark. R. Crim. P. 20.3.

## **Relevant Case Law**

An omnibus hearing at which a defendant moves to reduce bail and dismiss the charges is a “critical stage” of the criminal process, necessitating assistance of counsel. *Smith v. Lockhart*, 923 F.2d 1314 (8th Cir. 1991).

An omnibus hearing is not mandatory in every case. The court’s failure to hold an omnibus hearing is not reversible error unless it prejudices the defendant. *Jones v. City of Newport*, 29 Ark. App. 42, 780 S.W.2d 338 (1989).

A sample Omnibus Hearing Order and Checklist can be found on Appendix pages 103 and 104.

## **Pre-Trial Conference**

Whenever a trial is likely to be protracted or unusually complicated, or upon request by or agreement of counsel, the trial court, whether or not an omnibus hearing has been held, may hold one or more pretrial conferences with trial counsel present to consider such matters as will promote a fair and expeditious trial.

Matters which might usefully be considered include, but are not limited to:

Stipulations as to facts about which there is no dispute;

Marking for identification various documents and other exhibits of the parties;

Waivers of foundation as to such documents;

Excision from admissible statements of material prejudicial to a codefendant;

Severance of defendants or offenses;

Seating arrangements for defendant and counsel;

Use of jurors and questionnaires;

Number and use of peremptory challenges;

Procedure on objections where there are multiple counsel;

Order of presentation of evidence and arguments where there are multiple defendants;

Order of cross-examination where there are multiple defendants; and

Temporary absence of defense counsel during trial.

Pretrial conferences should be recorded. Ark. R. Crim. P. 20.4.

A sample Order for Pretrial Conference can be found on Appendix page 125.

A sample form for a Defendant's Pretrial Information can be found on Appendix page 99.

A sample form for a Prosecutor's Pretrial Information can be found on Appendix page 126.

A convenient means to set out Miscellaneous Pretrial Stipulations can be found on Appendix page 102.

### **No Statute of Limitations of Certain Offenses**

A prosecution for the following offenses may be commenced at any time:

Capital murder, Ark. Code Ann. § 5-10-101;

Murder in the first degree, Ark. Code Ann. § 5-10-102;

Murder in the second degree, Ark. Code Ann. § 5-10-103;

Rape, Ark. Code Ann. § 5-14-103, if the victim was a minor at the time of the offense;

Sexual indecency with a child, Ark. Code Ann. § 5-14-110;

Sexual assault in the first degree, Ark. Code Ann. § 5-14-124;

Sexual assault in the second degree, Ark. Code Ann. § 5-14-125, if the victim was a minor at the time of the offense;

Incest, Ark. Code Ann. § 5-26-202, if the victim was a minor at the time of the offense;

Engaging children in sexually explicit conduct for use in visual or print medium, Ark. Code Ann. § 5-27-303;

Transportation of minors for prohibited sexual conduct, Ark. Code Ann. § 5-27-305;

Employing or consenting to the use of a child in a sexual performance, Ark. Code Ann. § 5-27-402;

Producing, directing, or promoting a sexual performance by a child,  
Ark. Code Ann. § 5-27-403;

Computer exploitation of a child in the first degree, Ark. Code Ann. §  
5-27-605; and

Fertility treatment fraud, Ark. Code Ann. § 5-37-220.

Despite any statute of limitation, prosecution may be commenced for a violation of the following offenses if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law enforcement agency or prosecuting attorney, and the victim has not reached the age of twenty-eight:

Sexual assault in the third degree, Ark. Code Ann. § 5-14-126;

Sexual assault in the fourth degree, Ark. Code Ann. § 5-14-127;

Endangering the welfare of a minor in the first degree, Ark. Code Ann.  
§ 5-27-205;

Permitting abuse of a minor, Ark. Code Ann. § 5-27-221; and

Computer child pornography, Ark. Code Ann. § 5-27-603.

Despite any statute of limitation, prosecution may be commenced for a violation of the following offenses if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law enforcement agency or prosecuting attorney, and the victim has not reached the age of eighteen:

Battery in the first degree, Ark. Code Ann. § 5-13-201;

Battery in the second degree, Ark. Code Ann. § 5-13-202;

Aggravated assault, Ark. Code Ann. § 5-13-204;

Terroristic threatening in the first degree, Ark. Code Ann. § 5-13-301;

Kidnapping, Ark. Code Ann. § 5-11-102;

False imprisonment in the first degree, Ark. Code Ann. § 5-11-103;

Permanent detention or restraint, Ark. Code Ann. § 5-11-106; and

Criminal attempt, criminal solicitation, or criminal conspiracy to commit any offense listed in this subsection, Ark. Code Ann. §§ 5-3-201, 5-3-202, 5-3-301, and 5-3-401.

Ark. Code Ann. § 5-1-109.

### **Statute of Limitations for Other Offenses**

A prosecution for another offense shall be commenced within the following periods of limitation after the offense's commission:

Class Y felony or Class A felony, six years; however, for rape, the period of limitation is eliminated if biological evidence of the alleged perpetrator is identified that is capable of producing a deoxyribonucleic acid (DNA) profile;

Class B felony, Class C felony, Class D felony, or an unclassified felony, three years;

Misdemeanor or violation, one year; however, for failure to notify by a mandated reporter, the period of limitation is ten years after the child victim reaches eighteen years of age if the child in question was subject to child maltreatment; and

Municipal ordinance violation, one year unless a different period of time not to exceed three years is set by ordinance of the municipal government.

A defendant may be convicted of any offense included in the offense charged, notwithstanding that the period of limitation has expired for the included offense, if as to the offense charged the period of limitation has not

expired or there is no period of limitation, and there is sufficient evidence to sustain a conviction for the offense charged.

An offense is deemed committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time the course of conduct or the defendant's complicity in the course of conduct is terminated.

Time starts to run on the day after the offense is committed.

A prosecution is commenced when an arrest warrant is issued by a judge based on probable cause or an indictment, information, or other charging instrument if the arrest warrant or other process is sought to be executed without unreasonable delay.

The period of limitation does not run during any time when the accused is continually absent from the state or has no reasonably ascertainable place of abode or work within the state. However, in no event does this rule extend the period of limitation otherwise applicable by more than three years.

If there is biological evidence connecting a person with the commission of an offense and that person's identity is unknown, the prosecution is commenced if an indictment or information is filed against the unknown person and the indictment contains the genetic information of the unknown person and the genetic information is accepted to be likely to be applicable only to the unknown person.

When deoxyribonucleic acid (DNA) testing implicates a person previously identified through a search of the state DNA Data Base or National DNA Index System, a statute of limitation shall not preclude prosecution of the offense.

Ark. Code Ann. § 5-1-109.

## **Specific Offenses**

### **Arson**

A prosecution for arson, § 5-38-301(a)(1)(G), may be commenced within ten years after the offense was committed.

### **Insurance fraud**

A prosecution for a violation of § 23-66-502 may be commenced as follows:  
Within three years of completion of the last act taken to perpetrate alleged fraud; or

Within five years of any alleged violation of § 23-66-502 involving a motor vehicle purposely used to cause a motor vehicle accident for the purpose of filing an insurance claim.

If a prosecution could not be commenced within the time period prescribed because it was not reasonably possible to discover the alleged fraud at the time of the violation, the time period prescribed shall be extended for a period of three years.

The period of limitation may not extend more than ten years after the date of the violation of § 23-66-502. If the period has expired, a prosecution may nevertheless be commenced for:

Any offense involving either fraud or breach of a fiduciary obligation, within one year after the offense is discovered or should reasonably have been discovered by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself or herself not a party to the offense; and

Any offense that is concealed involving felonious conduct in office by a public servant at any time within five years after he or she leaves public office or employment or within five years after the offense is discovered or should reasonably have been discovered, whichever is sooner.

However, in no event does this section extend the period of limitation by more than ten years after the commission of the offense.

Ark. Code Ann. § 5-1-109.

### **Female Genital Mutilation**

The statute of limitations for a prosecution pursuant to Ark. Code Ann. § 5-14-135, female genital mutilation, does not begin to run until the victim of the offense reaches eighteen years of age or when the crime is first reported to a law enforcement agency, whichever occurs first. Ark. Code Ann. 5-14-135.

### **Domestic Abuse**

For an offense occurring after July 28, 2021, if the period prescribed in Ark. Code Ann. § (b) has expired, a prosecution may nevertheless be commenced for the following offenses within five years of the expiration of the limitations otherwise provided for:

- (A) Domestic battering in the first degree, § 5-26-303;
- (B) Domestic battering in the second degree, § 5-26-304; and
- (C) Aggravated assault on a family or household member, § 5-26-306.

If the offense has not previously been reported to a law enforcement agency or prosecuting attorney and:

- (A) The state discovers deoxyribonucleic acid (DNA) evidence sufficient to charge the defendant after the period prescribed has expired;
- (B) The state becomes aware of the existence of an audio or video recording, a photograph, or a written or electronic communication that provides evidence sufficient to charge the defendant after the period prescribed has expired;
- (C) The defendant confesses to the offense and all other elements of the offense are present; or
- (D) Three or more persons also victimized by the defendant present other evidence of the commission of an offense listed above or the

commission of domestic battering in the third degree, § 5-26-305, or first degree assault on a family or household member, § 5-26-307, to a law enforcement agency or prosecuting attorney against the same defendant.

Ark. Code Ann. § 5-1-109 (j)(1).

For an offense occurring after July 28, 2021, if the period prescribed in Ark. Code Ann. § (b) has expired, a prosecution may nevertheless be commenced for the following offenses within three years of the expiration of the limitations otherwise provided for:

(A) Domestic battering in the third degree, § 5-26-305; and

(B) First degree assault on a family or household member, § 5-26-307.

If the offense has not previously been reported to a law enforcement agency or prosecuting attorney and:

(A) The state discovers deoxyribonucleic acid (DNA) evidence sufficient to charge the defendant after the period prescribed has expired;

(B) The state becomes aware of the existence of an audio or video recording, a photograph, or a written or electronic communication that provides evidence sufficient to charge the defendant after the period prescribed has expired;

(C) The defendant confesses to the offense and all other elements of the offense are present; or

(D) Three or more persons also victimized by the defendant present other evidence of the commission of an offense listed above or the commission of domestic battering in the third degree, § 5-26-305, or first degree assault on a family or household member, § 5-26-307, to a law enforcement agency or prosecuting attorney against the same defendant.

Ark. Code Ann. § 5-1-109(j)(2).

### **Continuances**

The court should grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or

consent of the prosecution or defense, but also the public interest in prompt disposition of the case. Ark. R. Crim. P. 27.3.

### **Relevant Statutes and Case Law**

No delay because joint defendant not arrested: Ark. Code Ann. § 16-89-102. Denial of motion for continuance was proper where continuance motion was based upon co-defendant's plea bargain with state on eve of trial. *Godbold v. State*, 336 Ark. 251, 983 S.W.2d 939 (1999).

Denial of motion for continuance was proper where appellant knew of state's psychiatric report for four months prior to trial and made no investigation into the matter. *Copeland v. State*, 343 Ark. 327, 37 S.W.3d 567 (2001).

### **Withdrawal of Counsel**

Except as provided by Ark. R. Civ. P. 87, a lawyer may not withdraw from any proceeding or from representation of any party to a proceeding without permission of the court in which the proceeding is pending.

Permission to withdraw may be granted for good cause shown if counsel seeking permission presents a motion therefor to the court showing he has:

Taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his 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; and

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. Ark. R. Civ. P. 64.

According to Model Rule of Professional Conduct 1.16, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct or other law, the lawyer's

physical or mental condition materially impairs the lawyer's ability to represent the client, or the lawyer is discharged.

A lawyer may withdraw from representing a client if:

Withdrawal can be accomplished without material adverse effect on the interests of the client;

The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

The client has used the lawyer's services to perpetrate a crime or fraud;

A client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

Other good cause for withdrawal exists.

A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation.

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Ark. R. Prof. Conduct 1.16.

Further, according to Arkansas Supreme Court Rule 4-3, there are special procedures an attorney must follow to withdraw as counsel for a defendant in a criminal or a juvenile delinquency case once notice of appeal has been filed.

Ark. R. App. P. Crim. 16 requires trial counsel, whether retained or court-appointed, to continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause.

The Rule provides that if no notice of appeal of a conviction has been filed with the trial court, the trial court shall have exclusive jurisdiction to relieve counsel and appoint new counsel. A motion filed with the trial court to be relieved as counsel or a motion to the trial court for appointment of counsel shall clearly state that no notice of appeal has been filed with the trial court.

If a notice of appeal of a conviction has been filed with the trial court, the appellate court shall have exclusive jurisdiction to relieve counsel and appoint new counsel.

## **VIII. Juries**

### **In General**

#### **Selection of Prospective Jurors**

Courts are authorized to use a computer program that is capable of random selection of names from the list of registered voters or the enhanced list of prospective jurors as authorized by Ark. Code Ann. § 16-32-302 instead of maintaining the jury wheel or box. Ark. Code Ann. § 16-32-104.

The drawing and recording of jurors may be accomplished by a computerized-random-jury-selection process. Ark. Code Ann. § 16-32-105.

#### **Summons of Petit Jurors**

The persons whose names have been selected under Ark. Code Ann. § 16-32-105 shall be summoned to appear on a date set by the court to answer

questions concerning their qualifications. Unless excused or disqualified, those persons shall serve the required number of days or for the maximum period during the calendar year for which selected unless discharged sooner.

Jurors shall be summoned by the court or by the sheriff, as the court directs, by:

First class mail;

Service by telephone;

Personal service of summons; or

Other method as is permitted or prescribed by law.

A notice given by first class mail shall be sent on a form approved by the Administrative Office of the Courts or it shall include the following language:

“You are hereby notified that you have been chosen as a prospective juror. You must notify the sheriff [or the court] on or before (date) to confirm that you have received this notice. If you do not notify the sheriff [or the court] to confirm this notice, the sheriff [or the court] will contact you and there will be added cost. Please call the sheriff [or the court] at (phone number).”

If the prospective juror fails to acknowledge receipt of the notice, the sheriff or the court shall contact the prospective juror not less than five days before the prospective juror is to appear.

The court has the discretion to determine whether the sheriff or the court will be the prospective juror’s primary contact.

A juror who has been legally summoned and who fails to attend may be fined not less than \$5.00 nor more than \$500 unless excused by the circuit judge.

Ark. Code Ann. § 16-32-106.

### **Relevant Case Law**

Prospective juror appealed from decision finding her in contempt for failing to appear for jury duty. The Court of Appeals held that service of the summons

for jury duty failed to comply with the statutory requirements. Because prospective juror was not lawfully summoned to jury duty, she could not be found in contempt for failing to appear for jury duty. *Taylor v. State*, 76 Ark. App. 279, 64 S.W.3d 278 (2001).

### **Length of Service**

No person shall be required to report for jury duty on more than ten days, or for more than a four-month period during the calendar year for which he or she is selected.

An individual's length of jury service may be extended if he is engaged in the trial of a case at the time of the expiration of the period of permitted service, or he has not been required to report for jury duty during the period of permitted service.

Ark. Code Ann. § 16-31-104.

### **Excess Jurors**

If it appears that there are more jurors drawn and listed in the jury book than are needed for jury service, the judge shall designate the number of jurors required.

If the jurors are present in court, the judge shall have the correct number of names taken from the jury book in the same order as they appear thereon. If the jurors are not present in court, the judge shall direct the sheriff to summons the number of jurors needed, the names of whom shall be taken from the jury book in the same order as they appear thereon.

The names of those who have been excused from attendance shall be exempted.

Persons whose names are drawn and recorded in the jury book shall not be disqualified from further duty as provided for in Ark. Code Ann. § 16-31-104(a) until they have been required to report for jury service and sworn therefor.

Ark. Code Ann. § 16-32-107.

### **Additional Jurors**

If at any time it appears that a sufficient number of qualified jurors are not available to try scheduled cases, additional names may be drawn and recorded in the jury book in open court or randomly selected by computer program.

Ark. Code Ann. § 16-32-108.

### **Alternate Jurors**

In civil cases, the court may direct that up to two jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.

In civil cases, alternate jurors shall replace jurors who become unable to serve prior to the time the jury retires to consider its verdict.

In criminal cases, the number of alternate jurors is left to the discretion of the judge.

Alternate jurors shall replace regular jurors in the order in which the alternates were called.

In civil cases, alternate jurors who do not replace regular jurors shall be discharged after the jury retires to consider its verdict.

In criminal cases, alternate jurors, who have not replaced regular jurors prior to the time the jury retires for deliberation, shall be instructed to remain at the courthouse during deliberation.

Each opposing side shall be entitled to one peremptory challenge that may be used against an alternate juror. Other peremptory challenges allowed by law shall not be used against an alternate juror.

Alternate jurors shall have the same qualifications, shall take the same oath, and have the same functions and privileges as the regular jurors.

In civil cases, if a regular juror dies during deliberation, the court may replace the juror with the next alternate. In such an event, the court shall instruct the jury to disregard all previous deliberation, and to begin deliberation anew.

In criminal cases, if a regular juror becomes ill or dies after a verdict of guilty but before a verdict fixing punishment, the court may replace that juror with the next alternate. The court may first give the defendant, with the agreement of the prosecution, the option to waive jury sentencing or to accept a verdict by the remaining jurors. If defendant agrees to accept a verdict by the remaining jurors, the trial will continue with the alternate juror participating in the penalty phase. The court shall instruct the jury to begin deliberation anew as to the sentencing phase only.

Ark. R. Crim. P. 32.3; Ark. R. Civ. P. 47(b).

### **Number of Jurors**

In a criminal case, the jury shall be composed of twelve jurors. However, if the case is not a felony, the jury may be composed of less than twelve jurors by agreement of the parties. Ark. Code Ann. § 16-32-202. The verdict in criminal cases must be unanimous. Ark. Const., Art. 2, § 8.

In a civil case, the parties can stipulate to a jury of any number less than twelve and to a verdict of an agreed-to majority. If the verdict is unanimous, only the foreman shall sign it. If the verdict is less than unanimous, all jurors consenting to the verdict shall sign it. Ark. R. Civ. P. 48.

## **Grand Juries**

### **Selection of Grand Jurors**

Grand jurors shall be summoned in the same manner as petit jurors.

The grand jury shall consist of the first sixteen persons summoned remaining after the elimination of those disqualified or excused.

The remaining grand jurors shall be considered as alternates and shall be designated in the order they appear in the grand-jury book to replace regular grand jurors as they become unable to serve.

Grand jurors shall serve during the calendar year in which selected unless sooner discharged by the court.

The drawing and recording of grand jurors may be accomplished by a computerized-random-jury-selection process.

Ark. Code Ann. § 16-32-201.

### **Challenge to the Selection of a Grand Juror**

Any person held to answer a criminal charge may challenge the competency of a grand juror before he is sworn. Ark. Code Ann. § 16-33-301.

### **Selection of Grand Jury Foreman**

The judge convening the grand jury selects the foreman. *Blackmore v. State*, 8 S.W. 940 (1888).

## **Juror Qualifications**

### **Qualifications of Petit and Grand Jurors**

Every registered voter, who is a citizen of the United States and a resident of Arkansas and the county in which the person is summoned for jury service, is eligible if not otherwise disqualified under Ark. Code Ann. §§ 16-31-101 et seq.

### **Effect of Unqualified Juror on Verdict**

No verdict shall be void because a juror fails to possess any of the required qualifications unless the juror knowingly answered falsely on *voir dire* relating to his qualifications.

A juror shall be deemed to have answered falsely if he knowingly fails to respond audibly or otherwise as is required by the circumstances to make his position known to the court or counsel when such answer would have

revealed a disqualification on the part of the juror. Ark. Code Ann. § 16-31-107.

## **Exemption from Jury Service**

### **In General**

A person may be excused from serving as a grand or petit juror when:

The state of his health or that of his family reasonably requires his absence; or

For any reason, his own interests or those of the public will be materially injured by his attendance.

Ark. Code Ann. § 16-31-103.

### **General Assembly**

If a member of the General Assembly is summoned for service on a petit or grand jury in circuit court within thirty days preceding the convening of the General Assembly or at any time during a regular, extraordinary, or fiscal session, he or she is entitled to a deferment of that service until thirty days after adjournment sine die of the General Assembly.

### **Age 80**

A person who is eighty years of age or older may voluntarily exempt himself or herself from or decline to participate in jury service at any time.

Ark. Code Ann. § 16-31-103.

## ***Voir Dire* Examination of Jurors**

*Voir dire* examination shall be conducted to discover bases for challenge for cause and to gain knowledge to enable the parties to intelligently exercise peremptory challenges.

The judge shall initiate the *voir dire* examination by:

Identifying the parties;

Identifying the respective counsel;

Revealing the names of those witnesses whose names have been made known to the court; and

Briefly outlining the nature of the case.

The judge shall then solicit any information he or she thinks will touch their qualifications to serve as jurors in the trial.

The judge shall also permit additional questions by the parties as he or she deems reasonable and proper.

The attorneys for the parties shall be precluded from asking for a prospective juror's mailing or residential address or phone number during *voir dire*, but the attorneys or the court may ask prospective jurors their city or town of residence.

Ark. R. Crim. P. 32.2; Ark. R. Civ. P. 47; Ark. Code Ann. § 16-33-101.

A sample script for a Jury Qualification and Orientation can be found beginning on Appendix page 6. A Jury Selection Worksheet can be found at Appendix page 49.

### **Juror Questionnaires**

The court shall require members of petit jury panels to complete written questionnaires setting forth the following information:

Age;

Marital status;

Extent of education;

Occupation of juror and spouse; and

Prior jury service.

Upon request, the questionnaires shall be made available by the clerk of the court to the defendant or his counsel and the prosecuting attorney.

Upon a showing of good cause, the court may order that additional information regarding jurors be furnished.

The questionnaires may request the prospective juror's mailing or residential address or phone number. However, the address and phone number shall be redacted from the questionnaires before providing completed questionnaires to the attorneys or the parties.

Ark. R. Crim. P. 32.1; Ark. Code Ann. §16-33-101.

Courts may not charge a fee for providing jury questionnaires to the defendant or the prosecuting attorney. *Aikens v. State*, 368 Ark. 641, 249 S.W.3d 788 (2007).

### **Confidentiality of Juror Information**

Upon application by any person, and findings on the record for good cause, any juror information submitted to a circuit court or circuit clerk from which the identity of a particular juror can be determined may be considered confidential and shall not be released or otherwise made available.

“Juror information” includes:

An original or a copy of a list of potential jurors;

A list of potential jurors who were sworn and qualified;

Any response to a juror questionnaire; and

A list of an individual venire panel.

The confidential juror information may be made available to:

Any party eligible to represent a party in a proceeding before the circuit court;

A party appearing pro se in a proceeding before the circuit court and limited to the juror information relevant to that particular proceeding;

A governmental agency for the purposes of conducting an audit or similar activity associated with the administration of a plan or program; or

A grand jury or court upon a finding that the juror information is necessary for the determination of an issue before the grand jury or court.

The groups identified above may disclose the confidential information to:

A client or a legally authorized representative of a client of an attorney who receives the information;

An employee of an attorney who receives the information;

An attorney associated with an attorney who receives the information; and

A person with whom an attorney or a party appearing pro se who receives the information may consult or confer regarding potential jurors in a specific case.

If the confidential information is released, a signed receipt shall be obtained and stored in the jury records of the circuit clerk.

Unauthorized disclosure of the juror information is a Class C misdemeanor.

Ark. Code Ann. § 16-32-111.

### **Disqualification of Jurors**

The following persons are disqualified to serve as grand or petit jurors:

Individuals who are unable to speak or understand the English language;

Individuals who are unable to read or write the English language, except that the judge may exercise discretion to waive reading and writing requirement when the person is otherwise found to be a capable juror;

Individuals who have been convicted of a felony and have not been pardoned;

Individuals who are not of good character or approved integrity, are lacking in sound judgment or reasonable information, are intemperate or are not of good behavior;

Individuals who by reason of a physical or mental disability, are unable to render satisfactory jury service; except that no person shall be disqualified solely on the basis of loss of hearing or sight;

Individuals who are less than eighteen years of age at the time they are required to appear; and

Individuals who served as grand or petit jurors within the last two years.

Except by the consent of all the parties, no person shall serve as a petit juror in any case who:

Is related to any party or attorney in the cause within the fourth degree of consanguinity or affinity;

Is expected to appear as a witness or has been summoned to appear as a witness in the cause;

Has formed or expressed an opinion concerning the matter in controversy which may influence his judgment;

May have a material interest in the outcome of the case;

Is biased or prejudiced for or against any party to the cause or is prevented by any relationship or circumstance from acting impartially; or

Was a petit juror in a former trial of the cause or of another case involving any of the same questions of fact.

Ark. Code Ann. § 16-31-102; Ark. Code Ann. § 16-31-104; Ark. Code Ann. § 16-33-304. [*See Elmore v. State*, 355 Ark. 620, 144 S.W.3d 278 (2004) (allowing a trial judge's spouse to serve as a juror in a case where the trial judge presides creates an appearance of impropriety; dismissal of trial judge's wife from jury for cause was warranted in criminal prosecution, even though there was no indication of any actual impropriety).].

### **Capital Punishment Disqualification**

A member of the venire shall be excluded if he:

Would automatically vote against imposition of the death penalty without regard to any evidence that might be developed at trial; or

Would be unable to make an impartial decision as to the defendant's guilt because of the member's attitude toward the death penalty.

*Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Davis v. Georgia*, 429 U.S. 122 (1976); *Greene v. State*, 343 Ark. 526, 37 S.W.3d 579 (2001).

### **Hearing or Visually Impaired Jurors**

A qualified interpreter for the hearing impaired or a reader for the visually impaired must be provided when necessary to enable a person with those disabilities to act as a venire person or juror.

The interpreter or reader must be present throughout jury service, the trial, and when the jury assembles for deliberation.

The court shall administer an oath to the interpreter to ensure objective interpretation and confidentiality of the proceedings.

Sample oath: Do you solemnly swear (or affirm) that you will make a true, complete, and impartial interpretation to (name of juror) of the testimony given in this case, the proceedings of this court and the deliberations of the jury so help you God (or under the pains and penalties of perjury)?

The Court shall instruct the interpreter to:

Make a true and complete interpretation of all testimony and other relevant colloquy; and

Refrain from participating in the deliberation of the jury except for the complete interpretation of jurors' remarks made during deliberations.

The interpreter or reader shall be provided and paid for by the state through the Administrative Office of the Courts.

Ark. Code Ann. § 16-31-108.

## **Jury Protocol**

### **Jury Orientation**

Prospective jurors shall receive an orientation which informs them of the nature of their duties, trial procedure, and legal terminology. Ark. R. Crim. P. 34.1.

The Arkansas Jury Orientation video is available on the AOC's website.

A sample script for a Jury Qualification and Orientation can be found beginning on Appendix page 6.

### **Note-Taking by Jurors**

Jurors may take notes regarding the evidence presented to them during the course of a trial.

Jurors may keep the notes when the jury retires for its deliberations.

Notes shall be treated as confidential and the disclosure of their contents shall be made only to fellow jurors.

Ark. R. Crim. P. 33.5.

### **Evidence Testing by Jurors**

Jurors should not consider physical evidence that was not admitted at trial. Individual jurors should not perform tests outside the presence of other jurors and then report the results to them, thus subjecting them to extrinsic evidence. *Banghart v. Origoverken*, 49 F.3d 1302 (8th Cir. 1995).

For example, the use of toy cars, brought to the jury room for the purpose of a demonstration, came close to the bringing in of extraneous evidence.

Although it should not have occurred, the court did not find that there was a reasonable possibility of prejudice resulting from their presence in the jury room. The jurors could have used other inanimate objects and it would not have resulted in evidence testing sufficient to prove misconduct. *New Prospect Drilling Co. v. First Commercial Trust, N.A.*, 332 Ark. 466, 966 S.W.2d 233 (1998).

A juror visiting the scene of an accident may result in misconduct if it results in bringing in extrinsic evidence to the juror room. The Arkansas Supreme Court considers the following factors from *Diemer v. Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993), in determining whether juror misconduct warrants a new trial: (1) whether the trial court instructed the jury not to visit the site of the accident; (2) whether the juror offender simply voiced an opinion or engaged in an experiment relating to a crucial issue; (3) whether the offending juror's observations impugned a fact presented by a party; (4) whether the affiant describes the alleged juror with sufficient specificity, which would include identifying the names of the jurors who engaged in the complained of acts. *Campbell v. Hankins*, 2009 Ark. App. 479, 324 S.W.3d 358.

[**Note:** Ark. Code Ann. § 16-89-125 requires that after the jury retires for deliberation, if there is a disagreement between them as to any part of the

evidence or if they desire to be informed on a point of law, the court must require the officer to bring the jury into open court in order to answer the question, on the record. Further, the information must be given in the presence of or after notice to the counsel of the parties.].

### **Juror Questions to Witnesses**

Jurors shall not be permitted to pose questions to witnesses, either directly or through written questions submitted to the judge or to the parties. Ark. R. Crim. P. 33.8.

### **Jurors Viewing the Scene**

When the court determines it proper, the court may order the jury, conducted in a body under the charge of an officer, to the real property that is subject of action or the place where a material fact occurred.

The place shall be shown by a person appointed by the court for that purpose.

During the viewing, no person, other than the person appointed, may speak to the jury about any subject connected with the trial.

Ark. Code Ann. § 16-64-113.

When, in the opinion of the court, it is necessary that the jury should view the place in which the offense is charged to have been committed or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which must be shown to them by the judge or by a person appointed by the court for that purpose.

The officers must be sworn to refrain from speaking or communicating with the jury on any subject connected with the trial. He shall show the jury the place to be viewed and return them to court without unnecessary delay or at a specified time.

Ark. Code Ann. § 16-89-118.

*See Jefferson v. State*, 328 Ark. 23, 941 S.W.2d 404 (1997)(where the trial court's failure to instruct the bailiff to keep jurors from communicating about

the case during jury view, as required by statute, did not affect the essential fairness of the defendant's trial, and was not reversible error; the defendant did not object to the bailiff's taking charge of jury without receiving special statutory oath, and nothing in the record suggested that any misconduct occurred or that prejudice resulted during the jury view).

## **Challenges**

### **Challenges to the Array**

A challenge to the array shall be decided by the court. Ark. Code Ann. § 16-33-201.

The fact that the panel was drawn entirely from one district of a multi-district county did not constitute a constitutional violation. A jury may properly be drawn from any one district within a county having more than one district. *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998).

### **Challenges to the Selection of Jury List**

A challenge to the use of the names selected by the circuit clerk and placed in the jury wheel or box for the drawing of trial panels from the jury wheel or box may be made only by a litigant in a particular case.

If the trial judge sustains the challenge, he or she shall instruct the circuit clerk to select such a number of persons as the trial judge may designate from the current voter registration list. Those persons, upon being summoned, shall constitute the panel of jurors for the trial of the cause.

A challenge shall be sustained if it appears that there was a substantial irregularity in the drawing or summoning of the jury.

Ark. Code Ann. §16-32-109.

### **Challenges for Cause**

In addition to a general challenge for want of qualification, jurors may be challenged for bias.

**Actual bias** is the existence of such a state of mind to the case or a party, that the juror cannot try the case impartially and without prejudice to the substantial rights of party challenging.

**Implied bias** may be taken in the case of the juror:

Being related by consanguinity, or affinity, or who stands in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or alleged to be injured by the offense charged, or on whose complaint prosecution was instituted;

Being adverse to the defendant in a civil suit, or having complained against or being accused by him in a criminal prosecution;

Having served on the grand jury that found the indictment or on the coroner's jury that inquired into the death of the party, whose death is the subject of the indictment;

Having served on a trial jury that has tried another person for the offense charged in the indictment;

Having been one of the former jurors sworn to try the same indictment and whose verdict was set aside, or who were discharged without a verdict;

Having served as a juror in a civil action brought against the defendant for the act charged in the indictment; and

When the offense is punishable with death, the entertaining of such conscientious opinions as would preclude him from finding the defendant guilty.

Having formed or expressed an opinion merely from rumor shall not be a cause for challenge.

Ark. Code Ann. §§ 16-33-303 - 304.

### **Peremptory Challenges in Civil Cases**

Each party shall have three peremptory challenges, which may be made orally. Ark. Code Ann. §16-33-203(a).

However, if either party desires a panel, the court shall draw the names of eighteen jurors from a box containing the names of twenty-four competent jurors on separate slips of paper. Ark. Code Ann. §16-33-203(b)(1).

Each party shall be furnished with a copy of the list, from which each may strike the names of three jurors and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve names remaining on the original list shall constitute the jury. Ark. Code Ann. §16-33-203(b)(2).

### **Peremptory Challenges in Criminal Cases**

The equal protection clause of the Fourteenth Amendment and the equal protection component of due process under the Fifth Amendment of the Constitution of the United States forbid the purposeful exclusion of jurors on account of race or gender by peremptory challenges. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (landmark case forbidding prosecutor from challenging potential jurors solely on account of their race); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extended *Batson* to private litigants in civil cases); and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (extended to basis of gender).

**Racial** identity between a party and the excluded juror is not a precondition for a *Batson* challenge. *See Powers v. Ohio*, 499 U.S. 400 (1991) (where prosecutor peremptorily challenged black jurors in a case with a white criminal defendant).

Intentional discrimination on the basis of **gender** by state actors in use of peremptory strikes in jury selection violates equal protection clause. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419 (1994) (where putative father successfully appealed from order entered on jury verdict finding him to

be father of the child, challenging state's use of peremptory challenges to exclude men from jury).

There is a three-step process in a *Batson* challenge:

The opponent of a peremptory challenge must make a *prima facie* case of racial discrimination;

The proponent of the strike must come forward with a race-neutral explanation; and

The trial court must decide whether the opponent has proven purposeful racial discrimination.

*MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

### **Objection to Use of Peremptory Challenge**

The person asserting an unconstitutional use of a peremptory challenge must make a timely objection to preserve the record for appeal. *Lewis v. State*, 84 Ark. App. 327, 139 S.W.3d 810 (defendant failed to preserve appellate review of trial court's alleged error in cutting off state's race-neutral explanation, at second step of three-step *Batson* inquiry).

A *Batson* challenge will be considered timely so long as the objection is made before the jury is sworn. *Weston v. State*, 366 Ark. 265, 234 S.W.3d 848 (2006).

### ***Prima Facie* Showing of Abuse of Peremptory Challenge**

A party makes a *prima facie* case of purposeful discrimination by use of peremptory challenges where:

The party is a member of a racial group and the jurors of that race have been excused by the opponent's use of peremptory challenges;

Peremptory challenges constitute a practice that permits discrimination; or

Any other matter that would indicate a discriminatory intention.

*Batson v. Kentucky*, 476 U.S. 79 (1986)

Striking the sole black juror raises an inference of purposeful discrimination. *Hollamon v. State*, 312 Ark. 48, 846 S.W.2d 663 (1993).

Where the only evidence offered to prove discriminatory intent in the exercise of peremptory challenges was that the party striking jurors struck all the members of a particular race included in the venire panel, there was a lack of proof of intent to purposefully discriminate, and the trial court erred in sustaining the state's *Batson* challenge. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003).

### **Defense of a Peremptory Challenge**

Upon a presumptive showing, the burden shifts to the opponent to provide a neutral explanation of the intended peremptory challenge. The reason need not reach the level justifying a challenge for cause. *See Batson, supra*.

If there is any doubt about the legitimacy of the explanation provided by the party using the peremptory challenges, the court is to conduct a sensitive inquiry. *See Batson, supra*.

The state's race-neutral explanation must be more than a mere denial of racial discrimination but need not be persuasive or even plausible. Under step three of the *Batson* procedure, the ultimate burden of persuasion that there is a purposeful intent rests with and never shifts from the party opposing the strikes. *Williams v. State*, 2009 Ark. 433, 373 S.W.3d 237.

Unless discriminatory intent appears in prosecution's explanation for challenged peremptory juror strike, the reason provided is deemed race-neutral. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003).

A judge is not bound to accept the prosecutor's race-neutral reasons for peremptorily striking a juror. *Davis v. State*, 2019 Ark. App. 303.

*See also Riley v. State*, 2009 Ark. App. 613, 343 S.W.3d 327 (although prosecutor exercised peremptory challenge in part for discriminatory

purpose, trial court's decision that the prosecutor would have used peremptory challenge to exclude African American juror, regardless of her race, was not clearly against the preponderance of the evidence; prosecutor articulated race neutral reasons for peremptory strike of juror, such as juror did not complete juror questionnaire, she was young and soft-spoken, and she was not enrolled in school or employed, but prosecutor also stated that defendant and the accomplices' shared race played role in his decision to strike juror from the jury, and trial court was in best position to assess credibility of prosecutor, who gave number of race-neutral reasons for striking juror before adding one reason that was discriminatory); and

*Jackson v. State*, 375 Ark. 321, 290 S.W.3d 574 (2009) (where the state's reason for exercising peremptory strikes against African-American jurors, on the basis that they expressed reservation about the death penalty, was race-neutral, for *Batson* purposes, in capital murder prosecution; the state struck every juror, not just the African-American jurors, who expressed reservation about imposing the death penalty. When the state offers a race-neutral reason for a peremptory against an African-American, it is incumbent on the defense to show that it is pretext, and further questioning may be required).

### **Jury Deliberation**

Judge committed reversible error in going to jury room to respond to questions posed by the jury. Although no objection was made at the time, the fact that neither the defendant nor counsel was in the jury room at the time violated the defendant's fundamental right to be present at a critical stage of the criminal proceeding. *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997); *See also* Ark. Code Ann. § 16-89-125.

The time to correct a verdict based upon a claim that the jury misunderstood the instructions is prior to the jury's discharge. The jury has full power over its verdict and may amend it or recede from it at any time before the verdict has been received and recorded and before the jury has been discharged. Once the jury has been discharged and has left the presence of the court, it is

without power to correct or amend its verdict. *Spears v. Mills*, 347 Ark. 932, 69 S.W.3d 407 (2002).

### **Juror Misconduct**

A new trial was properly granted after a juror introduced extraneous legal materials during deliberations. *Sunrise Enterprises v. Mid-South Road Builders*, 337 Ark. 6, 987 S.W.2d 674 (1999).

A new trial was properly granted where the prejudice in the case stemmed from the fact that some jurors not only made up their minds about whether the defendant was guilty, but also discussed those opinions with jurors prior to the close of the state's case. The trial court properly limited the scope of the examination of jurors to matters that took place prior to formal deliberations and did not allow either party to examine jurors with regard to matters involving the jury's actual deliberations. *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354 (2000);

*But see Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002) (where denial of defendant's mistrial motion brought after juror revealed for first time in deliberations that he knew something about defendant's prior trial and was concerned that defendant had already served three years in jail, was not abuse of discretion because statements were in defendant's favor).

A new trial was warranted in a capital murder case where one juror was sleeping and another juror was tweeting during the trial. The trial court abused its discretion by not removing the sleeping juror after counsel notified the court that the juror was continually dozing, defendant objected to the juror's presence on the panel, and the court could have easily substituted an alternate juror. The tweeting juror admitted that he disregarded the court's instruction not to tweet and continued to tweet, specifically during sentencing deliberations. *Dimas-Martinez v. State*, 2011 Ark. 515, 385 S.W.3d 238.

A new trial was warranted where trial court improperly sent bailiff into jury chambers during deliberations in prosecution on rape and robbery charges, especially where it appeared that bailiff might have engaged in inappropriate discussion with jury concerning evidence. *Gold v. State*, 2013 Ark. 220.

See also Ark. R. Evid. 606 regarding juror testimony about deliberations.

## **Jury Trial Process**

### **Opening Court**

See Appendix page 5 for sample scripts and checklists concerning opening court in a trial.

### ***Voir Dire* Examination**

In all cases, both civil and criminal, the court shall examine all prospective jurors under oath upon all matters set forth in the statutes as disqualifications. Ark. Code Ann. § 16-33-101.

The court shall permit the parties or their attorneys to conduct *voir dire* or conduct the examination itself. If the court conducts the examination, the parties or their attorneys shall be permitted to supplement the examination by such inquiry as the court deems proper. Ark. R. Civ. P. 47.

### **Limitations of *Voir Dire***

Reasonable limitations on *voir dire* examinations by counsel are questions that are:

Repetitive;

Related to the juror's mailing or residential address or phone number (Ark. Code Ann. §16-33-101);

Designed to prejudice the juror;

Not related to anticipated instructions;

Argumentative; and

Not referring to hypothetical facts.

### **Relevant Case Law**

Generally, Arkansas attorneys are afforded considerable latitude in questioning on *voir dire*. See *Stovall v. State*, 233 Ark. 597, 346 S.W.2d 212 (1961) (liquor manufacturer); *Griffin v. State*, 239 Ark. 431, 389 S.W.2d 900 (1965) (self-defense); *Turner v. State*, 171 Ark. 1118, 287 S.W. 400 (1926) (character of prosecuting witness); *Bethel v. State*, 162 Ark. 76, 257 S.W. 740 (1924) (Ku Klux Klan member).

### **Oath of the Jury**

Once the jury has been formed, the clerk administers the oath.

A sample **criminal** oath is found in Ark. Code Ann. § 16-89-109. It states:

“You, and each of you, do solemnly swear, that you will well and truly try the case of the state of Arkansas against \_\_\_\_\_, and a true verdict render, unless discharged by the court or withdrawn by the parties.

The oath could similarly read:

“Do you and each of you solemnly swear that you will well and truly try the case of \_\_\_\_\_ vs. \_\_\_\_\_ and render a true verdict unless discharged by the court or withdrawn by the parties?”

A sample **civil** oath is found in Ark. Code Ann. § 16-30-103. It states:

“I do solemnly swear (or affirm) that I will well and truly try each and all of the issues submitted to me as a juror and a true verdict render according to the law and the evidence.”

### **Admonishment of Jury**

Upon any recess, the jury must be admonished by the court that it is their duty not to communicate with anyone on any subject connected to the trial. Ark. Code Ann. § 16-89-118.

Arkansas Model Jury Instruction—Crim. 2d 100-B suggests the following language:

“During any recess or adjournment, you must not discuss this case among yourselves or with anyone else and you must not permit anyone to discuss the case with you or in your presence. Do not email, blog, tweet, text, or post information about this case on social networking sites during this trial. If anyone attempts to discuss the case with you or in your presence get his name and report him to me immediately.

Furthermore, during any recess or adjournment you must not talk to any of the attorneys, parties, or witnesses about anything. You should not even pass the time of day with them in the courthouse or elsewhere. I say this, not because I think you would discuss this case with them, but simply because it is not proper for you to be seen talking with one side or the other. In other words, it is important that you be, and appear to be, impartial at all times during the trial of this case.

Do not do any research on the internet or otherwise; or make any investigation about the case or the parties on your own.

A. [During any recess or adjournment you must not read any newspaper account of this trial, and you must not listen to any radio report or watch any T.V. report regarding this case. Do not let anyone discuss any such account or report with you.]

B. [If you have a cell phone, pager, or other communication device, you must turn that device off while in the courtroom. Unless otherwise instructed, you can use those devices only during recesses. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you.]

[Or]

[Do not bring cell phones, pagers, or other communication devices to the courtroom. If someone needs to contact you in an emergency, the court can receive messages that it will deliver to you. If you need to contact someone, the court will make a telephone available to you.]

C. [I again remind you not to discuss this case, or talk at all with any attorneys, parties, or witnesses in this case.]

This instruction should be given before the first recess. Thereafter, bracketed paragraph "C" may be given instead of the entire instruction.

Bracketed paragraph "A" should be given before each lunch break and evening recess if there is a possibility that the case will attract media coverage.

Bracketed paragraph "B" has two options depending upon whether the judge permits communication devices in the courtroom.

Sample jury admonishments can be found in the Appendix on page 50, and in the sample jury trial scripts.

*See* AMCI 2d 100-A for a cautionary instruction regarding the commencement of trial.

## **IX. Trial Timing, Type of Trial & Sentencing**

### **Trial Timing**

#### **Precedence of Felony Trials & the Incarcerated**

Except for extraordinary circumstances, precedence is given to criminal felony trials over other matters before the court. Precedence is also given to the trials of those persons who are incarcerated. Ark. R. Crim. P. 27.1.

#### **Precedence Where Victim is Under Age of 14**

Precedence is also to be given to a case in which the victim is under the age of fourteen. Ark. Code Ann. § 16-80-102.

Pursuant to Administrative Order No. 5, when a case affected by Ark. Code Ann. § 16-80-102 is not tried within nine months following the filing of a criminal information in the circuit court, the circuit judge, before whom the case is pending, will inform the Administrative Office of the Courts in writing the reason or reasons therefor. Thereafter, at intervals of ninety days the

trial court will inform the Administrative Office of the Courts as to the status of the case. During the pendency of the case, no continuance shall be granted on motion of either the state or the defendant except upon written order detailing the reasons for and the duration of the delay.

### **Time for Filing Formal Charge When in Custody**

If the defendant is continued in custody subsequent to the first appearance, the prosecuting attorney shall file an indictment or information within sixty days of the defendant's arrest.

Failure to file an indictment or information within sixty days shall not be grounds for dismissal of the case against the defendant, but shall, upon motion of the defendant, result in the defendant's release from custody unless the prosecuting attorney establishes good cause for the delay.

If good cause is shown, the court shall reconsider bail for the defendant.

Ark. R. Crim. P. 8.6.

### **Speedy Trial**

The rules for speedy trial are found in Arkansas Rules of Criminal Procedure 27 to 30, specifically:

Ark. R. Crim. P. 28.1 – Limitations and Consequences

Ark. R. Crim. P. 28.2 – When Time Commences to Run

Ark. R. Crim. P. 28.3 – Excluded Periods

Ark. R. Crim. P. 30.1 – Absolute Discharge

Ark. R. Crim. P. 30.2 – Waiver

The Sixth Amendment guarantees that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy...trial.” This constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice: to (1) prevent undue and oppressive

incarceration prior to trial; (2) minimize anxiety and concern accompanying public accusation; and (3) limit the possibilities that long delay will impair the ability of an accused to defend himself. *Jolly v. State*, 358 Ark. 180, 189 S.W.3d 40 (2004); *but see Betterman v. Montana*, 136 S.Ct. 1609 (2016) (holding that Sixth Amendment's speedy trial guarantee protects the accused from arrest or indictment through trial, but does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges).

The time for trial runs from the date of the defendant's arrest or from the date the defendant receives service of the summons. Ark. R. Crim. P. 28.2.

### **Time To Be Tried**

An incarcerated defendant is entitled to release on recognizance if not tried in **nine** months.

A defendant serving a sentence for another offense is to be tried within **twelve** months.

A defendant on bond is to be tried within **twelve** months.

Ark. R. Crim. P. 28.1.

### **Excluded Periods**

The following periods shall be excluded in computing the time for trial:

Examination and hearing on competency of defendant;

Consideration of pretrial motions up to thirty days;

Congested docket (provided court makes certain written findings and schedules the trial on the next available date permitted by the trial docket);

Continuances requested by the defendant or his attorney (continuance must be to a day certain, and the period of delay is from the date the

continuance is granted until subsequent date contained in the order or docket entry granting the continuance);

Continuances requested by prosecutor where evidence is unavailable or issues complex;

Absence of defendant;

Time between dismissal and refileing;

Where trial is joined with a codefendant whose time for trial has not run; and

Any other period for good cause. Ark. R. Crim. P. 28.3.

Excluded time to be set out in writing by the court by order or docket entry. Rule 28.3 of the Arkansas Rules of Criminal Procedure has not been interpreted to require that an order granting a continuance include an actual date, rather than a to-be-determined trial date. *Turner v. State*, 2017 Ark. 253, 526 S.W.3d 822.

Failure to comply with speedy-trial requirements is a bar to prosecution. Ark. R. Crim. P. 30.1.

The motion to dismiss based upon an alleged speedy-trial violation must be made prior to trial. Ark. R. Crim. P. 30.2.

Appellant waived his right to a speedy trial when he failed to move for a dismissal prior to trial. Appellant announced that he was ready to proceed with trial and participated in jury selection before moving for a dismissal. *Rogers v. State*, 66 Ark. App. 283, 989 S.W.2d 568 (1999).

Speedy trial is waived by the defendant entering a plea of guilty, but defendant may be able to assert ineffective assistance of counsel. *Clark v. State*, 274 Ark. 81, 621 S.W.2d 857 (1981).

The withdrawal of a guilty plea has the effect of restarting the time for speedy-trial purposes. *Kelch v. Erwin*, 333 Ark. 567, 970 S.W.2d 255 (1998).

The excluded period related to defendant's competency runs from the date a mental exam is ordered to the date the resulting mental report is filed. Upon finding of incompetency, the period of time that the defendant was committed to the State Hospital until his competency is restored is properly excludable. *Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998).

For purposes of speedy trial, the time does not commence running until all the elements of the charged offense have been completed. *Cheatham v. State*, 63 Ark. App. 106, 974 S.W. 2d 490 (1998).

When an appeal is taken from a district court decision to the circuit court, the time for speedy trial begins to run from the day the appeal is filed in circuit court. *Johnson v. State*, 337 Ark. 196, 987 S.W.2d 694 (1999).

The loss of the state's only witness constituted good cause to nolle pros the case, and the period of time attributable to the nolle pros was excluded from the speedy-trial calculation. *Jones v. State*, 347 Ark. 455, 65 S.W.3d 402 (2002).

The burden is upon the state to show good cause for an untimely delay in bringing an accused to trial within the period required by the speedy trial rules. *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

Once a defendant presents a *prima facie* case of a violation of his right to speedy trial, the burden is upon the state to show that the delay was the result of the defendant's conduct or was otherwise legally justified. *Meine v. State*, 309 Ark. 124, 827 S.W.2d 151 (1992).

The duty falls on the state to exercise "due diligence" to arrest an accused and to bring that person to trial. The burden is on the state to prove that it has met this burden. *Duncan v. Wright*, 318 Ark. 153, 883 S.W.2d 834 (1994).

*See also Weaver v. State*, 313 Ark. 55, 852 S.W.2d 130 (1993) (prosecution of defendant 868 days after his arrest violated speedy trial rules and required dismissal of robbery charges and convictions. The Supreme Court would not accept state's invitation to prospectively change speedy trial rules; speedy trial rules had worked relatively well and only meaningful way to ensure that public policy behind speedy trial rules was effectuated was to discharge any defendant who had not been promptly tried, even though reversal and dismissal of convictions was an unpleasant task).

### **Interstate Agreement on Detainers**

The Interstate Agreement on Detainers is an interstate compact to which Arkansas is a signatory. Article III provides that where a detainer is lodged against a prisoner based upon an untried indictment, information or complaint of another state, the prisoner, upon request, must be brought to trial on the untried charges within 180 days. Failure to accord a timely trial may mandate dismissal of the underlying charge. The compact is designed to standardize interstate rendition procedures in order to protect the inmate's right to speedy trial. *See Ark. Code Ann. § 16-95-101.*

*See also Padilla v. State*, 279 Ark. 100, 648 S.W.2d 797 (1983) (charge of violation of probation, absent an allegation of commission of an indictable offense, was not an untried indictment, information, or complaint within scope and meaning of prompt disposition provisions of the Interstate Agreement on Detainers Act); and

*Dotson v. State*, 2013 Ark. 382 (Interstate Agreement on Detainers inapplicable where no detainer was filed).

### **Trial Setting**

Cases shall be set for trial at the request of any party after the issues have been joined. The court may assign a trial date, on its own motion, even though neither party has requested a setting. Precedence shall be given to actions entitled thereto by any statute. Ark. R. Civ. P. 40.

## **Continuances**

The court may, upon motion and for good cause shown, continue any case previously set for trial. Ark. R. Civ. P. 40(b).

Proceedings where any party is a member of the Senate or House of Representatives or is a Clerk of either branch of the General Assembly, or Lieutenant Governor while presiding as president of the Senate, shall be stayed for a time not to exceed fifteen days preceding the convening of the General Assembly and not less than thirty days after its adjournment. Ark. R. Civ. P. 40(c)(1).

Proceedings in which any attorney for either party is a member of the Legislative Council, or the Legislative Audit Committee, or any Joint Interim Committee of the General Assembly, shall be stayed or reset if said proceeding has been scheduled on any day upon which the Legislative Council, Legislative Audit Committee, or any Joint Interim Committee is meeting. The attorney shall request the continuance of the Court no less than three days before said proceeding is to commence. Ark. R. Civ. P. 40(c)(2).

*See also* Ark. Code Ann. § 16-63-406.

## **Type of Trial**

### **Civil Demand for Jury Trial**

When an issue in an action is triable of right by a jury, a party may demand a jury trial by filing a written demand therefor not later than twenty days prior to trial date.

Failure to timely and properly file a demand constitutes a waiver of a jury trial.

A demand may not be withdrawn without the consent of all the parties.

Ark. R. Civ. P. 38.

The demand shall be served as required of other pleadings. Ark. R. Civ. P. 5(c).

### **Specification of Issues**

In a demand for a jury trial, the party may specify the issues to be tried by jury.

Failure to specify issues shall operate to have all issues triable by jury to be so tried.

If issues have been specified in the demand, any other party may file a demand for a jury trial of any other or all issues of fact in the action.

The demand shall be filed with the clerk within:

Ten days after service of the original demand; or

Such lesser time as the court may order.

Ark. R. Civ. P. 38(b).

### **Trial by Court or Jury**

When trial by jury has been demanded as provided in Ark. R. Civ. P. 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless:

Consent to trial by the court without a jury is made by written stipulation and filed with the court, or by oral stipulation in open court and entered in the record; or

The court, with or without a motion, finds that right to jury trial does not exist as to any or all of the issues.

Issues for which no demand for jury has been made shall be tried by the court. However, notwithstanding the failure to demand a jury trial as provided in Ark. R. Civ. P. 38, the court, upon motion, may order a jury trial of any or all issues.

In all actions not triable of right by a jury, the court upon motion or of its own initiative, may try any issue with an advisory jury or, with the consent of all parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Ark. R. Civ. P. 39.

### **Right to Jury Trial / Amendment 80 / Cleanup Doctrine**

Article 2, Section 7 of the Constitution of 1874 provides, in part, that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy. . . [.]”

In November 2000, Arkansas voters approved Constitutional Amendment 80. One of the amendment's fundamental purposes was the merger of law and equity, a feat accomplished by abolishing courts of chancery and establishing circuit courts as the state's trial courts of general jurisdiction. Previously, subject matter jurisdiction had been divided among the circuit, chancery, and probate courts. The consolidation of subject matter jurisdiction in general and the merger of law and equity in particular raise questions with respect to the right to trial by jury. Because the Seventh Amendment of the United States Constitution does not apply to the states, the parameters of this right are defined solely by Arkansas law. John J. Watkins, The Right to Trial by Jury in Arkansas After Merger of Law and Equity, 24 U. Ark. Little Rock L. Rev. 649 (2002).

The Supreme Court has held that Amendment 80 did not repeal or modify Article 2, Section 7. As a result of the merger, however, the Supreme Court will be required to determine the parameters of the right to trial by jury in the new system. The possible impact is most clearly seen in cases involving legal issues formerly decided in chancery court under the cleanup doctrine. In *Kansas City Life Ins.*, the Supreme Court held that the litigant was not deprived of his or her right to trial by jury because that right is limited to cases that would have been decided "at law" in 1874. By virtue of the cleanup doctrine, which was well-established by 1874, legal issues could be decided by

the chancellor without a jury. *Colclasure v. Kansas City Life Ins. Co.*, 290 Ark. 585, 720 S.W.2d 916 (1986).

In a merged system, the question is whether Article 2, Section 7 requires trial by jury with respect to legal issues which, prior to merger, would have been heard in chancery under the cleanup doctrine. Faced with this question after the merger of law and equity in the federal courts, the U.S. Supreme Court has held that in a case involving both legal and equitable issues, the former will ordinarily be tried first to the jury in order to avoid the preclusive effect of an initial decision by the court on the equitable issues. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

However, federal cases on this point are not binding, because the right to jury trial in state court is governed not by the Seventh Amendment but by state law. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996); *Colclasure v. Kansas City Life Ins. Co.*, *supra*.

It has been suggested as a matter of practice that when a case with legal and equitable claims involves common questions of fact, the preferable approach is to try those questions to the jury, perhaps on written interrogatories as allowed by Ark. R. Civ. P. 49(a), before the court determines whether equitable relief is appropriate. The jury's findings would be binding on the court, which would serve as fact-finder only as to non-common factual questions arising in connection with the equitable relief. If the order of trial is arranged in this fashion, the right to jury trial on the legal claims would be ensured. Temporary equitable relief, if appropriate, could be granted pending a final adjudication on the merits. 2 Arkansas Civil Prac. & Proc. § 29:3 (5th ed.).

*See Ludwig v. Bella Casa, LLC*, 2010 Ark. 435, 372 S.W.3d 792 (trial court could submit to jury fact questions regarding appeal by neighboring landowners of decision by county board of adjustment that landowner's construction of a private airstrip was not an airport or landing field and that

it was for private recreational use; while there was no right to a jury trial at common law for appeals from administrative agencies because these agencies did not exist at common law and were creatures of statute, legislature specifically and clearly intended the right to a jury trial attach to these types of claims); and

*Nat'l Bank of Arkansas v. River Crossing Partners, LLC*, 2011 Ark. 475, 385 S.W.3d 754 (count of mortgagee's complaint seeking foreclosure of mortgage and a determination of the loan amount was improperly submitted to jury and should have been tried by the court; a foreclosure proceeding was an equitable proceeding, and the loan amount was essential to the foreclosure proceeding itself).

### **Waiver of Jury Trial in a Criminal Case**

A defendant with the assent of the prosecutor may waive a jury trial. The trial court has no discretion under Ark. R. Crim. P. 31.1 to accept the defendant's guilty plea to a felony and pass sentence over the prosecuting attorney's objection. *See State v. Smittie*, 341 Ark. 909, 20 S.W.3d 352 (2000).

A waiver of jury may be made in a capital case if the death penalty has been waived. Ark. R. Crim. P. 31.4; Ark. Code Ann. § 16-89-108.

The waiver may be made in writing or in open court by the defendant. The defendant's attorney may waive a jury trial in open court where the defendant is present and understands his actions. Ark. R. Crim. P. 31.2; *Bolt v. State*, 314 Ark. 387, 862 S.W.2d 841 (1993).

A waiver of a jury may be withdrawn with permission of the court before the jury trial begins. Ark. R. Crim. P. 31.5.

A sample Waiver of Jury Trial can be found on Appendix page 132.

### **Bifurcation of Criminal Trials**

For jury trials, bifurcation applies in all cases where the defendant is charged with a felony and found guilty of any offense. Ark. Code Ann. § 5-4-103.

Except in capital punishment / death penalty cases, the court shall fix punishment in any case in which:

The defendant pleads guilty to an offense;

The defendant's guilt is tried by the court;

The jury fails to agree on punishment;

The prosecution and the defense agree that the court may fix punishment; or

A jury sentence is found by the trial court or an appellate court to be in excess of the punishment authorized by law.

Ark. Code Ann. § 5-4-103.

For combination jury/bench trials, bifurcation applies as follows:

After the jury finds the defendant guilty, the defendant may waive jury sentencing if the prosecutor agrees and the court consents. Ark. Code Ann. §16-97-101(5).

After a guilty plea, the defendant may be sentenced by the jury with agreement of the prosecutor and consent of the court. Ark. Code Ann. §16-97-101(6).

## **Bifurcated Sentencing**

### **Jury Trials**

The jury hears all evidence relevant to every charge and retires to reach a verdict.

If the defendant is found guilty of one or more charges, the jury shall then hear additional evidence relevant to sentencing. Evidence introduced in the guilt phase can be considered but need not be re-introduced.

After introduction of evidence relevant to sentencing, if any, instructions on the law, and arguments, the jury shall retire again and determine a sentence within the statutory range.

The court has discretion to instruct the jury that counsel may argue alternative sentences for which the defendant may qualify. The jury may, at its discretion, recommend an alternative sentence, however, this is not binding on the court.

Ark. Code Ann. § 16-97-101.

### **Sentencing by the Court**

A party may present evidence relevant to sentencing and the opposing party may offer rebuttal evidence.

If a sentencing hearing is not requested, the court may order one or a pre-sentence investigation pursuant to Ark. Code Ann. § 5-4-102.

The court may hear or request argument following a hearing or pre-sentence investigation.

Ark. Code Ann. § 16-97-102.

### **Evidence Relevant to Sentencing**

Evidence relevant to sentencing either by a court or a jury may include but is not limited to:

Applicable law on parole, meritorious good time, or transfer;

Prior felony and misdemeanor convictions of the defendant. May advise jury as to nature, date, time, and place sentence received and date of release from confinement or supervision from all prior offenses;

Prior judicial determinations of delinquency in juvenile court subject to limitations in Ark. Code Ann. §16-97-103(3);

Victim impact evidence or statement;

Relevant character evidence;

Evidence of aggravating and mitigating circumstances;

Evidence relevant to guilt presented in first stage;

Evidence held inadmissible in first stage may be submitted for consideration in second stage if basis for exclusion did not apply to sentencing; and

Rebuttal evidence.

Ark. Code Ann. § 16-97-103.

Under bifurcated-proceedings statute, sentencing is now a trial in and of itself, in which new evidence may be submitted. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994).

If a victim impact statement is offered, the defendant is required to physically remain in the courtroom during the testimony unless the court determines that the defendant is behaving in a disruptive manner or in a manner that presents a threat to the safety of any person present in the courtroom. Ark. Code Ann. 16-90-1112.

### **Capital Cases**

Arkansas Code Annotated § 5-4-602 outlines procedures to be followed in capital felony cases. The statute requires that the same jury sit in the guilt phase of the trial and the sentencing phase of the capital felony trial.

Exceptions:

- (a) Resentencing after error found upon appellate review; and
- (b) Mistrial declared in sentencing phase.

Ark. Code Ann. § 5-4-616.

## **X. Trial to Verdict**

### **Burden of Proof**

The burden of proof lies with the party who would be defeated if no evidence were given on either side. Ark. Code Ann. § 16-40-101.

### **Order of Proof**

The order of proof shall be regulated by the court so as to expedite the trial and enable the tribunal to obtain a clear view of all the evidence.

Ordinarily, the plaintiff, or person who has the burden of proof, first offers proof, followed by the defendant with proof of counterclaim or cross claim and so on until the proof in chief has concluded. The plaintiff may then offer rebuttal proof and the defendant surrebuttal proof.

Ark. Code Ann. § 16-40-102.

*See also* Ark. R. Evid. 611.

### **Testifying Witnesses**

Every person is competent to testify as a witness except as provided in the Rules of Evidence. Ark. R. Evid. 601.

Preliminary questions concerning the qualification of a person to be a witness shall be determined by the court. Ark. R. Evid. 104.

Testimony of witnesses shall be taken in open court, unless otherwise provided by law. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony by contemporaneous transmission from a different location. Ark. R. Civ. P. 43.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so. Ark. R. Evid. 603. *See also* Ark. Code Ann. § 16-40-102 regarding administering oaths.

A witness may not testify to a matter unless he has personal knowledge of the matter, except as provided in Ark. R. Evid. 702 relating to expert witnesses. Evidence to prove personal knowledge of the witness may, but need not, consist of the testimony of the witness himself. Ark. R. Evid. 602.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment. Ark. R. Evid. 611.

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. Ark. R. Evid. 611.

Waiver of one's right to cross-examine must be made knowingly. *Suggs v. State*, 317 Ark. 541, 879 S.W.2d 428 (1994).

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. Ark. R. Evid. 611.

The court, at the suggestion of a party or on its own motion, may call witnesses. All parties are entitled to cross-examine witnesses thus called.

The court may interrogate witnesses, whether called by itself or by a party.

Objections to the calling of witnesses by court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Ark. R. Evid. 614.

## **Vulnerable Witnesses**

Subject to the Arkansas Rules of Civil Procedure, Arkansas Rules of Evidence, or other rule of the Supreme Court, if requested by either party in a criminal trial or hearing and if a certified facility dog is available within the jurisdiction of the judicial district in which the criminal case is being adjudicated, a child witness or vulnerable witness of the party shall be afforded the opportunity to have a certified facility dog accompany him or her while testifying in court.

“Vulnerable witness” means a person testifying in a criminal hearing or trial who has an intellectual and developmental disability or has a significant impairment in cognitive functioning acquired as a direct consequence of a brain injury or resulting from a progressively deteriorating neurological condition, including without limitation Alzheimer's disease or dementia.

Ark. Code Ann. § 16-43-1002.

## **Witness Subpoenas**

Subpoenas are governed by Ark. R. Civ. P. 45. A subpoena commands each person to whom it is directed to appear and give testimony at the time and place therein specified.

A subpoena may be served by the sheriff of the county in which it is to be served, by his deputy, or by any other person who is not a party and is not less than eighteen years of age. Service shall be made by delivering a copy of the subpoena to the person named.

A subpoena for a trial or hearing may be served by telephone by a sheriff or his deputy when the trial or hearing is to be held in the county of the witness's residence.

A subpoena for a trial or hearing or for a deposition may also be served by an attorney of record for a party by any form of mail

addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or agent of the addressee.

When a witness fails to attend in obedience to a subpoena or intentionally evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arrest directing that the witness be brought before the court at a time and place to be fixed in the warrant, to give testimony and answer for contempt.

In criminal cases, out-of-state witnesses must be directed by court order to appear under the Uniform Act to Secure Attendance of Witnesses from Without State in Criminal Cases. Ark. Code Ann. §§ 16-43-402 – 16-43-406.

A defendant in a criminal case has no absolute right to have the court subpoena out-of-state witnesses or to have witnesses appear at government expense. Whether such a request will be granted is in the discretion of the trial court. *Sullivan v. State*, 289 Ark. 323, 711 S.W.2d 469 (1986).

However, the defendant has a right to production of an unlimited number of witnesses from out-of-state, if they are material. The defendant must show that a witness is material and necessary to show that denial of the witness's production is a denial of confrontation. See *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

## **Experts**

A witness qualifies as an expert if, on the basis of his qualifications, he has knowledge of the subject at hand that is beyond that of an ordinary person. *Williams v. Southwestern Bell Telephone Company*, 319 Ark. 626, 893 S.W.2d 770 (1995).

The test for admissibility of expert testimony is whether specialized knowledge will aid the trier of fact in understanding the evidence or in determining a fact in issue. *Williams v. Ingram*, 320 Ark. 615, 899 S.W.2d 454 (1995).

Regarding scientific expert testimony, the Arkansas Supreme Court adopted the holding of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which disposed of the “*Frye*” test in *Farm Bureau v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), in favor of consideration of the “*Daubert* Factors.”

Under this standard, the factors that may be considered in determining whether the methodology is valid are: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.

*See* Paul C. Giannelli, *Daubert* Factors, 23 Crim. Just. 42 (2008-2009).

### **Interpreters**

Arkansas requires court proceedings to be conducted in English. Ark. Code Ann. § 16-10-1101.

A person with limited English proficiency who is a party to or a witness in a court proceeding is entitled to a qualified interpreter to interpret for the person throughout the court proceeding. Ark. Code Ann. § 16-10-1103.

The Administrative Office of the Courts is committed to providing excellent translator and interpretive services.

The Administrative Office of the Courts also furnishes a certified court interpreter for parties, witnesses, or jurors who are deaf. Services are also provided for sight-impaired jurors.

As soon as the court is aware that an interpreter is needed, it should contact the Administrative Office of the Courts and request an interpreter.

*See also* Ark. R. Civ. P. 43 (providing for the appointment of interpreters); and Ark. R. Evid. 1009 (regarding admission of translated materials).

When, in the opinion of the court, it is necessary that the jury should view the place in which the offense is charged to have been committed or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which must be shown to them by the judge or by a person appointed by the court for that purpose.

The officers *must be sworn* to suffer no person to speak or communicate with the jury on any subject connected with the trial, nor do so themselves, except for the mere showing of the place to be viewed, and to return them into court without unnecessary delay or at a specified time.

Ark. Code Ann. § 16-89-118 (emphasis added).

### **Court-Appointed Experts**

The court may appoint an expert witness on its motion or upon the motion of a party. The court may request nomination(s) from the parties or may appoint an expert witness of its own choosing.

An expert witness shall not be appointed by the court unless he consents to act. The witness shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. Ark. R. Evid. 706(a).

The expert witness shall inform the parties of his findings. He or she may be required to give a deposition, be called to testify by either party or the court and be subject to cross-examination by either party.

The court may authorize disclosure to the jury of the fact that the court appointed the expert witness. Ark. R. Evid. 706.

*See also* Ark. R. Civ. P. 26(b)(4).

### **The Bailiff**

At the start of a jury trial, the court shall administer the following oath to its bailiff:

I do solemnly swear (or affirm) that I will faithfully, impartially, and to the best of my ability, discharge the duties of bailiff of this court, to which office I have been appointed, and strictly obey all orders of the court, as bailiff during the present session now being held.

Prior to the deliberation of the jury, the court shall administer the following oath to its bailiff:

I do solemnly swear (or affirm) that I will keep this jury together, not allowing any person to speak to them or overhear their deliberations, nor to speak to them myself, unless it is in the performance of my official duties as bailiff to this court.

Ark. Code Ann. § 16-24-101.

### **The Media**

A judge may authorize broadcasting, recording, or photographing of a trial with these exceptions:

Timely objection by party or attorney;

Timely objection by a witness, upon being informed by the court of the right to refuse any of the above;

All juvenile matters in circuit court as well as hearings in probate and domestic relations matters in circuit court, e.g., adoptions, guardianships, divorce, custody, support, and paternity;

In camera proceedings unless the court consents; and

Jurors, minors without parental or guardian consent, victims in cases involving sexual offenses, and undercover police agents or informants shall not be broadcast, recorded or photographed.

The procedure for broadcasting, recording, or photographing of any court proceeding is set out in Administrative Order No. 6.

The court shall direct that the news media representatives enter into a pooling arrangement for the broadcasting, recording, or photographing of a trial. The media pool may have two cameras in the courtroom during the course of a trial. No artificial lighting device shall be employed.

Electronic devices shall not be used in the courtroom to broadcast, record, photograph, e-mail, blog, tweet, text, post, or transmit by any other means except as may be allowed by the court.

Failure to abide by Administrative Order No. 6 can result in a contempt citation against the news representative and agency.

Ark. Sup. Ct. Admin. Order No. 6.

### **Disqualification of Judge**

Unless the parties waive the disqualification, no judge shall sit on the determination of any case in which he or she is interested in the outcome, is related to any party within the third degree of consanguinity or affinity, has been of counsel in the case or presided over it in any inferior court, or is otherwise disqualified under the Arkansas Code of Judicial Conduct. Ark. Code Ann. § 16-13-214.

The Arkansas Code of Judicial Conduct states that a judge shall disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned. This includes situations where:

The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

acting as a lawyer in the proceeding;

a person who has more than a de minimis interest that could be substantially affected by the proceeding; or  
likely to be a material witness in the proceeding.

The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

The judge:

served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

was a material witness concerning the matter; or

previously presided as a judge over the matter in another court.

A judge subject to disqualification under this Canon, other than for bias or prejudice, may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

## **Relevant Case Law**

*See Huffman v. Arkansas Judicial Discipline & Disability Comm'n*, 344 Ark. 274, 42 S.W.3d 386 (2001)(where the fact that a judge and his wife owned approximately twelve thousand shares of retailer's stock worth about seven hundred thousand dollars created an appearance of impropriety in ruling on retailer's motion for a temporary restraining order (TRO) against union, and, thus, recusal was required, even if the ownership interest was *de minimus* and could not be substantially affected by his decision; the judge's conduct would create in reasonable minds the perception that his ability to carry out judicial responsibilities with integrity, impartiality, and competence was impaired).

*See also Ferguson v. State*, 2016 Ark. 319, 498 S.W.3d 733 (holding that judge was required to recuse herself from defendant's criminal trial for domestic battery because judge's impartiality might reasonably be questioned when she had presided over dependency-neglect proceeding involving defendant in which the child that was the subject of that proceeding was the victim to the pending criminal charge, and the judge found that defendant's questioning of her impartiality in the criminal proceeding required her to withdraw as the finder of fact).

*See also Latham v. State*, 2017 Ark. 210, 520 S.W.3d 666 (concluding that a serious appearance of impropriety is created when a judge rules on a post-trial motion from a case in which he or she was originally the prosecuting attorney).

## **XI. Evidentiary Issues**

### **Judicial Notice**

Judicial notice is given to a fact that is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the

trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Ark. R. Evid. 201.

A court may take judicial notice, whether requested or not. But the court must take judicial notice if requested by a party and supplied with the necessary information.

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

Judicial notice may be taken at any stage of the proceeding.

The court shall instruct the jury to accept as conclusive any fact judicially noticed. Ark. R. Evid. 201.

Courts must take judicial notice of laws of other states. Ark. Code Ann. §16-40-104.

### **Relevant Case Law**

The trial judge took judicial notice that the location of the appellant's home would call for a nighttime search. Because there was no evidence, and because the judge's personal knowledge was not subject to cross-examination or review, there was no proper basis for taking judicial notice. *Heaslet v. State*, 77 Ark. App. 333, 74 S.W.3d 242 (2002).

### **Presumptions**

When not otherwise provided by law or the Rules of Evidence, to disprove a presumption, a party must show that the nonexistence of the presumed fact is more probable than its existence.

If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies. Ark. R. Evid. 301.

When the Criminal Code provides that proof of a particular fact gives rise to a presumption as to the existence of a fact that is an element of the offense, the issue as to the existence of the presumed fact shall be submitted to the jury unless the court determines that the evidence as a whole precludes a finding beyond a reasonable doubt of the presumed fact.

However, the evidence of the fact giving rise to the presumption alone does not impose a duty of finding the presumed fact, even if the evidence is un rebutted.

Ark. Code Ann. § 5-1-111.

### **The Witness**

**Testimony from Former Trial.** When admissible, the testimony of any witness given in any court at any former trial between the same parties or their privies and involving the same issue or claim for relief may be proved by the duly certified transcript thereof. Ark. R. Civ. P. 80.

**Exclusion of Witnesses.** At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause. Ark. R. Evid. 615.

The rule is mandatory and requires the exclusion of witnesses when it is invoked. *Lard v. State*, 2014 Ark. 1, 431 S.W.3d 249 (court committed error in not excluding members of a murder victim's family during the trial, after the rule had been invoked, when they were to testify in the sentencing phase).

**Judge As Witness.** The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the issue for appellate review. Ark. R. Evid. 605.

**Juror As Witness.** A member of the jury may not testify as a witness before the jury in the trial of the case in which he is sitting as a juror. If he is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury. Ark. R. Evid. 606.

**Who May Impeach.** The credibility of a witness may be attacked by any party, including the party calling him. Ark. R. Evid. 607.

**Evidence of Character & Conduct of Witness.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. Ark. R. Evid. 608.

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. Ark. R. Evid. 608.

### **Relevant Case Law**

Neither Arkansas Rule of Evidence 608, nor Rules 609, 613, or 806, permit impeachment by extrinsic evidence on a collateral matter. *Teas v. State*, 23 Ark. App. 154, 744 S.W.2d 739 (1988).

Since it cannot be said that a defendant's truthfulness has been attacked simply because he takes the witness stand, a defendant who takes the witness stand cannot support his testimony by offering evidence that shows his character for truthfulness among his

associates or in the community. *Rios v. State*, 262 Ark. 407, 557 S.W.2d 198 (1977).

The mere fact that a witness's testimony has been contradicted by other evidence does not constitute an attack upon the witness's character for truthfulness. *Collins v. State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984).

In interpreting Rule 608, the threefold test of admissibility is (1) the question must be asked in good faith, (2) the probative value must outweigh its prejudicial effect, and (3) the prior conduct must relate to the witness's truthfulness. *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983).

**Evidence of Conviction of Crime.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment. Ark. R. Evid. 609.

Ten-year time limit on use of a conviction (since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is later).

Conviction not admissible if has been the subject of a pardon or equivalent procedure based on a finding of innocence.

Evidence of juvenile adjudications is generally not admissible under this rule. Except as otherwise provided by statute, however, the court may in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is

satisfied that admission of the evidence is necessary for a fair determination of the issue of guilt or innocence.

A pending appeal from a conviction does not render it inadmissible.

Ark. R. Evid. 609.

See *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998) (Under rules of evidence, once an accused takes the stand, his credibility may be impeached with prior felony convictions; however, the convictions may not be used as proof of guilt).

**Religious Beliefs or Opinions.** Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of his nature his credibility is impaired or enhanced. Ark. R. Evid. 610.

**Writing or Object Used to Refresh Memory.** If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. Ark. R. Evid. 612.

**Prior Statements.** In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel. Ark. R. Evid. 613.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent. Ark. R. Evid. 613.

## Relevant Case Law

A prior inconsistent statement cannot be quoted into evidence as part of the impeachment process. *Williams v. State*, 55 Ark. App. 156, 934 S.W.2d 931 (1996).

Where a witness admits having made a prior inconsistent statement, the court should not allow extrinsic evidence of the prior statement, nor evidence to prove the statement is incorrect. *Rouse v. Goode*, 293 Ark. 272, 737 S.W.2d 447 (1987); *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988).

Statements are clearly relevant for impeachment purposes where they contradict testimony and are therefore admissible under Rule 613. *McDaniel v. State*, 291 Ark. 596, 726 S.W.2d 679 (1987).

Unsworn prior statements made by a witness cannot be introduced as substantive evidence in a criminal case to prove the truth of the matter asserted therein. *Lewis v. State*, 41 Ark. App. 89, 848 S.W.2d 955 (1993).

Admissibility is not limited to the admission of prior inconsistent statements in which diametrically opposite assertions have been made, instead, a witness's prior statement is admissible whenever a reasonable man could infer on comparing the whole effect of the two statements that they have been produced by inconsistent beliefs. *Truck Ctr. of Tulsa, Inc. v. Autrey*, 310 Ark. 260, 836 S.W.2d 359 (1992).

## Records

**Pleading an Official Document.** In pleading an official document or official act, it is sufficient to aver that the document was issued or the act done in compliance with law. Ark. R. Civ. P. 9.

**Records of Secretary of State.** The Secretary of State shall reside and keep his or her office at the seat of government and shall have the custody of

all records, rolls, and documents which properly belong to the state. Ark. Code Ann. § 25-16-403.

**Records of County Surveyor.** A certified copy of the record of any county surveyor, under the hand of the surveyor, shall be admitted as *prima facie* evidence in any court of record in this state. Ark. Code Ann. § 14-15-712.

**Records of Dept. of Alcohol Beverage Control.** Judicial notice shall be taken of sealed and authenticated records of the Alcoholic Beverage Control Board. Ark. Code Ann. § 3-2-204.

**Articles of Incorporation.** The document certified by the Secretary of State, when introduced in evidence, shall constitute *prima facie* proof of the facts therein recited and shall constitute *prima facie* evidence that the corporate purpose sought to be effected by the filing has been lawfully accomplished. Ark. Code Ann. § 4-26-1201.

**Records of Insurance Department.** The Commissioner shall maintain as confidential, and not subject to subpoena, financial information regarding material transactions of insurers. Certain data and reports are not to be open to public inspection and shall not be admissible in evidence in any action or proceeding, other than those brought by the Commissioner. Ark. Code Ann. § 23-61-107.

**Registration of Trademarks & Labels.** Any certificate of registration issued by the Secretary of State, duly certified by the Secretary of State, shall be admissible in evidence as competent and sufficient proof of the registration of a mark in any actions or judicial proceedings in any court of this state. Ark. Code Ann. § 4-71-205.

**Documents Under Seal of Dept. of Aeronautics.** Any certified copies or certified photostatic copies of any records, books, papers, documents, determinations, rulings, or orders of the Arkansas Department of Aeronautics, when certified under the seal of the department, shall be acceptable as evidence in the courts. Ark. Code Ann. § 27-114-104.

Brand Book or supplements thereto shall be *prima facie* evidence of ownership and shall take precedence over brands of like kind should the question of ownership arise. Ark. Code Ann. § 2-34-211.

**Records of Commissioner of Education.** Copies of any papers or documents on file in the office of the Commissioner of Education authenticated by him or her with the seal of the State Board of Education shall be admissible in evidence with the same effect as the original. Ark. Code Ann. § 6-11-117.

**Papers Executed by Administrator of Employment Security Division.** The Director shall procure an official seal, and every paper executed by the director in pursuance of law and sealed with the seal of his or her office shall be received in evidence in any court or other tribunal in this state and may be recorded in the same manner and with like effect as instruments regularly acknowledged. Ark. Code Ann. § 11-10-301.

**Papers Executed by Commissioner of Revenue.** Every paper executed by the Director of the Department of Finance and Administration or by any other employee of the Department and sealed with its official seal shall be received in evidence in any court or other tribunal and may be recorded in the same manner and with like effect as deeds regularly acknowledged. Ark. Code Ann. § 19-1-206.

### **Impeachment of Adverse Witness**

A witness's credibility may be impeached on the following grounds:

Bad reputation for truth or veracity (Ark. R. Evid. 405);

Prior criminal vicious or immoral act affecting character and tending to show not worthy of belief;

Inconsistent or contradictory prior statements;

Showing interest, bias, or hostility;

Conviction of a crime (Ark. R. Evid. 609);

Mentally incapacitated at time of event;

Lack of personal knowledge (Ark. R. Evid. 602); or

Character and conduct. (Ark. R. Evid. 608).

### **Fifth Amendment**

The Constitutions of the United States and the State of Arkansas prohibit compelling an individual to give testimony against himself or herself. Ark. Const., Art. 2, § 8.

The privilege of a witness against self-crimination is not dependent on the nature of the current proceeding. Rather, the test is whether the testimony of the witness might later subject the witness to criminal prosecution. The privilege is thus available to a witness in a civil proceeding as well as to a defendant in a criminal prosecution. *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Dunkin v. Citizens Bank of Jonesboro*, 291 Ark. 588, 727 S.W.2d 138 (1987).

It is the duty of a court to determine the legitimacy of a witness's reliance upon the privilege against compelled self-incrimination. *Dunkin, supra*.

The judge must determine from the form of the question if there is possibility that the answer will incriminate the witness. If the judge determines that it will not be incriminating, he or she may order the witness to answer. A further refusal to answer the question subjects the witness to contempt proceedings under Ark. Code Ann. § 16-43-602.

Parties should not call a witness that they know will refuse to testify based on their Fifth Amendment privilege, and the court must not allow a party to attempt to build its case out of inferences arising from use of the testimonial privilege. "The evil in the non-testimony of such a witness is not the mere calling of the witness, but the obvious inferences drawn by a jury to a series of questions, to all of which the witness refuses to answer on Fifth Amendment grounds. In that case the questions themselves may well have

been the equivalent in the jury's mind of testimony.” *Foster v. State*, 285 Ark. 363, 687 S.W.2d 829 (1985).

Allowing the state to call a witness while knowing that witness will invoke his or her Fifth Amendment privilege, deprives the defendant of his Sixth Amendment right to cross-examine the witnesses against him. *Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000).

### **Statutory Immunity Order**

In the case of any individual who has been or may be called to testify, the circuit court shall issue, upon the request of the prosecuting attorney, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination.

A prosecuting attorney may request an immunity order when, in his judgment: (1) The testimony or other information from the individual may be necessary to the public interest; and (2) The individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination. Ark. Code Ann. § 16-43-604.

No such immunity shall be granted until after the individual has declined to answer questions or has requested immunity before answering questions. Ark. Code Ann. § 16-43-605.

No testimony or other information compelled under the order, or any other information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. Ark. Code Ann. § 16-43-603.

An individual who has once been granted immunity under the provisions of this subchapter for an offense in connection with which his testimony has

been sought shall not again be granted immunity under this subchapter in connection with any subsequent offenses. Ark. Code Ann. § 16-43-606.

### **Privileges**

Unless otherwise provided by constitution, statute, or rule, no person has a privilege to: (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any matter or producing any object or writing. Ark. R. Evid. 501.

**Lawyer-Client.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between himself or his representative and his lawyer or his lawyer's representative. Ark. R. Evid. 502.

Exceptions include: furtherance of a crime or fraud, claimants through the same deceased client, breach of duty by lawyer or client, document attested to by a lawyer, joint clients, and public officer or agency.

### **Relevant Case Law**

Inherent in the idea of waiver of the attorney-client privilege is the understanding that the client is allowing disclosure of something that was previously privileged as a confidential communication; in other words, confidentiality is a characteristic of the communication at the time it is made, and the question of whether or not the privilege might be waived in the future is irrelevant for purposes of determining whether the communication was confidential when it was made. *Holt v. McCastlain*, 357 Ark. 455, 182 S.W.3d 112 (2004).

**Physician and Psychotherapist-Patient.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records or confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition. Ark. R. Evid. 503.

Exceptions include: Proceedings for hospitalization, examination by order of court, and when the condition is an element of a claim or defense. Ark. R. Evid. 503.

### **Relevant Case Law**

See *Vaughn v. State*, 2020 Ark. 313, 608 S.W.3d 569, for an in-depth discussion on this privilege.

**Husband-Wife.** An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse. Ark. R. Evid. 504.

Exceptions include: When one spouse is charged with a crime against the other or a child of either or a person residing in the household of either.

### **Relevant Case Law**

The burden of proving that a privilege applies is upon the party asserting it. *Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992). “Marital confidential communication privilege” prohibits testimony concerning statements privately communicated between spouses during their marriage, and the nontestifying spouse may invoke the privilege even if the marriage has been dissolved, but the privilege does not protect information communicated after the couple has permanently separated. *United States v. Jackson*, 939 F.2d 625 (8th Cir. 1991).

The marital privilege applies to communications, not to what the spouse heard, saw, and observed in relation to a criminal charge. *MacKool v. State*, 365 Ark. 416, 231 S.W.3d 676 (2006).

**Religious.** A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser. Ark. R. Evid. 505.

**Political Vote.** Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot. Ark. R. Evid. 506.

**Trade Secrets.** A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require. Ark. R. Evid. 507.

**State Secrets.** The state must recognize a governmental privilege created under the laws of the United States. Ark. R. Evid. 508.

**Identity of Informer.** There exists a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer conducting an investigation. Ark. R. Evid. 509.

Exceptions include: Voluntary disclosure and testimony on relevant issue.

#### **Relevant Case Law**

Absent surprise or other mitigating factors, orderly procedures of a trial are best served by a preliminary ruling on whether the state should be compelled to disclose the identity of a confidential informant. *Warrior v. State*, 299 Ark. 337, 772 S.W.2d 592 (1989).

**Waiver by Voluntary Disclosure.** A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. (This rule does not apply if the disclosure itself is privileged.) Ark. R. Evid. 510.

**Compulsion.** A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege. Ark. R. Evid. 511.

**Comment Upon Claim.** The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom. Ark. R. Evid. 512.

**Media Privilege.** Before any editor, reporter, or other writer for any newspaper, periodical, radio station, television station, or Internet news source, or publisher of any newspaper, periodical, or Internet news source, or manager or owner of any radio station shall be required to disclose to any grand jury or to any other authority the source of information used as the basis for any article he or she may have written, published, or broadcast, it must be shown that the article was written, published, or broadcast in bad faith, with malice, and not in the interest of the public welfare. Ark. Code Ann. § 16-85-510.

### **Character Evidence**

Under Ark. R. Evid. 404(a), evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

**Character of Accused.** Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

**Character of Victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; and

**Character of Witness.** Evidence of the character of a witness, as provided in Ark. R. Evid. 607, 608, and 609.

Evidence of other **crimes, wrongs, or acts** is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ark. R. Evid. 404(b).

### **Relevant Case Law**

The list of exceptions set out in the evidentiary rule governing evidence of other crimes, wrongs, or acts is exemplary and not exhaustive. *Spencer v. State*, 348 Ark. 230, 72 S.W.3d 461 (2002).

Evidence of a defendant's character or a trait of his character can be admissible if it is independently relevant and not offered to show merely that the defendant has bad character. *Simmons v. State*, 95 Ark. App. 114, 234 S.W.3d 321 (2006).

There are two requirements for admission of Ark. R. Evid. 404(b) evidence: (1) it must have independent relevance, and (2) its relevance must not be substantially outweighed by the danger of unfair prejudice. *Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1980).

To be sufficiently probative of intent to be admissible, defendant's prior bad act must be similar to the crime charged. *Osburn v. State*, 2009 Ark. 390, 326 S.W.3d 771 (2009).

Evidence of a victim's violent character, including evidence of specific violent acts, is admissible where claim of justification is raised, for such evidence is relevant to the issue of who was the aggressor and whether accused reasonably believed he was in danger of suffering unlawful deadly physical force. *Smith v. State*, 273 Ark. 47, 616 S.W.2d 14 (1981).

Evidence of prior bad acts is admissible in the government's case-in-chief when the defendant places his state of mind in issue, even if state of mind is placed in issue by means of a general denial defense. However, when the defendant denies only the criminal act, he does not

place his state of mind in issue. *United States v. Thomas*, 58 F.3d 1318 (8th Cir. Ark. 1995).

When Ark. R. Evid. 404(b) evidence is admitted, the defendant is entitled to a limiting instruction that the proof of other crimes is admitted solely for the limited purposes listed in Ark. R. Evid. 404(b) and should not be considered as evidence of guilt. *See Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1980).

Arkansas courts have long recognized a "**pedophile exception**," which allows proof of similar acts with the same child or other children in the same household when it is helpful in showing a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship. Such evidence not only helps to prove the depraved sexual instinct of the accused but is also admissible to show the familiarity of the parties and antecedent conduct toward one another and to corroborate the testimony of the victim. *Hyatt v. State*, 63 Ark. App. 114, 975 S.W.2d 443 (1998); *Brewer v. State*, 68 Ark. App. 216, 6 S.W.3d 124 (1999); *Pickens v. State*, 347 Ark. 904, 69 S.W.3d 10 (2002); *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002).

For the pedophile exception to apply, there must be a sufficient degree of similarity between the evidence to be introduced and the sexual conduct of the defendant. Similarities in age and gender of victims are demonstrative of a depraved sexual instinct, such that the pedophile exception is applicable. *Kelley v. State*, 2009 Ark. 389, 327 S.W.3d 373.

Additionally, for the pedophile exception to apply, there must be an "intimate relationship" between the perpetrator and the victim of the prior act. An "intimate relationship," does not necessarily require that the child live in the home of the accused. The Arkansas Supreme Court has defined an "intimate relationship," as close in friendship or

acquaintance, familiar, near, or confidential. For purposes of the pedophile exception, the Court has admitted the testimony of a child living in the same household or staying as an overnight guest in the perpetrator's home. The Supreme Court has also admitted evidence against a perpetrator who babysat a child, or who gained access to the child. *Id.*

Finally, evidence admitted pursuant to the pedophile exception to Rule 404 (b) must not be too separated in time, so as to make the evidence unduly remote. *See Lamb v. State*, 372 Ark. 277, 275 S.W.3d 144 (2008), in which the Court concluded that admission of evidence about the defendant's prior sexual abuse of a child that occurred approximately twenty years prior to his trial was not too remote and was properly admitted pursuant to the pedophile exception.

The Supreme Court has declined to expand the pedophile exception to include evidence of a defendant's similar acts with a physically-disabled adult who lived with and was cared for by the accused. *See Hortenberry v. State*, 2017 Ark. 261, 526 S.W.3d 840.

**Reputation.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Ark. R. Evid. 405.

#### **Relevant Case Law**

It is necessary to allow evidence of a defendant's character so that defendant might have a chance to raise reasonable doubt in the minds of the jury; however, type of character evidence which may be offered on direct examination is limited to opinion or reputation evidence, and specific instances of conduct may not be used. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994).

Once character evidence is admissible, one permissible method to admit such evidence is by reputation or opinion testimony, and on cross-examination, inquiry is allowable into relevant specific instances of conduct. *Frye v. State*, 2009 Ark. 110, 313 S.W.3d 10.

Proof of character by specific instances of conduct may be introduced in cases in which character or trait of character is essential element of a charge, claim, or defense; such character trait must be operative fact which, under substantive law, determines rights and liabilities of the parties. *Solomon v. State*, 323 Ark. 178, 913 S.W.2d 288 (1996).

**Habit.** Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine. Ark. R. Evid. 406.

#### **Relevant Case Law**

“Habit,” for purpose of the rule of evidence governing admissibility of evidence thereof, is an acquired or developed mode of behavior or function that has become nearly or completely involuntary; it is regular response to repeated specific situation which may become semiautomatic. *Henry v. Cline*, 275 Ark. 44, 626 S.W.2d 958 (1982).

#### **Photograph Victim-Homicide Case**

In a homicide case, the state has a right to have a photograph depicting the deceased person as he or she appeared in life before the crime occurred admitted and displayed at trial during the state's case-in-chief, if the photograph is submitted by the prosecution and is a reasonable, accurate, and appropriate depiction of the deceased

person, subject to Rule 403 of the Arkansas Rules of Evidence and any other rule or law.

The court may limit the size of the photograph, the length of time the photograph is displayed, and give a limiting instruction to the jury as to the weight the photograph should be afforded.

Ark. Code Ann. § 16-90-1116.

## **XII. Verdicts & Sentencing**

### **Receiving the Verdict**

There is a Checklist on Appendix page 5 outlining the procedure that a judge should follow when the jury has returned from deliberation with a verdict.

### **Civil Verdicts**

The court may require the jury to return only a general verdict pronouncing generally on all the issues. Ark. R. Civ. P. 49(a).

When the jury has agreed upon its verdict, it must be brought into court, the names called by the clerk, and the verdict rendered by their foreman. Ark. Code Ann. § 16-64-119.

When the verdict is announced either party may require the jury to be polled, which is done by the clerk or court asking each juror if it is his or her verdict. If anyone answers in the negative, the jury must again be sent out for further deliberation. Ark. Code Ann. § 16-64-119.

### **General Verdict Accompanied by Answer to Interrogatories**

In addition to a general verdict, the court may submit written interrogatories on one or more issues that shall be answered to reach a general verdict.

The court shall make such explanation or instruction as necessary for the jury to answer interrogatories and render a general verdict.

The court shall direct the jury to make written answers and to render a general verdict.

When verdict and answers are harmonious, the appropriate judgment shall be entered.

When answers are consistent with each other, but one or more is inconsistent with verdict, the court may:

Enter judgment in accordance with answers, notwithstanding the verdict;

Return the jury for further consideration of answers and verdict; or

Order a new trial.

When answers are inconsistent with each other and one or more is also inconsistent with the verdict, the court shall not enter judgment, but may return the jury for further consideration, or order a new trial.

Ark. R. Civ. P. 49(a).

### **Special Verdict**

The court may require the jury to return only a special verdict in the form of a special written finding on each issue of fact by:

Submitting written questions that may be answered briefly or categorically; or

Submitting appropriate written forms of the several special findings that might properly be made under the pleadings and evidence; or

Using such other method as the court deems proper.

The court shall make such explanation or instruction as necessary for the jury to make findings.

The party waives a trial by jury of an issue of fact omitted by the court, unless its submission to the jury is demanded before the jury retires.

When an issue is omitted without demand for submission:

Court may make a finding; or

If no finding made, a finding in accord with the judgment on the special verdict is deemed made.

Ark. R. Civ. P. 49(b).

### **Assessment of Damages by Jury**

When, by the verdict, either party is entitled to recover money from the adverse party, the jury shall assess amount of recovery in the verdict. Ark. Code Ann. § 16-64-121.

### **Tort Reform – Assessment of Fault**

Ark. Code Ann. § 16-55-201 eliminates “joint liability.” Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault. A defendant’s liability shall be determined by multiplying the total amount of damages recoverable by the plaintiff by the percentage of each defendant’s fault. Ark. Code Ann. § 16-55-203 sets out a procedure to increase the percentage of a several-share if it is shown the amount of damages against another defendant is uncollectible.

Ark. Code Ann. § 16-55-202 directs that in assessing percentages of fault, the fact finder shall consider the fault of all persons or entities who contributed to the alleged injury or death or damage to property, tangible or intangible, regardless of whether the person or entity was or could have been named as a party to the suit.

**Caution!** This provision has been held unconstitutional and in conflict with Ark. Const., Art. 4, § 2 and Ark. Const., Amend. 80, § 3 because rules regarding pleading, practice, and procedure are solely the responsibility of the supreme court; the nonparty-fault provision bypassed the rules of pleading, practice, and procedure by setting up a procedure to determine the fault of a nonparty and mandating the consideration of that nonparty's fault in an effort to reduce a plaintiff's

recovery. *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135.

*See also ProAssurance Indem. Co. v. Metheny*, 2012 Ark. 461, 425 S.W.3d 698 where the circuit court's rejection of the defendant's request to place nonparties on the verdict form was upheld because Ark. Code Ann. § 16-55-201 only allocates liability as to "each defendant." In so doing, the Supreme Court of Arkansas declined to hold that a defendant is vested with a substantive right of allocation of liability to a nonparty.

## **Allocation of Fault**

### **Jury Allocation**

In an action for personal injury, medical injury, wrongful death, or property damage, the jury shall determine the fault of all persons or entities, including those not made parties, who may have joint liability or several liability for the alleged injury, death, or damage to property.

The jury shall determine the fault of a nonparty only if:

The claimant entered into a settlement agreement with the nonparty, or a defending party has given notice, as provided in Ark. R. Civ. P. 9(h), that the nonparty was wholly or partially at fault; and

The defending party has carried the burden of establishing a *prima facie* case of the nonparty's fault.

The jury shall allocate the fault, on a percentage basis, among those persons or entities, including those not made parties, found to have contributed to the injury, death, or property damage.

Assessment of the percentage of a nonparty's fault shall be used only for determining the percentage of fault of the parties.

A finding of fault shall not subject a nonparty to liability in any action or be introduced as evidence of liability in any action.

Ark. R. Civ. P. 49(c).

### **Allocation by Court**

In an action for personal injury, medical injury, wrongful death, or property damage tried without a jury, the court shall determine the fault of all persons or entities, including those not made parties, who may have joint liability or several liability for the alleged injury, death, or damage to property.

The court shall determine the fault of a nonparty only if:

The claimant entered into a settlement agreement with the nonparty, or a defending party has given notice, as provided in Ark. R. Civ. P. 9(h), that the nonparty was wholly or partially at fault; and

The defending party has carried the burden of establishing a *prima facie* case of the nonparty's fault.

The court shall allocate the fault, on a percentage basis, among those persons or entities, including those not made parties, found to have contributed to the injury, death, or property damage.

Assessment of the percentage of a nonparty's fault shall be used only for determining the percentage of fault of the parties.

A finding of fault shall not subject a nonparty to liability in any action or be introduced as evidence of liability in any action.

Ark. R. Civ. P. 52 (a)(2).

### **Punitive Damages**

To recover punitive damages, the plaintiff must satisfy the burden of proof by clear and convincing evidence. Plaintiff must prove compensatory damages and an “aggravating factor”:

(1) That the defendant acted with malice (may be inferred from reckless disregard for consequences); or

(2) That the defendant intentionally pursued a course of conduct for the purpose of causing injury or damage. Ark. Code Ann. §§ 16-55-206 and 207.

### **Bifurcated trial**

All actions tried before a jury in which punitive damages are sought shall, on the motion of any party and if warranted by the evidence, be conducted in a bifurcated trial before the same jury.

The jury shall first determine the liability of the defendant or defendants for compensatory damages, the amount of compensatory damages to be awarded, and, at the discretion of the circuit court, the liability of the defendant or defendants for punitive damages.

Should it be necessary, the jury will then determine, in a separate proceeding, the liability of the defendant or defendants for punitive damages, if that issue was not decided previously, and the amount of punitive damages to be awarded.

Evidence of a defendant's financial condition shall not be admitted in the first proceeding unless relevant to an issue other than the amount of punitive damages.

Ark. R. Civ. P. 42 (b)(2).

Finally, Ark. Code Ann. § 16-55-208 says that a punitive-damages award shall not be more than the greater of the following: two hundred-fifty thousand dollars or three times the amount of compensatory damages not to exceed one million dollars. (Amounts shall be adjusted as of January 20, 2006, and at three-year intervals thereafter, in accordance with the Consumer Price Index Rate for the previous year as determined by the Administrative Office of the Courts.) If the defendant is found to have

intentionally pursued a course of conduct for the purpose of causing injury or damage, then the limitations do not apply.

**Caution!** This statute was held unconstitutional under Article 5, Section 32, which says that “no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property,” because it limits the amount of recovery outside of the employment relationship. *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, 385 S.W.3d 822.

### **Uniform Contribution Among Tortfeasors Act**

In 2013, the General Assembly adopted portions of the **Uniform Contribution Among Tortfeasors Act**. It contains the following provisions:

The right of contribution exists among joint tortfeasors.

A joint tortfeasor is not entitled to a money judgment for contribution until he or she has by payment discharged the common liability or has paid more than his or her pro rata share of the common liability.

The right of contribution is not limited to money damages but also includes the right to an allocation of fault as among all joint tortfeasors and the rights provided for in Ark Code Ann. § 16-61-204.

A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

Ark. Code Ann. § 16-61-202.

As to the effect of releases on an injured person’s claim and on the right of contribution, the UCATA says:

A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other joint tortfeasors unless the release so provides.

A release by the injured person of a joint tortfeasor does not relieve the released tortfeasor from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other joint tortfeasor to secure a money judgment for contribution has accrued and provides for a reduction, to the extent of the pro rata share of the released joint tortfeasor, of the injured person's damages recoverable against all other joint tortfeasors.

When the injured person releases a joint tortfeasor, the injured person's damages recoverable against all the other joint tortfeasors shall be reduced by the greatest of the following:

The amount of the consideration paid for the release;

The pro rata share of the released joint tortfeasor's responsibility for the injured person's damages; or

Any amount or proportion by which the release provides that the total claim shall be reduced.

When the injured person releases a joint tortfeasor, the remaining defendants are entitled to a determination by the finder of fact of the released joint tortfeasor's pro rata share of responsibility for the injured person's damages.

Ark. Code Ann. § 16-61-204.

Note: The Act is remedial in nature and applies to all causes of action accruing on or after March 25, 2003. *See also J-McDaniel Const. Co. v. Dale E. Peters Plumbing Ltd.*, 2014 Ark. 282, 436 S.W.3d 458.

The Arkansas Lawyer Vol. 49 No. 1 has several informative articles on the legislation.

Also note that Ark. Code Ann. § 16-55-205 creates a statutory cause of action for “acting in concert,” that somewhat resembles “conspiracy.” It permits recovery against one for the intentional torts of another if both the party and the other person or entity were acting in concert or if the other person or entity was acting as an agent or servant of the party.

### **Findings by the Court**

If requested by a party at any time prior to entry of judgment, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Ark. R. Civ. P. 58.

If requested by a party, when granting or refusing interlocutory injunctions, the court shall find the facts specially and state separately its conclusions of law thereon.

Requests for findings are not necessary for purposes of review.

Findings of fact shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given to the opportunity of the circuit court to judge the credibility of the witnesses.

Findings of a master adopted by the court are considered findings of the court.

If an opinion or memorandum opinion is filed, it is sufficient that findings and conclusions appear therein.

Upon motion of a party made not later than ten days after entry of judgment, the court may amend its findings of fact previously made or make additional findings and may amend the judgment accordingly.

The motion may be made with a motion for a new trial pursuant to Ark. R. Civ. P. 59.

When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may

thereafter be raised whether or not the party raising the question has made in the circuit court an objection to such findings or has made a motion to amend them or a motion for judgment.

Ark. R. Civ. P. 52.

### **Interest on Judgments**

A judgment entered by a court shall bear post-judgment interest and, if appropriate under the facts of the case, prejudgment interest as follows: In an action on a contract at the rate provided by the contract or at a rate equal to the Federal Reserve primary credit rate in effect on the date on which the judgment is entered plus two percent (2%), whichever is greater; and

In any other action at a rate equal to the Federal Reserve primary credit rate in effect on the date on which the judgment is entered plus two percent (2%).

Interest on a judgment shall not exceed the maximum rate permitted under Arkansas Constitution, Amendment 89.

A judgment rendered or to be rendered against a county in the state on a county warrant or other evidence of county indebtedness shall not bear interest.

Ark. Code Ann. § 16-65-114.

### **Sentencing**

A defendant who is found guilty of capital murder shall be sentenced to death or life imprisonment without parole in accordance with Ark. Code Ann. §§ 5-4-601 – 608, unless the defendant was younger than eighteen years of age at the time he or she committed the capital murder in which case he or she shall be sentenced to life imprisonment with the possibility of parole after serving a minimum of thirty (30) years' imprisonment. *See Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); Ark. Code Ann. § 5-4-104(b); but see *Harris v. State*, 2018 Ark. 179, 547 S.W.3d 64 (holding that the parole

eligibility provisions of the Fair Sentencing of Minors Act of 2017 does not apply to certain juvenile offenders).

A defendant convicted of a Class Y felony or murder in the second degree shall be sentenced to a term of imprisonment in accordance with Ark. Code Ann. §§ 5-4-401 – 404. In addition to a term of imprisonment, the trial court may sentence the defendant to:

Pay a fine as authorized by Ark. Code Ann. §§ 5-4-201 and 202;

Make restitution as authorized by Ark. Code Ann. § 5-4-205; or

Suspend imposition of an additional term of imprisonment in accordance with Ark. Code Ann. § 5-4-304.

However, a defendant who was 18 years of age or older at the time of the offense and who was convicted of one or more of the following Class Y felonies in which the victim was less than 14 years of age at the time of the offense shall be sentenced to life without the possibility of parole:

Rape involving forcible compulsion, § 5-14-103(a)(1);

Trafficking of persons, § 5-18-103;

Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;

Transportation of minors for prohibited sexual conduct, § 5-27-305;

Producing, directing, or promoting a sexual performance by a child, § 5-27-403; and

Computer exploitation of a child in the first degree, § 5-27-605.

Ark. Code Ann. § 5-4-104(c).

A defendant convicted of an offense other than capital murder, murder in the second degree, treason, or a Class Y felony may be sentenced to any one or more of the following:

Imprisonment as authorized by Ark. Code Ann. §§ 5-4-401 – 404;

Probation as authorized by Ark. Code Ann. §§ 5-4-301 – 307 and Ark. Code Ann. §§ 16-93-306 – 314;

Payment of a fine as authorized by Ark. Code Ann. §§ 5-4-201 and 202;

Restitution as authorized by a provision of Ark. Code Ann. § 5-4-205;

or

Imprisonment and payment of a fine.

Ark. Code Ann. § 5-4-104(d).

The court may not suspend imposition of sentence as to a term of imprisonment nor place the defendant on probation for:

Capital murder, treason, a Class Y felony (except to suspend imposition of an additional term of imprisonment, see above and Ark. Code Ann. § 5-4-304), DWI, BWI, murder in the second degree (except to suspend imposition of an additional term of imprisonment, see above and Ark. Code Ann. § 5-4-304), or engaging in a criminal enterprise.

In any other case, the court may suspend imposition of sentence or place the defendant on probation, in accordance with Ark. Code Ann. §§ 5-4-301 – 307 and Ark. Code Ann. §§ 16-93-306 – 314.

Ark. Code Ann. § 5-4-104(e).

If the offense is punishable by fine and imprisonment, the court may sentence the defendant to pay a fine and suspend imposition of the sentence as to imprisonment or place the defendant on probation. Ark. Code Ann. § 5-4-104(e).

The court may not suspend execution of a sentence.

When a sentence is pronounced and then suspended, the trial court has suspended execution of sentence. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

### **Mandatory Sentencing for Certain Offenses**

A defendant who was eighteen years of age or older at the time of the offense and who was convicted of one or more of the following Class Y felonies in which the victim was less than fourteen years of age at the time of the offense shall be sentenced to life without the possibility of parole:

- (a) Rape involving forcible compulsion, § 5-14-103(a)(1);
- (b) Trafficking of persons, § 5-18-103;
- (c) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;
- (d) Transportation of minors for prohibited sexual conduct, § 5-27-305;
- (e) Producing, directing, or promoting a sexual performance by a child, § 5-27-403; and
- (f) Computer exploitation of a child in the first degree, § 5-27-605.

Ark. Code Ann. § 5-4-104.

The Sentencing Order forms can be found beginning on the Supreme Court's website.

### **Relevant Case Law**

The suspended portion of a sentence of imprisonment commences to run upon release from confinement. The trial court could revoke a five-year suspended sentence only during those five years, which began upon release from incarceration, and not after the suspended sentence is completed. *Matthews v. State*, 265 Ark. 298, 578 S.W.2d 30 (1979).

For example, a habitual offender was sentenced to a ten-year term of imprisonment (the statutory minimum) and ten years suspended (the maximum). Two years after he was released, the court imposed the ten years suspended. The appellate court held the trial court could only imposed a sentence of no more than ten years less the length of time from the defendant's release until his revocation, roughly eight years. *Chadwell v. State*, 80 Ark. App. 133, 91 S.W.3d 530 (2002).

The trial court could not sentence defendants to the statutory minimum for their Class Y felony (ten years) and then suspend the sentence. When a defendant is convicted of a Class Y felony, a trial court shall not suspend imposition of sentence as to a term of imprisonment or place the defendant on probation. *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000).

“Double counting” jail time is impermissible. Credit for jail time is appropriate when the pretrial incarceration is due to inability to make bail, but not appropriate when the incarceration is due wholly to unrelated charges based on conduct other than that for which the defendant is sentenced. *Hanley v. State*, 2017 Ark. App. 583, 535 S.W.3d 276.

### **Conditions of Incarceration**

The sentencing court may not impose conditions of incarceration. Once the circuit court enters a judgment and commitment order, jurisdiction is transferred to the Department of Correction—the Executive Branch—and it is for that branch to determine any conditions of incarceration. For example, ordering drug treatment during incarceration is prohibited. *Richie v. State*, 2009 Ark. 602, 357 S.W.3d 909.

### **Post-Conviction No Contact Orders**

At the request of the prosecuting attorney, a court shall determine whether to issue an extended post-conviction no contact order to a person convicted of one or more of the following offenses:

Capital murder or attempted capital murder, murder in the first degree or attempted murder in the first degree, murder in the second

degree or attempted murder in the second degree, kidnapping, battery in the first degree, battery in the second degree, rape, sexual assault in the first degree, domestic battering in the first degree, domestic battering in the second degree, and aggravated assault upon a law enforcement officer or an employee of a correctional facility, if a Class Y felony.

If such a request is made, the court shall order the defendant to show cause why an extended post-conviction no contact order shall not be issued and shall hold a show cause hearing at the sentencing of the defendant.

A victim has the right to be heard at the show cause hearing.

If the court determines after the show cause hearing that the defendant should be subject to an extended post-conviction no contact order, the court shall:

Enter written findings of fact and the grounds on which the extended post-conviction no contact order is issued;

Determine the time period the extended post-conviction no contact order is effective, up to the life of the defendant, and include the time period in the extended post-conviction no contact order;

Determine the additional terms described below to be included in the extended post-conviction no contact order and include the terms in the extended post-conviction no contact order;

Issue the extended post-conviction no contact order in a separate document from the judgment imposing the sentence on the defendant;  
and

Provide a copy of the extended post-conviction no contact order to the defendant.

The court may include one or more of the following terms in the extended post-conviction no contact order:

Order the defendant not to threaten, visit, assault, molest, abuse, injure or otherwise interfere with the victim;

Order the defendant not to follow the victim, including following the victim to his or her workplace;

Order the defendant not to harass the victim;

Order the defendant not to contact the victim by telephone, written communication, or electronic means; or

Order the defendant to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified place at times when the victim is present.

Ark. Code Ann. § 5-4-106.

### **Sentencing Standards**

The court may apply sentencing standards in felony cases when:

The defendant pleads guilty;

The plea is negotiated;

The defendant is found guilty by the court;

The jury fails to agree on punishment; or

The jury's sentence is found by the court to be illegal.

Ark. Code Ann. § 5-4-103.

The standards do not apply to:

Misdemeanors;

Probation-revocation proceedings;

Felonies committed before January 1, 1994;

Findings of guilty by a jury; or

Convictions of capital murder.

The presumptive sentence is arrived at by determining the offense seriousness level (Ark. Code Ann. § 16-90-803(b)(1)) and the offender history score (Ark. Code Ann. § 16-90-803(b)(2)).

For purposes of determining the offender's criminal history score, the court looks at the offender's "records" at the time of sentencing not arrest.

The Offense Seriousness Ranking Table, the Criminal History Worksheets and the Sentencing Grid are published by the Arkansas Sentencing Commission.

The Criminal History Worksheets are found on the Sentencing Commission's website.

Ark. Code Ann. § 16-90-803.

### **Departure from Standards**

The sentencing standards are not mandatory. The trial court may deviate from the presumptive sentence without providing a written justification.

If the departure is agreed upon by the parties (negotiated plea), written reasons must be provided by the parties to the court. If the court rejects the agreement, the defendant may withdraw his plea.

A list of mitigating factors can be found in Ark. Code Ann. § 16-90-804(c).

A list of aggravating factors can be found in Ark. Code Ann. § 16-90-804(d).

The Sentencing Order forms can be found on the Supreme Court's website.

### **Habitual Offenders**

Habitual offenders (those who have committed multiple felonies) shall be sentenced to an extended term of imprisonment according to the guidelines set forth in Ark. Code Ann. § 5-4-501.

The guidelines in Ark. Code Ann. § 5-4-501(a)(1) describe those offenders who have committed more than one but fewer than four felonies. Their extended sentence is set out in Ark. Code Ann. § 5-4-501(a)(2) according to the class of felony that has been committed.

The guidelines in Ark. Code Ann. § 5-4-501(b)(1) describe those offenders who have committed four or more felonies. Their extended sentences are set out in Ark. Code Ann. § 5-4-501(b)(2).

The guidelines in Ark. Code Ann. § 5-4-501(c)(1) describe those offenders who are convicted of a serious felony involving violence who have previously committed a serious felony involving violence. Those persons must serve mandatory sentences of not less than forty years nor more than eighty years, or life, without the possibility of parole except under Ark. Code Ann. § 16-93-615.

An offender who is convicted of rape or sexual assault involving a victim less than 14 years of age and who has previously been convicted of a serious felony involving violence shall be sentenced to life in prison without the possibility of parole. Ark. Code Ann. § 5-4-501(c)(3).

The guidelines in Ark. Code Ann. § 5-4-501(d)(1) describe those offenders who have committed two or more felonies involving violence, as defined in the statute. Their mandatory extended sentences are set out in Ark. Code Ann. § 5-4-501(d)(1), according to the class of felony that has been committed.

The jury shall first hear all the evidence and render a verdict. Then, the court, out of the hearing of the jury, shall hear evidence of the defendant's prior felony convictions and shall determine the number of prior serious felonies involving violence convictions, if any. The trial court shall then instruct the jury as to the number of prior convictions for a serious felony involving violence and the statutory sentencing range. The jury shall retire again and then determine a sentence within the statutory range. Ark. Code Ann. § 5-4-501(c)(4).

For the purpose of determining the number of felonies for which a defendant has been convicted, if the defendant was previously convicted of a felony for possession of a controlled substance under the Uniform Controlled Substances Act, Ark. Code Ann. § 5-64-101 et seq., and the defendant also was convicted of a felony for possession of drug paraphernalia under Ark. Code Ann. § 5-64-443 stemming from the same set of facts, the two felonies shall be considered as one felony. Ark. Code Ann. § 5-4-501(i).

### **Delayed Release**

A person who commits a serious felony involving violence is subject to delayed release if the state proves beyond a reasonable doubt that the person committed a serious felony involving violence under an aggravating circumstance.

“Serious felony involving violence” means:

- A. Murder in the first degree, § 5-10-102;
- B. Murder in the second degree, § 5-10-103;
- C. Battery in the first degree, § 5-13-201;
- D. Aggravated assault, § 5-13-204;
- E. Terroristic threatening, § 5-13-301, if a felony offense;
- F. Terroristic act, § 5-13-310;
- G. Arson, § 5-38-301;
- H. Unlawful discharge of a firearm from a vehicle, § 5-74-107; and
- I. An attempt, a solicitation, or a conspiracy to commit the foregoing offenses, if the attempt, solicitation, or conspiracy itself is a felony.

In order to seek delayed release, the state shall set out the allegation in the indictment, in the information, or in a separate filing.

If the finder of fact is the circuit court, the state may present evidence of an aggravating circumstance during its case-in-chief, and if the circuit court finds the person guilty and sentences the person to a term of imprisonment, the circuit court shall make the determination as to whether the state proved

beyond a reasonable doubt that the person committed a serious felony involving violence under an aggravating circumstance and sentence the person accordingly.

If the finder of fact is a jury, the jury shall first hear all evidence relevant to the serious felony involving violence with which the person is charged and shall retire to reach a verdict of guilt or innocence on the charge.

If the person is found guilty of the serious felony involving violence, the circuit court shall then instruct the jury that the state seeks a sentence of imprisonment that would provide for delayed release.

The state may then offer additional evidence and argument that one or more aggravating circumstances existed, which the person may rebut with his or her own evidence and argument.

The jury shall retire again and then determine a sentence and, if the sentence includes a term of imprisonment, a finding as to whether the person is subject to delayed release.

If the finder of fact is a jury, the jury shall first hear all evidence relevant to the serious felony involving violence with which the person is charged and shall retire to reach a verdict of guilt or innocence on the charge.

If the person is found guilty of the serious felony involving violence, the circuit court shall then instruct the jury that the state seeks a sentence of imprisonment that would provide for delayed release.

The state may then offer additional evidence and argument that one or more aggravating circumstances existed, which the person may rebut with his or her own evidence and argument.

The jury shall retire again and then determine a sentence and, if the sentence includes a term of imprisonment, a finding as to whether the person is subject to delayed release.

Ark. Code Ann. § 5-4-405.

## **Sentencing Enhancements**

### **Domestic Abuse**

Any person who commits any of the following offenses may be subject to an enhanced sentence of an additional term of imprisonment of not less than one year and not more than ten years if the offense is committed in the presence of a child:

Capital murder, § 5-10-101;

Murder in the first degree, § 5-10-102;

Murder in the second degree, § 5-10-103;

Aggravated robbery, § 5-12-103;

A felony offense of assault or battery under § 5-13-201 et seq.;

Rape, § 5-14-103;

Sexual assault in the second degree, § 5-14-125; or

A felony offense of domestic battering or assault on a family or household member under § 5-26-303 — § 5-26-309.

To seek enhancement, the prosecuting attorney must notify the defendant in writing and advise the defendant that he or she is subject to the enhanced penalty. The notice may be included in the criminal information or indictment.

The enhanced portion of the sentence is consecutive to any other sentence imposed.

A person, who receives an enhanced sentence, is not eligible for early release on parole or community correction transfer during the enhanced portion of the sentence.

Ark. Code Ann. § 5-4-702.

## **Terrorism**

Any person who is found guilty of or who pleads guilty or nolo contendere to terrorism, Ark. Code Ann. § 5-54-205, may be subject to an enhanced sentence of an additional term of imprisonment of ten years if the person's acts caused serious physical injury to a law enforcement officer, firefighter, or emergency service technician providing emergency assistance at the scene of the act of terrorism.

The enhanced portion of the sentence is consecutive to any other sentence imposed.

A person, who receives an enhanced sentence, is not eligible for early release on parole or community correction transfer during the enhanced portion of the sentence.

Ark. Code Ann. § 5-54-206.

## **Manufacture of Methamphetamine in the Presence of Certain Persons**

Any person who is found guilty of or who pleads guilty or nolo contendere to manufacture of methamphetamine, Ark. Code Ann. § 5-64-423, or possession of drug paraphernalia with the purpose to manufacture methamphetamine, Ark. Code Ann. § 5-64-443(b), may be subject to an enhanced sentence of an additional term of imprisonment of ten years if the offense is committed:

In the presence of a minor, elderly person, or incompetent person who may or may not be related to the person;

With a minor, elderly person, or incompetent person in the same home or building where the methamphetamine was being manufactured or where the drug paraphernalia to manufacture methamphetamine was in use or was in preparation to be used; or

With a minor, elderly person, or incompetent person present in the same immediate area or in the same vehicle at the time of the person's arrest for the offense.

"Elderly person" means any person seventy years of age or older.

"Incompetent person" means any person who is incapable of consent because he or she is physically helpless, mentally defective, or mentally incapacitated.

"Minor" means any person under eighteen years of age.

The enhanced portion of the sentence is consecutive to any other sentence imposed.

A person, who receives an enhanced sentence, is not eligible for early release on parole or community correction transfer during the enhanced portion of the sentence.

Ark. Code Ann. § 5-64-407.

#### **Drug Offenses that Occur in Proximity to Certain Locations**

A person is subject to an enhanced sentence of an additional term of imprisonment of ten years if:

He or she possesses a controlled substance in violation of Ark. Code Ann. § 5-64-419 and the offense is a Class C felony or greater; or

He or she possesses with the purpose to deliver, delivers, manufactures, or traffics a controlled substance in violation of Ark. Code Ann. §§ 5-64-420, 5-64-440; and

The offense is committed on or within one thousand feet of the real property of:

A city or state park;

A public or private elementary or secondary school, public vocational school, or private or public college or university;

A designated school bus stop as identified on the route list published by a public school district each year;

A skating rink, Boys Club, Girls Club, YMCA, YWCA, community center, recreation center, or video arcade;

A publicly funded and administered multifamily housing development;

A drug or alcohol treatment facility;

A day care center;

A church; or

A shelter as defined in Ark. Code Ann. § 9-4-102.

The enhanced portion of the sentence is consecutive or concurrent to any other sentence imposed at the discretion of the court.

A person, who receives an enhanced sentence, is not eligible for early release on parole or community correction transfer during the enhanced portion of the sentence.

Ark. Code Ann. § 5-64-411. *See Small v. State*, 2018 Ark. App. 80, 543 S.W.3d 516 (holding that statute permitting enhancement of a sentence required proof of culpable mental state).

### **Use of a Firearm While Committing or Escaping from Committing a Felony**

Any person convicted of any offense which is classified as a felony, who employed any firearm of any character as a means of committing or escaping from the felony, may be subjected to an additional period of confinement in the state penitentiary for a period not to exceed fifteen years.

The period of confinement imposed shall be in addition to any fine or penalty provided by law as punishment for the felony itself.

Any additional prison sentence imposed shall run consecutively to any period of confinement imposed for conviction of the felony itself.

A separate appeal may be taken to the Arkansas Supreme Court from the imposition of the enhanced sentence and any appeal shall be in the manner prescribed for appellate review of conviction of criminal offenses in general.

The only question to be decided upon the separate appeal shall be whether the evidence warrants a finding that the defendant actually employed a firearm in the commission of, or escape from commission of, the felony for which he or she stands convicted.

Any reversal of a defendant's conviction for the commission of the felony shall automatically reverse the prison sentence which may be imposed under this section.

Ark. Code Ann. § 16-90-120.

**Committing the Offense of Aggravated Cruelty to a Dog, Cat, or Equine in the Presence of a Child**

Any person who commits the offense of aggravated cruelty to a dog, cat, or equine under Ark. Code Ann. § 5-62-104, may be subject to an enhanced sentence of an additional term of imprisonment not to exceed five years if the offense was committed in the presence of a child.

To seek this enhanced penalty, a prosecuting attorney shall notify the defendant in writing that the defendant is subject to the enhanced penalty.

The prosecuting attorney may include the written notice in the information or indictment.

The enhanced portion of the sentence is consecutive to any other sentence imposed.

Any person convicted under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.

Ark. Code Ann. § 5-4-702.

## **Stacking Enhancements**

There is no constitutional barrier to the enhancement of separate punishments for distinct crimes. For example, the punishment for each of three separate crimes, each committed with a firearm, could be enhanced for each of the three offenses. *Welch v. State*, 269 Ark. 208, 599 S.W.2d 717 (1980).

*See McKeever v. State*, 367 Ark. 374, 240 S.W.3d 583 (2006) (where the commission of each of three terroristic acts was a separate offense, each of which could have been committed with or without a firearm, the punishment for each of the three offenses could be enhanced under the firearm statute).

## **Pre-Adjudication Probation**

The court has the option of creating a pre-adjudication probation program as an additional alternative to the disposition of criminal offenders to assist the offender in atoning for his or her criminal transgression and promote the enforcement of the state's criminal statutes while easing the inmate burden on the county jails and the Department of Correction. Ark. Code Ann. § 5-4-901.

The structure, method, and operation of the pre-adjudication probation program may differ and shall be based upon the specific needs of and resources available to the judicial district where the pre-adjudication probation program is located. The program may incorporate services from various state agencies, including without limitation the Department of Community Correction and the Department of Human Services. Ark. Code Ann. § 5-4-903.

A person charged with a felony is eligible to participate in a pre-adjudication probation program if the circuit court with jurisdiction over the case and the prosecuting attorney agree, and the person is not charged with one of the following criminal offenses:

A criminal offense for which the person would be required to register as a sex offender;

A felony involving violence as listed in Ark. Code Ann. § 5-4-501(d)(2);

A felony involving a victim who was seventeen years of age or younger at the time the felony was committed; or

A felony involving a victim who was sixty-five years of age or older at the time the felony was committed.

A person charged with a traffic offense committed in any type of motor vehicle who was a holder of a commercial learner's permit or commercial driver license at the time the traffic offense was committed is ineligible to participate in a pre-adjudication probation program.

Ark. Code Ann. § 5-4-904.

A pre-adjudication probation program judge may impose sanctions on a program participant who fails to complete certain court-ordered program requirements or fails to meet certain court-ordered program goals. Sanctions may include:

Time spent in the custody of the county sheriff;

Additional fines;

Community service;

Substance abuse testing;

Written assignments; and

Volunteer work for a nonprofit organization.

Ark. Code Ann. § 5-4-905.

Participants are eligible to have their records sealed. Ark. Code Ann. § 5-4-906.

The pre-adjudication probation program judge shall establish a schedule for the payment of costs, fees, and restitution. The judge may order the offender to pay such costs and fees as listed in Ark. Code Ann. § 5-4-907, including court costs, drug testing costs, substance abuse treatment costs, mental health treatment costs, supervision fees, and restitution.

### **Community Correction**

Upon a determination by the court that a defendant is an eligible offender and that placement in a community correction program is proper, the court may suspend the imposition of the sentence or place the defendant on probation and assign the defendant to a community correction program as a condition of probation for a designated period of time commensurate with goals of program.

Jurisdiction over the defendant remains with the court

If after receipt of an order directing a defendant to a community correction center, the Department of Community Correction determines that the defendant is not eligible for placement in a community correction program under Ark. Code Ann. §§ 16-93-1201 et seq., the Department of Community Correction shall not admit the defendant but shall immediately notify the prosecuting attorney in writing.

After receipt of the notice, the prosecuting attorney shall notify the court of the defendant's ineligibility for placement in a community correction center and the court shall resentence the defendant accordingly.

Ark. Code Ann. § 5-4-312.

### **Judicial and Administrative Transfers**

A commitment shall be treated as a commitment to the Division of Correction and subject to regular transfer eligibility.

However, an inmate may be judicially or administratively transferred to the Division of Community Correction by the Division of Correction unless the court indicates on the sentencing order that the Division of

Correction shall not administratively transfer a statutorily eligible inmate to the Division of Community Correction in accordance with the rules promulgated by the Board of Corrections.

The Parole Board may release from confinement an inmate who has been sentenced and judicially transferred to the Department of Community Correction, incarcerated for a minimum of 180 days, and determined by the Department of Community Correction to have successfully completed its therapeutic program.

Ark. Code Ann. § 12-27-127; Ark. Code Ann. § 5-4-312.

Administrative transfer to the Department of Community Correction is conditioned upon bed space availability and upon the Department of Community Correction's final determination of the defendant's initial and continuing eligibility for Department of Community Correction placement.

A determination of ineligibility by the Department of Community Correction shall result in the immediate return of the defendant to the Department of Correction.

Ark. Code Ann. § 5-4-312(b)(3)(A).

### **Sentencing Criteria to be Considered by the Court**

If the crime is not capital murder, treason, Class Y felony, murder in the second degree, first-degree rape, kidnapping or aggravated robbery, DWI, BWI, or engaging in continuing-criminal enterprise and the defendant is not a habitual offender, the court may suspend imposition of sentence or place the defendant on probation. In making this determination, the court shall consider whether:

There is undue risk that during the period of a suspension or probation the defendant will commit another offense;

The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution;

Suspension or probation will discount the seriousness of the defendant's offense; or

The defendant has the means available or is so gainfully employed that restitution or compensation to the victim of his or her offense will not cause an unreasonable financial hardship and will be beneficial to the rehabilitation of the defendant.

The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of suspension or probation:

The defendant's conduct neither caused nor threatened serious harm;

The defendant did not contemplate that his or her conduct would cause or threaten serious harm;

The defendant acted under strong provocation;

There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense;

The victim of the offense induced or facilitated its commission;

The defendant has compensated or will compensate the victim of the offense for the damage or injury that he or she sustained;

The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before commission of the present offense;

The defendant's conduct was the result of circumstances unlikely to recur;

The character and attitudes of the defendant indicate that he or she is unlikely to commit another offense;

The defendant is particularly likely to respond affirmatively to suspension or probation;

The imprisonment of the defendant would entail excessive hardship to him or her or his or her dependents;

The defendant is elderly or in poor health; and

The defendant cooperated with law enforcement authorities in his or her own prosecution or in bringing other offenders to justice.

Ark. Code Ann. § 5-4-301.

A period of suspension or probation commences to run when the circuit court pronounces the probationer's sentence in the courtroom or upon the entry of a sentencing order, whichever occurs first. However, if a court sentences a defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment, the period of the suspension commences to run on the day the defendant is lawfully set at liberty from the imprisonment.

Whether pronounced or entered at the same or a different time, multiple periods of suspension or probation run concurrently.

Ark. Code Ann. § 5-4-307.

### **Conditions of Suspension or Probation**

The court shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life. The court shall provide as an express condition of every suspension or probation that defendant not commit an offense punishable by imprisonment during the period of suspension or probation.

If the court suspends imposition of sentence on a defendant or places him on probation, it may, as a condition of its order, require that the defendant:

Support his dependents and meet his family responsibilities;

Undergo available medical or psychiatric treatment, and enter and remain in a specified institution, when required for that purpose;

Participate in a community-based rehabilitative program or work-release program;

Refrain from frequenting unlawful or designated places or consorting with designated persons;

Have no firearms in his or her possession;

Make restitution or reparation to aggrieved parties in an amount he or she can afford to pay, for the actual loss or damage caused by his or her offense;

Post a bond, with or without surety, conditioned on the performance of prescribed conditions; and/or

Satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his or her liberty or incompatible with his or her freedom of conscience.

If the court places a defendant on probation, it may as a condition of its order, require that the defendant:

Report as directed to the court or probation officer and permit the probation officer visitation at employment or elsewhere;

Remain within the jurisdiction of the court unless granted permission to leave by the court or the probation officer; and/or

Answer all reasonable inquiries by the court or probation officer and promptly notify the court or probation officer of any change in address or employment.

If the court suspends imposition of sentence on a defendant or places him or her on probation, the court shall require that the defendant either:

Work consistently in suitable employment for the entire duration of his or her suspended sentence or probation or for three years, whichever occurs earlier; or

If the defendant is unemployed, pursue a prescribed secular course of study and show continuous progress in improving academic skills and education by increasing his or her reading, math, and communication skills to at least the ninth-grade level regardless of a prior high school or other educational credentials.

If the defendant is unemployed, he/she shall also meet at least one of the following benchmarks:

Earn a Career Readiness Certificate;

Earn a Workforce Alliance for Growth in the Economy Certificate;

Earn a high school diploma by passing the Department of Career Education approved assessment; or

Enroll in vocational training designed to equip him or her for suitable employment.

If the defendant is serving a suspended sentence or is on probation at the end of the required study or training, he or she shall work in suitable employment for the remainder of his or her suspended sentence or probation or for three years, whichever occurs earlier.

If the court suspends imposition of sentence on a defendant or places him or her on probation, the court shall give the defendant a written statement explicitly setting forth the conditions under which he or she is being released.

Ark. Code Ann. § 5-4-303.

If the court suspends the imposition of sentence or places the defendant on probation conditioned upon making restitution or reparation under Ark. Code Ann. § 5-4-303(c)(6), the court shall by concurrence of the victim, defendant, and the prosecuting attorney determine the amount to be paid as restitution. The court shall further, after considering the assets, financial condition, and occupation of the defendant, determine whether restitution shall be total or

partial, the amounts to be paid if by periodic payments, and if personal services are contemplated, the reasonable value and rate of compensation for services rendered to the victim.

The court may order that the defendant spend a period of confinement in a county or city jail or other authorized local detention, correctional or rehabilitative facility, up to one hundred twenty days for a felony, thirty days for a misdemeanor, or three hundred sixty-five days in the case of confinement in a community correction's facility.

Ark. Code Ann. §§ 5-4-303 - 304.

*See also* Ark. Code Ann. § 5-4-102 on Presentence Investigations.

*See also* Ark. Code Ann. § 16-93-314 on Discharge of Probation.

*See also* Ark. Code Ann. § 16-93-303 on First Time Offenders.

For a Uniform Terms and Conditions of Probation form see the AOC's website.

### **Revocation of Probation**

At any time before the expiration of a period of suspension or probation, a court may summon a defendant to appear before it or may issue a warrant for the defendant's arrest.

At any time before the expiration of a period of suspension or probation, any law enforcement officer may arrest a defendant without a warrant if the law enforcement officer has reasonable cause to believe that the defendant has failed to comply with a condition of his or her suspension or probation.

A defendant arrested for violation of suspension or probation shall be taken immediately before the court that suspended imposition of sentence or, if the defendant was placed on probation, before the court supervising the probation.

If a court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his or her suspension or probation, the court may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation. The revocation may be punished as contempt under Ark. Code Ann. § 16-10-108.

If a court revokes a suspension or probation, the court may enter a judgment of conviction and may impose any sentence on the defendant that might have been imposed originally for the offense of which he or she was found guilty.

A court shall not revoke a suspension of sentence or probation because of a person's inability to achieve a high school diploma, high school equivalency diploma approved by the Department of Career Education, or gainful employment. Ark. Code Ann. § 16-93-308.

However, the court may revoke a suspension of sentence or probation if the person fails to make a good faith effort to achieve a high school diploma, high school equivalency diploma approved by the Department of Career Education, or gainful employment. Ark. Code Ann. § 16-93-308.

### **Preliminary Hearings**

A defendant arrested for a violation of suspension or probation is entitled to a preliminary hearing to determine whether there is reasonable cause to believe that he or she has violated a condition of suspension or probation.

The defendant shall be given prior notice of the time and place of the hearing, the purpose of the hearing, and the condition alleged to have been violated.

The defendant has the right to hear and controvert evidence against him or her and to offer evidence in his or her own behalf. He or she also has the right to counsel and to cross-examine witnesses.

If the court conducting the preliminary hearing finds that there is reasonable cause to believe that the defendant has violated a condition

of suspension or probation, it may order the defendant to be detained or it may return the defendant to supervision with conditions. If the court conducting the preliminary hearing does not find reasonable cause, it shall order the defendant released from custody.

The court conducting the preliminary hearing shall prepare and furnish to the court that suspended imposition of sentence on the defendant or placed him or her on probation a summary of the preliminary hearing, including the responses of the defendant and the substance of the documents and evidence given in support of revocation.

A preliminary hearing is not required if:

The defendant waives the preliminary hearing;

The revocation is based on the defendant's commission of an offense for which he or she has been tried and found guilty in an independent criminal proceeding; or

The revocation hearing is held promptly after the arrest and in the judicial district where the alleged violation occurred or where the defendant was arrested.

Ark. Code Ann. § 16-93-307.

A suspension or probation shall not be revoked except after a revocation hearing.

The hearing shall be within sixty days of the defendant's arrest.

The defendant shall be given prior notice of the time and place of the hearing, the purpose of the hearing, and the condition alleged to have been violated.

The defendant has the right to hear and controvert evidence against him or her and to offer evidence in his or her own behalf. He or she also has the right to counsel and to cross-examine witnesses.

If suspension or probation is revoked, the court shall prepare and furnish to the defendant a written statement of the evidence relied on and the reasons for revoking suspension or probation.

Ark. Code Ann. §16-93-307.

As matter of due process, a defendant is entitled to advanced notice of the evidence relied upon for revocation of his or her probation. A defendant cannot properly prepare for a revocation hearing without knowing in advance what charges of misconduct are to be investigated. The burden is on the state to properly notify the defendant of such evidence. If the basis for revocation was not stated in the revocation petition, the defendant will be entitled to a reversal. *Hill v. State*, 65 Ark. App. 131, 985 S.W.2d 342 (1999).

### **Effect of Revocation**

Following revocation, the court may:

Continue the period of suspension of imposition of sentence or continue the period of probation;

Lengthen the period of suspension or the period of probation within the limits set by Ark. Code Ann. § 5-4-306;

Increase the fine within the limits set by Ark. Code Ann. § 5-4-201;

Impose a period of confinement to be served during the period of suspension of imposition of sentence or period of probation;

If a period of confinement is imposed on an individual during his or her period of probation resulting from a technical conditions violation, the confinement shall be for up to ninety days';

If a period of confinement is imposed on an individual during his or her period of probation resulting from a serious conditions violation, confinement shall be for exactly one hundred eighty days; or

Impose any conditions that could have been imposed upon conviction of the original offense.

A period of confinement under this section may be reduced by the Department of Correction or the Department of Community Correction for good behavior and successful program completion.

A period of confinement shall not be reduced under this section for more than fifty percent of the total time of confinement ordered to be served.

A period of confinement under this section shall not be reduced by any time served by the defendant while he or she awaits a court hearing to challenge the imposition of the sanction.

Ark. Code Ann. § 16-93-309.

### **Relevant Case Law**

Arkansas Code Annotated § 5-4-205(a)(1) provides that “[a] defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution.” A finding by a preponderance of the evidence that a defendant has violated the terms and conditions of his probation is not an adjudication of guilt as required by Ark. Code Ann. § 5-4-205(a)(1). Thus, the trial court may not order the defendant to pay restitution as part of his sentence following the revocation of his probation. *Phillips v. State*, 2017 Ark. App. 320, 525 S.W.3d 8.

### **Sex-Offender Registration**

At the time of adjudication of guilt, the sentencing court shall enter on the sentencing order whether the offender is required to register as a sex offender.

If the sentencing court finds the offender is required to register as a sex offender, then at the time of adjudication of guilt the sentencing court shall require the sex offender to complete the sex offender

registration form prepared by the Director of the Arkansas Crime Information Center pursuant to Ark. Code Ann. § 12-12-908 and shall forward the completed sex offender registration form to the Arkansas Crime Information Center.

A sex offender subject to lifetime registration under Ark. Code Ann. § 12-12-919 shall report in person every six months after registration to the local law enforcement agency having jurisdiction to verify registration.

A sexually dangerous person subject to lifetime registration under Ark. Code Ann. § 12-12-919 shall report in person every ninety days after registration to the local law enforcement agency having jurisdiction to verify registration.

Ark. Code Ann. § 12-12-906.

Sex offenses are defined at Ark. Code Ann. § 12-12-903(12).

A sex offender is not required to register as a sex offender if:

- (a) the victim was under eighteen years of age and the sex offender was no more than three years older than the victim at the time of the sex offense;
- (b) the court determines that there was no evidence of force, compulsion, threat, or intimidation in the commission of the sex offense; and
- (c) the court does not otherwise order registration under § 12-12-903(B)(i).

Ark. Code Ann. § 12-12-906.

The sentencing court shall assess at the time of sentencing a mandatory fine of two hundred fifty dollars on any person who is required to register. Ark. Code Ann. § 12-12-910.

Special procedures apply to those individuals that the prosecutor seeks to classify as “sexually dangerous person.”

To classify a person as a sexually dangerous person, a prosecutor may allege in the information that the prosecutor is seeking a determination that the defendant is a sexually dangerous person.

If the defendant is adjudicated guilty, the court shall enter an order directing an examiner qualified by the Sex Offender Assessment Committee to issue a report to the sentencing court that recommends whether or not the defendant should be classified as a sexually dangerous person.

After sentencing, the court shall make a determination regarding the defendant's status as a sexually dangerous person.

The sentencing court shall retain jurisdiction to determine whether a defendant is a sexually dangerous person for one year after sentencing or for so long as the defendant remains incarcerated for the sex offense.

Ark. Code Ann. § 12-12-918.

A person required to register as a sex offender shall verify registration every six months after the person's initial registration date during the period of time in which the person is required to register. The verification shall be done in person at a local law enforcement agency having jurisdiction. The person shall sign and date a Sex Offender Acknowledgment Form in which a law enforcement officer shall also witness and sign. Ark. Code Ann. § 12-12-909.

A person required to register as a sex offender who claims to be homeless shall verify his or her registration every thirty days during the period of time in which the person is required to register as a sex offender and claims to be homeless. Ark. Code Ann. § 12-12-909.

Sex offender registration requirements are mandatory, and failure to comply with those duties is a strict liability offense. *Adkins v. State*, 371 Ark. 159, 264 S.W.3d 523 (2007).

## **Lifetime Registration**

Lifetime registration is required for a sex offender who:

Was found to have committed an aggravated sex offense;

Was determined by the court to be or assessed as a Level 4 sexually dangerous person;

Has pleaded guilty or nolo contendere to or been found guilty of a second or subsequent sex offense under a separate case number, not multiple counts on the same charge;

Was convicted of rape by forcible compulsion, § 5-14-103(a)(1), or other substantially similar offense in another jurisdiction; or

Has pleaded guilty or nolo contendere to or been found guilty of failing to comply with registration and reporting requirements under § 12-12-904 three or more times.

Ark. Code Ann. § 12-12-919.

## **Termination of Obligation to Register**

A sex offender, who is not subject to lifetime registration, may petition the sentencing court for termination of his obligation to register fifteen years after the date the sex offender first registered in Arkansas.

The court shall hold a hearing on the application at which the applicant and any interested persons may present witnesses and other evidence.

No less than twenty days before the date of the hearing on the application, a copy of the application for termination of the obligation to register shall be served on:

The prosecutor of the county in which the adjudication of guilt triggering registration was obtained if the sex offender was convicted in this state; or

The prosecutor of the county where a sex offender resides if the sex offender was convicted in another state.

A copy also shall be served to the Arkansas Sex Offender Registry in the Arkansas Crime Information Center and to Community Notification Assessment at least twenty days before the hearing.

If the sex offender has not been assessed in the five years before making a request to terminate the obligation to register under this section, the prosecuting attorney may request a reassessment and an order terminating the obligation to register shall not be granted without a reassessment.

The court shall grant an order terminating the obligation to register upon proof by a preponderance of the evidence that:

The applicant, for a period of fifteen years after the applicant was released from prison or other institution, placed on parole, supervised release, or probation has not been adjudicated guilty of a sex offense; and

The applicant is not likely to pose a threat to the safety of others.

If a court denies a petition to terminate the obligation to register, the sex offender may not file a new petition to terminate the obligation to register under this section before 3 years from the date the order denying the previous petition was filed.

Ark. Code Ann. § 12-12-919.

### **DNA Sampling**

Persons adjudicated guilty of a qualifying offense (any felony offense, any sexual offense classified as a misdemeanor, or a repeat offense, as defined in Ark. Code Ann. § 12-12-1103) shall have a DNA sample drawn. Ark. Code Ann. § 12-12-1109.

A person who is acquitted on the grounds of mental disease or defect of the commission of a qualifying offense and committed to an institution or other facility shall also have a DNA sample drawn.

Unless finding that undue hardship would result, the sentencing court shall assess at sentencing a mandatory fine of not less than two hundred fifty dollars on any person required to provide a DNA sample. Ark. Code Ann. § 12-12-1118.

## **Record Sealing**

### **The Comprehensive Criminal Record Sealing Act of 2013**

The Comprehensive Criminal Record Sealing Act of 2013 is codified at Ark. Code Ann. §§ 16-90-1401 et seq. It repealed the provisions of Ark. Code Ann. §§ 16-90-901 et seq., but left the provisions of Ark. Code Ann. §§ 16-93-301 et seq., (concerning first time offenders and probation) intact. It was effective January 1, 2014.

The Act provides that a person is eligible to file a uniform petition to seal his or her record of a **misdemeanor or violation** immediately after completion of his or her sentence, including full payment of restitution, court costs, and driver's license suspension reinstatement fees.

There is not a limit to the number of times a person may file a uniform petition to seal the record of a misdemeanor or violation except that a person may not file:

A new uniform petition to seal one of the following criminal offenses until after a period of five years has elapsed since the completion of the person's sentence for the conviction of:

Negligent homicide, Ark. Code Ann. § 5-10-105, if it was a Class A misdemeanor;

Battery in the third degree, Ark. Code Ann. § 5-13-203;

Indecent exposure, Ark. Code Ann. § 5-14-112;

Public sexual indecency, Ark. Code Ann. § 5-14-111;

Sexual assault in the fourth degree, Ark. Code Ann. § 5-14-127; or

Domestic battering in the third degree, Ark. Code Ann.  
§ 5-26-305.

A new uniform petition to seal a misdemeanor violation of driving or boating while intoxicated, Ark. Code Ann. § 5-65-103, until after the applicable lookback periods under Ark. Code Ann. § 5-65-111 have elapsed;

A new uniform petition to seal a criminal offense listed above before one year from the date of the order denying the previous uniform petition;

A new uniform petition to seal a misdemeanor or violation before ninety days from the date of an order denying a uniform petition to seal the misdemeanor or violation;

A new uniform petition to seal a misdemeanor or violation under this section if an appeal of a previous denial of a uniform petition to seal a misdemeanor or violation for the same misdemeanor or violation is still pending; or

A new uniform petition to seal a misdemeanor or violation under this section if:

The person was a holder of a commercial driver license or commercial learner's permit at the time the misdemeanor or violation was committed; and

The misdemeanor or violation was a traffic offense, other than a parking violation, vehicle weight violation, or vehicle defect violation, committed in any type of motor vehicle.

Ark. Code Ann. § 16-90-1405.

For a uniform petition filed under Ark. Code Ann. § 16-90-1405, unless the circuit court or district court is presented with and finds that there

is clear and convincing evidence that a misdemeanor or violation conviction should not be sealed under this subchapter, the court shall seal the misdemeanor or violation conviction. Ark. Code Ann. § 16-90-1415.

If a person has no more than one previous **felony** conviction, he or she may petition a court to seal a record of a conviction immediately after the completion of the person's sentence for:

A nonviolent Class C felony or Class D felony;

An unclassified felony;

An offense under Ark. Code Ann. §§ 5-64-101 et seq., that is a Class A felony or Class B felony;

Solicitation to commit, attempt to commit, or conspiracy to commit the substantive offenses listed above; or

A felony not involving violence committed while the person was less than eighteen years of age.

Ark. Code Ann. § 16-90-1406.

The following felonies are not eligible to be sealed:

A Class Y felony, Class A felony, or Class B felony, except as provided in Ark. Code Ann. § 16-90-1406;

Manslaughter, Ark. Code Ann. § 5-10-104;

An unclassified felony if the maximum sentence of imprisonment for the unclassified felony is more than ten years;

A felony sex offense; or

A felony involving violence under Ark. Code Ann. § 5-4-501(d)(2).

Ark. Code Ann. § 16-90-1408.

A uniform petition filed under Ark. Code Ann. § 16-90-1406 may be granted if the court finds by clear and convincing evidence that doing so would further the interests of justice, considering the following factors:

Whether the person appears likely to reoffend;

The person's other criminal history;

The existence of any pending charges or criminal investigations involving the person;

Input from the victim of the offense for which the person was convicted, if applicable; and

Any other information provided by the state that would cause a reasonable person to consider the person a further threat to society.

Ark. Code Ann. § 16-90-1415.

A person may petition the court to seal a record of a felony conviction for possession of a controlled substance, Ark. Code Ann. § 5-64-419, or counterfeit substance, Ark. Code Ann. § 5-64-441, upon the completion of the person's sentence if, prior to sentencing:

An intake officer appointed by the court, where applicable, determines that the person has a drug addiction and recommends the person as a candidate for residential drug treatment;

The court places the person on probation and includes as part of the terms and conditions of the probation that:

The person successfully completes a drug treatment program approved by the court; and

The person remains drug-free until successful completion of probation; and

The person successfully completes the terms and conditions of the probation.

Ark. Code Ann. § 16-90-1407.

A uniform petition filed under Ark. Code Ann. § 16-90-1407 may be granted if the court finds that doing so is in the best interest of the petitioner and the state. Ark. Code Ann. § 16-90-1415.

A person may petition a district court or circuit court to seal a record of a prior **arrest** if charges have not been filed by the prosecuting attorney within one year of the date of the arrest. The petition shall be filed in the county in which the arrest was made. Ark. Code Ann. § 16-90-1409.

A person may petition to seal the records of a case in which there was for any reason:

Entry of an order **nolle prosequi** upon motion of the prosecuting attorney after one year has passed since the date of the entry of the order nolle prosequi;

Entry of an order of **dismissal**;

An **acquittal**, unless that acquittal was for reason of mental disease or defect under Ark. Code Ann. §§ 5-2-301 et seq.; or

A decision by the prosecuting attorney not to file charges.

The petition shall be filed in the court in which the order nolle prosequi or order of dismissal was entered. Ark. Code Ann. § 16-90-1410.

A uniform petition filed under Ark. Code Ann. § 16-90-1409 or Ark. Code Ann. § 16-90-1410 shall be granted unless the state shows by a preponderance of the evidence that doing so would place the public at risk, or not further the interests of justice. Ark. Code Ann. § 16-90-1415.

The court shall issue an order sealing the record of a conviction of a person **pardoned** by the Governor. (This mandate does not apply to a person

convicted for a sex offense, an offense resulting in death or serious physical injury, or any offense where the victim was under eighteen years of age.)

A person shall have his or her record of a conviction sealed by the court if the person:

- (1) Committed a felony in this state while under sixteen years of age;
- (2) Was convicted and given a suspended sentence;
- (3) Received a pardon for the conviction; and
- (4) Has not been convicted of another criminal offense.

This section does not prevent a person from requesting that his or her criminal record be sealed under Ark. Code Ann. § 16-90-1405 or 1406.

Ark. Code Ann. § 16-90-1411.

A uniform petition filed under Ark. Code Ann. § 16-90-1411 shall be granted if the court finds that the requirements of Ark. Code Ann. § 16-90-1411 are met. Ark. Code Ann. § 16-90-1415.

The **procedure** for sealing of records begins with a person, who is eligible under the Act, filing a uniform petition in the circuit or district court in the county where the offense was committed and in which the person was convicted for the offense.

If a person has previously petitioned the court and was denied, the person may not file another uniform petition until one year has passed.

A copy of the petition shall be served upon the prosecuting attorney and the arresting party if that person is a named party (not required).

The prosecuting attorney may file a notice of opposition within thirty days. The court may set a hearing if a notice of opposition is filed and may only grant the petition after the hearing is conducted.

The court may grant or deny the petition at any time after the thirty-days period has expired.

The clerk shall certify copies of the uniform order to the prosecuting attorney, arresting agency, ACIC, and the district court where the person appeared before the transfer or appeal to circuit court.

The circuit court clerk, and the district court clerk if applicable, shall remove all documents relating to the record, and sequester them in a file in a separate and confidential holding area within the clerk's office. A docket sheet shall be replaced by the sealed docket sheet; it shall contain the docket number, a statement that the record has been sealed, and the date that the order to seal the record was issued. All indices to the file of the person with a sealed record shall be maintained in a way to prevent general access to the identification of the person.

The prosecuting attorney shall likewise remove all documents relating to the record and sequester them in a file in a separate and confidential holding area in his or her office. The arresting agency shall do the same.

Ark. Code Ann. § 16-90-1413.

ACIC shall provide the uniform petitions and uniform orders. Ark. Code Ann. § 16-90-1414.

All of the Uniform Petitions and Orders to Seal can be found on the Arkansas Crime Information Center's website.

An appeal of the grant or denial of the uniform petition to seal may be taken by either party. Ark. Code Ann. § 16-90-1415.

The custodian of a sealed record shall not disclose the existence of the sealed record or release the sealed record except when requested by:

The person whose record was sealed or the person's attorney when authorized in writing by the person;

A criminal justice agency, as defined in Ark. Code Ann. § 12-12-1001, and the request is accompanied by a statement that the request is being made in conjunction with:

An application for employment with the criminal justice agency by the person whose record has been sealed; or

A criminal background check under the Polygraph Examiners Licensing Act, Ark. Code Ann. §§ 17-39-101 et seq., or the Private Security Agency, Private Investigator, and School Security Licensing Act, Ark. Code Ann. §§ 17-40-101 et seq.;

A court, upon a showing of:

A subsequent adjudication of guilt of the person whose record has been sealed; or

Another good reason shown to be in the interests of justice;

A prosecuting attorney, and the request is accompanied by a statement that the request is being made for a criminal justice purpose;

A state agency or board engaged in the licensing of healthcare professionals;

The Arkansas Crime Information Center; or

The Arkansas Commission on Law Enforcement Standards and Training.

Ark. Code Ann. § 16-90-1416.

The effect of a sealed record is as follows: a person whose record has been sealed shall have all privileges and rights restored, and the record that has

been sealed shall not affect any of his or her civil rights or liberties unless otherwise specifically provided by law.

A person who wants to reacquire the right to vote, which was removed from him or her as the result of a felony conviction, must follow the procedures in Arkansas Constitution, Amendment 51, § 11.

A petition granted pursuant to the Comprehensive Record Sealing Act of 2014 does not reconfer the right to carry a firearm if that right was removed as the result of a felony conviction.

Upon the entry of the uniform order, the person's underlying conduct shall be deemed as a matter of law never to have occurred, and the person may state that the underlying conduct did not occur and that a record of the person that was sealed does not exist.

The Act does not prevent the use of a prior conviction otherwise sealed under this subchapter for the following purposes:

Any criminal proceeding for any purpose not otherwise prohibited by law;

Determination of offender status under the former Ark. Code Ann. § 5-64-413;

Habitual offender status, Ark. Code Ann. §§ 5-4-501 et seq.;

Impeachment upon cross-examination as dictated by the Arkansas Rules of Evidence;

Healthcare professional licensure by a state agency or board;

Any disclosure mandated by Rule 17, 18, or 19 of the Arkansas Rules of Criminal Procedure; or

Determination of certification, eligibility for certification, or of the ability to act as a law enforcement officer, by the Arkansas Commission on Law Enforcement Standards and Training.

### **Relevant Case Law**

*See Bolin v. State*, 2015 Ark. 149, 459 S.W.3d 788 for a discussion on whether the Comprehensive Criminal Record Sealing Act of 2013 [CCRSA] should be applied retroactively. In *Bolin*, the Court concluded “the legislature expressly designated that the CCRSA should be retroactive with regard to misdemeanors but chose to exclude that retroactivity with regard to felonies. Had the legislature intended for the CCRSA to govern the sealing of felony records for offenses occurring before January 1, 2014, it could have included language to that effect[.]”

### **First-time Offenders**

Whenever an accused enters a plea of guilty or nolo contendere prior to an adjudication of guilt, the judge of the circuit court or district court, in the case of a defendant who previously has not been convicted of a felony, without making a finding of guilt or entering a judgment of guilt and with the consent of the defendant, may defer further proceedings and place the defendant on probation for a period of not less than one year, under such terms and conditions as may be set by the court.

A sentence of a fine not exceeding thirty-five hundred dollars or an assessment of court costs against a defendant does not negate the benefits provided by the First Offender Act or cause the probation placed on the defendant to constitute a conviction.

No person shall be eligible for sealing of his or her record as a first-time offender whose offense is: a serious felony involving violence, a felony involving violence under Ark. Code Ann. § 5-4-501, an offense that requires the person to register as a sex offender under the Sex Offender Registration Act of 1997; public sexual indecency; indecent exposure; bestiality; or exposing another person to the human immunodeficiency virus.

Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided.

Upon fulfillment of the terms and conditions of probation or upon release by the court prior to the termination period thereof, the defendant shall be discharged without court adjudication of guilt, whereupon the court shall enter an appropriate order that shall effectively dismiss the case, discharge the defendant, and seal the record, consistent with the procedures established in the Comprehensive Criminal Record Sealing Act of 2013, Ark. Code Ann. §§ 16-90-1401 et seq.

During the period of probation, a defendant is considered as not having a felony conviction except for:

- (1) Application of any law prohibiting possession of a firearm by certain persons;
- (2) A determination of habitual offender status;
- (3) A determination of criminal history; (4) A determination of criminal history scores;
- (5) Sentencing; and
- (6) The purposes of impeachment as a witness under Rule 609 of the Arkansas Rules of Evidence.

After successful completion of probation placed on the defendant under the First Offender Act, a defendant is considered as not having a felony conviction except for:

- (1) A determination of habitual offender status;
- (2) A determination of criminal history;
- (3) A determination of criminal history scores;

(4) Sentencing; and

(5) The purposes of impeachment as a witness under Rule 609 of the Arkansas Rules of Evidence.

A person, whose records have been sealed pursuant to the First Offender Act, may look to Ark. Code Ann. § 5-73-103 to determine eligibility to possess a firearm.

A court as a condition of probation shall order the defendant to:

Enroll in and complete a vocational, technical, educational, or similar program if the court finds that the defendant's lack of an employable or marketable skill contributes to the defendant's being unemployed.

The court may order the person to pay tuition for any vocational, technical, educational, or similar program in installments after the completion of the education or training program.

If the defendant is on probation at the end of the vocational, technical, educational, or similar program, he or she shall be required to work in suitable employment for the remainder of his or her probation or for three years, whichever occurs earlier; or

Work consistently in suitable employment for the entire duration of his or her probation or for three years, whichever occurs earlier.

Ark. Code Ann. § 16-93-303.

All district court judges and circuit court judges shall immediately report to the Arkansas Crime Information Center, in the form prescribed by the Center, all probations of criminal defendants under Ark. Code Ann. §§ 16-93-301 - 16-93-303.

Prior to granting probation to a criminal defendant under Ark. Code Ann. §§ 16-93-301 - 16-93-303, the court shall query the Center to determine whether the criminal defendant has previously been granted probation under the provisions of Ark. Code Ann. §§ 16-93-301 - 16-93-303.

If the center determines that an individual has utilized Ark. Code Ann. §§ 16-93-301 - 16-93-303 more than one time, the Center shall notify the last sentencing judge of that fact.

During the probationary period, the Center shall report the case as pending and shall not record it as guilty until the circuit court or district court enters an adjudication of guilt.

Ark. Code Ann. § 16-93-304.

ACIC provides a First Offender Probation Online Search database of individuals who have previously been granted probation.

Upon placing a person on probation, the court shall issue an order, in writing, setting forth that the offender is being placed on probation, that the offender has knowledge and understanding of the consequences of probation and violations thereof, any terms and conditions of the probation, as well as any presentence investigation completed. Ark. Code Ann. § 16-93-1207.

### **Alternative Sentencing Options**

Specialty court programs are an interdisciplinary, non-adversarial judicial process for diverting an offender (or alleged offender) who has a demonstrated dependence on alcohol or an illicit drug, into a strenuous treatment program that includes frequent drug testing, required employment, treatment and counseling and regular court appearances to monitor program compliance. Specialty courts are typically staffed by a team consisting of the judge and court staff, a prosecutor, a public defender or private attorney representing the offender, a probation or parole officer, and a drug counselor.

Upon successful completion of a specialty court program, an individual may have his or her criminal record(s) sealed. See Ark. Code Ann. §16-98-303.

### **Relevant Case Law**

A specialty court participant's due process rights were violated when the circuit court expelled him from the court's drug-court program without holding a hearing. The fact that the participant signed a prospective waiver of certain rights upon his entry into the program was not sufficient to cure the violation. *Neal v. State*, 2016 Ark. 287, 497 S.W.3d 666 (2016).

Find additional information about specialty courts on the AOC's website.

## **XIII. Post Trial**

### **Civil Post Trial**

#### **Motion for a Directed Verdict - Civil**

A party may move for a directed verdict at the close of the evidence offered by an opponent and may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the extent as if the motion had not been made.

A party may also move for a directed verdict at the close of all of the evidence.

A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.

A motion for a directed verdict shall state the specific grounds therefor.

The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

Ark. R. Civ. P. 50(a).

### **Motion for Judgment Notwithstanding the Verdict**

Whenever a motion for a directed verdict is denied, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.

A party who has moved for a directed verdict may, not more than ten days after entry of judgment, move to have the verdict and judgment entered in accordance with his motion for a directed verdict.

A party who has moved for a directed verdict may, when no verdict was returned and within ten days after the jury was discharged, move for judgment in accordance with his motion for directed verdict. A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered.

If the court neither grants nor denies the motion within thirty days of the date on which it is filed or treated as filed, it shall be deemed denied as of the thirtieth day.

A motion for a new trial may be joined with a motion for judgment notwithstanding the verdict, or a new trial may be prayed in the alternative.

If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Ark. R. Civ. P. 50(b).

### **Grant of Motion for Judgment Notwithstanding the Verdict – Conditional Rulings**

If the motion for judgment notwithstanding the verdict is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it

should be granted if the judgment is thereafter vacated or reversed and shall specify the grounds for granting or denying the motion for the new trial.

If the motion for a new trial is conditionally granted, the order thereon does not affect the finality of the judgment.

If the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may file a motion for a new trial pursuant to Arkansas Rule of Civil Procedure not later than ten days after entry of the judgment notwithstanding the verdict.

Ark. R. Civ. P. 50(c).

### **Denial of Motion for Judgment Notwithstanding the Verdict – Conditional Rulings**

If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict.

If the appellate court reverses the judgment, it may determine the appellee is entitled to a new trial or it may direct the trial court to determine whether a new trial shall be granted.

Ark. R. Civ. P. 50(d).

### **Failure to Question Sufficiency of the Evidence**

In a jury trial, a party who does not have the burden of proof on a claim or defense must move for a directed verdict based on insufficient evidence at the

conclusion of all the evidence to preserve a challenge to the sufficiency of the evidence for appellate review. (Otherwise, it is waived.)

A party who has the burden of proof on a claim or defense need not make such a motion to challenge on appeal the sufficiency of the evidence supporting a jury verdict adverse to that party.

If for any reason the motion is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

Ark. R. Civ. P. 50(e).

### **Motion for a New Trial - Civil**

On the motion of any aggrieved party, a new trial may be granted to all or any of the parties and on all or part of the claim for any of the following grounds materially affecting the substantial rights of such party:

- (1) Any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial;
- (2) Misconduct of the jury or prevailing party;
- (3) Accident or surprise which ordinary prudence could not have prevented;
- (4) Excessive damages appearing to have been given under the influence of passion or prejudice;
- (5) Error in the assessment of the amount of recovery, whether too large or too small;
- (6) The verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to the law;

(7) Newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial; or

(8) Error of law occurring at the trial and objected to by the party making the application.

On a motion for a new trial in an action tried without a jury, the court may:

Open the judgment if one has been entered;

Take additional testimony;

Amend findings of fact and conclusions of law; or

Make new findings and conclusions and direct the entry of a new judgment.

Motions shall:

Be written;

Set forth in separate paragraphs the grounds or assignments of error; and

Be filed not later than ten days after entry of judgment.

A motion made before entry of judgment shall become effective and be treated as filed on the day after the judgment is entered. If the court does not rule on the motion within thirty days of the date on which it is filed or treated as filed, it shall be deemed denied as of the thirtieth day.

If the motion is based on grounds (2), (3), or (7) above, the motion must be accompanied by supporting affidavits. The opposing party may file opposing affidavits.

The opposing party shall have ten days after service within which to file opposing affidavits which period may be extended for an additional period not exceeding twenty days either by the court for good cause

shown or by the parties by written stipulation. The court may permit reply affidavits.

The court may, on its own initiative, order a new trial for any reason for which it might have granted a new trial on motion of a party, not later than ten days after entry of judgment.

After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely filed, for a reason not stated in the motion.

In either case, the court shall specify in the order the ground therefor.

Ark. R. Civ. P. 59.

### **Relief from Judgment, Decree, or Order**

“Relief from a judgment is governed by Ark. R. Civ. P. 60, which differs substantially from its federal counterpart. Any request for Ark. R. Civ. P. 60 relief is a direct attack on a judgment, which is different from a collateral attack made in another proceeding. Under Rule 60(a), the trial court may modify or vacate a judgment “[t]o correct errors or mistakes or to prevent the miscarriage of justice ... within ninety days of its having been filed with the clerk.” This action may be taken “on motion of the court or any party, with prior notice to all parties.” The court has “broad authority” to prevent the miscarriage of justice but cannot modify a judgment to take action that, in retrospect, it should have taken but did not in fact take. A court may, however, modify the damages awarded in a default judgment after Rule 60(a)'s 90-day deadline has expired.

After expiration of the ninety-day period, the court may modify or vacate a judgment only under the circumstances described in Rule 60(b) and (c). The trial court loses jurisdiction to act after ninety days, even if the motion was made during that period. However, the ninety-day limitation does not apply to injunctions or to other cases in which

the court has continuing jurisdiction, to certifications made pursuant to Ark. R. Civ. P. 54(b), or to probate orders so long as the court's action is taken within the time allowed for appeal after a final judgment. In addition, a judgment may be modified after ninety days to reflect accurately the court's decision or to clarify its original intention.

Rule 60(b) provides that a clerical error or an error of “oversight or omission” may be corrected “at any time” with prior notice to all parties. If an appeal has been docketed, “such mistakes ... may be so corrected with leave of the appellate court.” Clerical errors occur when, for example, the judgment includes an inaccurate dollar amount because of a mistake in addition, misidentifies the parties and contains internal inconsistencies, or inadvertently omits portions of a ruling announced in open court.

By contrast, amending a divorce decree to include division of retirement benefits not mentioned in the judge's findings cannot be characterized as a correction of clerical error. Nor does the dismissal of a suit for failure to prosecute based on a mistaken view of the underlying circumstances constitute such an error. In addition, an error resulting from the negligence of a party or his or her attorney is not the sort of mistake contemplated by Rule 60(b).

After ninety days have elapsed from the entry of judgment, the trial court's control is limited by Rule 60(c), with the exceptions previously noted. By its terms, this subdivision does not apply to default judgments, which are governed by Rule 55(c). Whether or not the ninety-day period has expired, a plaintiff moving to set a judgment aside must make a prima facie showing of a valid cause of action, and a defendant making the motion must make a prima facie showing of a valid defense. The motion is addressed to the sound discretion of the trial court.

Rule 60(c) establishes the conditions under which a judgment may be set aside after ninety days. The court may act if grounds for a new trial have been discovered after expiration of that period. If the basis for the motion is “newly discovered evidence,” the motion to set aside must be made within one year from the time the evidence was discovered or one year from the filing of the judgment, “whichever is the earlier.” Notice of the motion must be served upon the other parties to the action within the time limit for making the motion. The moving party must show that the newly discovered evidence could not, with reasonable diligence, have been discovered in time to present it at the trial.

In addition, a motion to set aside a judgment may be made by a party who was constructively served and did not appear. Such a motion must be made within two years after the filing of the judgment or within one year after the judgment has been served upon him, whichever is earlier. Notice of the filing of the motion, again, must be served upon any adverse party within the time for filing the motion.

A judgment may also be set aside for “misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.” The original version of Rule 60(c) required a showing of “fraud practiced by the successful party in obtaining the judgment,” i.e., extrinsic fraud. This limitation, which produced troublesome results, was eliminated in 2000 when the rule was amended to abolish the “unfair distinction between extrinsic and intrinsic fraud.”

Consequently, any type of fraud or misrepresentation is sufficient, except that proof of extrinsic fraud has been held necessary in adoption cases. Even if fraud occurred, however, as a matter of public policy an adjudication of paternity in a divorce decree cannot be corrected through Rule 60.

The remaining grounds for setting aside a judgment, as provided in Rule 60(c), are misprisions of the clerk; erroneous proceedings

against an infant or person of unsound mind when neither the condition of the defendant nor the error appears in the proceedings; death of one of the parties before judgment; and errors of judgment shown by an infant within twelve months after reaching age eighteen, upon a showing of cause.

Rule 60(k) expressly preserves the “the power of a court to entertain an independent action to relieve a party from a judgment who was not personally served with process or to set aside a judgment or decree for fraud upon the court.” Because Rule 60 does not apply to judgments by default, they may be attacked only under Rule 55(c) and not by an independent action.

If a new trial has been granted pursuant to Rule 59, the order may not be set aside more than ninety days after it was entered, absent a finding of one of the grounds stated in Rule 60(c). A trial court loses jurisdiction to act on a motion for new trial if no action is taken within thirty days, and thus Rule 60 does not authorize the court to act on the motion thereafter. Although the language of Rule 60(a) is very broad in allowing a judgment to be set aside “to prevent the miscarriage of justice,” the rule cannot be used to circumvent the deadline in Rule 59 for a motion for new trial. But the trial court may act pursuant to Rule 60 after expiration of the 180-day period for a party unaware that a judgment was entered to seek additional time to file a notice of appeal.”

2 Arkansas Civil Prac. & Proc. § 31:7 (5th ed.).

### **Remittitur and Additur**

If a trial court considers the jury's award of damages to be excessive in view of the evidence, it may conditionally grant a new trial, subject to the prevailing party's agreement to remit the excess amount. A new trial is ordered if the victor rejects the reduced award. By accepting the lower amount, the winning party acquiesces in the judgment and thus cannot

appeal, although he or she may cross-appeal in the event of an appeal by the losing party.

The court's power with respect to remittitur is inherent, applies to compensatory and punitive damages, and may be exercised *sua sponte* as well as in response to a motion for new trial. Remittitur is appropriate when the amount of compensatory damages cannot be sustained by the evidence, “shocks the conscience of the court or demonstrates that jurors were motivated by passion or prejudice.”

2 Arkansas Civil Prac. & Proc. § 32:3 (5th ed.), see also *O'Neal Ford, Inc. v. Davie*, 299 Ark. 45, 770 S.W.2d 656 (1989).

Implicit in Ark. R. Civ. P. 59 is the trial court's power to grant a new trial where the damages are excessive unless the prevailing party agrees to a remittitur. *Shepherd v. Looper*, 293 Ark. 29, 732 S.W.2d 150 (1987).

Additur, the converse of remittitur, is not recognized in Arkansas. *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998).

## **Criminal Post Trial**

### **Trial Counsel's Duties on Appeal**

Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause. After the notice of appeal of a judgment of conviction has been filed, the appellate court shall have exclusive jurisdiction to relieve counsel and appoint new counsel.

If court appointed counsel is permitted to withdraw in the interest of justice or for other sufficient cause in a direct appeal of a conviction or in an appeal in a postconviction proceeding under Ark. R. Crim. P. 37.5, new counsel shall be appointed promptly by the court exercising jurisdiction over the matter of counsel's withdrawal.

If court appointed counsel is permitted to withdraw in the interest of justice or for other sufficient cause from an appeal in a postconviction proceeding other than a postconviction proceeding under Ark. R. Crim. P. 37.5, new counsel may be appointed in the discretion of the court exercising jurisdiction over the matter of counsel's withdrawal.

Ark. R. App. P. Crim. 16.

### **Motion for a Directed Verdict - Criminal**

In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor.

In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.

A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient.

A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense.

The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment.

A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed

denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

Ark. R. Crim. P. 33.1.

### **Relevant Case Law**

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994).

The test for determining whether there is sufficient evidence is whether there is substantial evidence to support the verdict. Substantial evidence is evidence that is of enough force and character to compel reasonable minds to reach a conclusion without resorting to suspicion and conjecture. *Miller v. State*, 318 Ark. 673, 887 S.W.2d 280 (1994).

To preserve a challenge to the sufficiency of the evidence for appeal, a defendant must make a specific motion for a directed verdict at the close of the state's case that advises the circuit court of the exact element of the crime the state failed to prove. *Duggar v. State*, 2013 Ark. App. 135, 427 S.W.3d 77.

### **Motion for a New Trial - Criminal**

A new trial should be granted when:

Trial was had in absence of defendant;

Jury received evidence out of court;

Verdict was by lot or other manner than a fair expression of opinion;

Erroneous instruction was given or proper instruction was omitted;

Verdict was against the evidence and law;

Newly discovered evidence; and

The defendant did not receive a fair trial.

Ark. Code Ann. § 16-89-130.

## **Relevant Rules & Case Law**

Post Trial Motions: Ark. R. Crim. P. 33.3.

A motion for new trial shall be filed not more than thirty days after the entry of judgment. Ark. R. Crim. P. 33.3.

**Newly discovered evidence** – It is the duty of the trial judge, where it appears that the defendant has discovered important evidence in his favor since the verdict that he could not have before anticipated or obtained by the exercise of due diligence, to grant a new trial. *McCullars v. State*, 183 Ark. 376, 35 S.W.2d 1030 (1931).

A verdict by lot is a verdict by chance, such as by flipping a coin or drawing straws. A verdict reached by a jury through a compromise of their views is not a verdict by lot. *Blaylack v. State*, 236 Ark. 924, 370 S.W.2d 615 (1963).

An acquittal cannot be set aside by the court. *Cummins v. United States*, 232 F. 844 (8th Cir. 1916).

Decision whether to grant a new trial is left to the sound discretion of the trial judge and will not be reversed absent an abuse of discretion or manifest prejudice to complaining party. *Richmond v. State*, 302 Ark. 498, 791 S.W.2d 691 (1990).

There is no abuse of discretion in refusing a new trial on the ground of newly discovered cumulative testimony. *Crouthers v. State*, 154 Ark. 372, 242 S.W. 815 (1922).

## **Rule 37**

### **Scope of Remedy**

The petitioner must be in custody under sentence of circuit court. Persons on parole, probation, free on appeal bond, or whose sentence was suspended are not eligible.

The judge may set aside the original judgment, discharge the petitioner, resentence him or her, grant a new trial, or otherwise correct the sentence.

See Ark. R. Crim. P. 37.1 and 37.4.

See also *Branning v. State*, 2010 Ark. 401 (defendant was not eligible for postconviction relief since he was not in custody at the time he filed the petition).

Note: Ark. Code Ann. § 16-90-111 has been held to conflict with Rule 37 of the Arkansas Rules of Criminal Procedure and has been held to be superseded in part by Rule 37. See *Williams v. State*, 2016 Ark. 16; *Benton v. State*, 325 Ark. 246, 925 S.W.2d 401 (1996).

### **Grounds**

A person in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified may file a petition on the following grounds, praying that the sentence be vacated or corrected:

That the sentence was imposed in violation of the Constitution and laws of the United States or this state; or

That the court imposing the sentence was without jurisdiction to do so; or

That the sentence was in excess of the maximum sentence authorized by law; or

That the sentence is otherwise subject to collateral attack.

Ark. R. Crim. P. 37.1.

### **Form of Petition**

If the petition is not in the proper form, it may be dismissed.

The petition must be verified with the notarized signature of petitioner.

The petition shall state in concise, nonrepetitive, factually specific language, the grounds upon which it is based. The petition, whether handwritten or typed, shall be clearly legible, and shall not exceed ten pages of thirty lines

per page and fifteen words per line, with left and right margins of at least one and one-half inches and upper and lower margins of at least two inches.

In addition to filing the petition with the clerk of the court, the petitioner shall send a letter to the judge of the circuit court that imposed the sentence notifying the judge that the petition has been filed and file with the clerk a copy of the letter.

The letter to the judge shall enclose all copies of pleadings and documents relating to the petition and shall reflect service on the prosecuting attorney.

Filings pursuant to this subsection shall be used solely for purposes of Administrative Order No. 3, and failure to comply shall not be grounds for dismissing the petition.

Administrative Order No. 3 requires circuit judges to report cases under advisement for more than ninety days to the Administrative Office of the Courts. The ninety-day period does not start to run on a Rule 37 petition until the judge is notified as provided.

Ark. R. Crim. P. 37.1.

### **Time Limits**

No proceedings under this rule shall be entertained by the circuit court while the appeal is pending.

All grounds must be raised in the first petition filed under the rule, unless the court denied the first petition without prejudice.

If a conviction was obtained on a plea of guilty, or the petitioner was found guilty at trial and did not appeal the judgment of conviction, the petition must be filed in the appropriate circuit court within ninety days of the date of entry of judgment.

If a petition is filed before the entry of the judgment, the petition shall be treated as filed on the day after the entry of the judgment.

If an appeal was taken of the judgment of conviction, the petition must be filed in the circuit court within sixty days of the date the mandate is issued by the appellate court.

If a petition is filed after a conviction is affirmed by the appellate court but before the mandate is issued, the petition shall be treated as filed on the day after the mandate is issued.

In the event an appeal was dismissed, the petition must be filed in the appropriate circuit court within sixty days of the date the appeal was dismissed.

If the appellate court affirms the conviction but reverses the sentence, the petition must be filed within sixty days of a mandate following an appeal taken after resentencing.

If no appeal is taken after resentencing, then the petition must be filed with the appropriate circuit court within ninety days of the entry of the judgment.

The decision of the court in any proceeding under this rule shall be final when the judgment is rendered. No petition for rehearing shall be considered.

Before the court acts upon a petition, the petition may be amended with leave of the court.

The state may file a response within twenty days after service of a petition, with evidence of service on opposing counsel or on the petitioner if he or she is acting pro se.

A petition filed pro se by a person confined in a correctional or detention facility, which appears to be untimely, shall be deemed to have been filed on the date of its deposit in the facility's legal mail system if the following conditions are satisfied:(i) on the date the petition is deposited in the mail, the petitioner is confined in a state correctional facility, a federal correctional facility, or a regional or county detention facility that maintains a system

designed for legal mail; and (ii) the petition is filed pro se; and (iii) the petition is deposited with first-class postage prepaid, addressed to the clerk of the circuit court; and (iv) the petition contains a notarized statement by the petitioner.

Ark. R. Crim. P. 37.2.

Note: The time limits under Rule 37 are jurisdictional in nature. A judge must deny as untimely any petition filed by a petitioner convicted after January 1, 1991, not filed within the time limit regardless of the merits of the petition. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989). However, where the case involved the death penalty, and where ambiguous circumstances existed regarding petitioner's legal representation during the window of time in which petitioner could have filed his Rule 37 petition, fundamental fairness "in this narrowest of instances where the death penalty is involved" dictates an exception to allow petitioner to proceed with his Rule 37 petition despite its untimely filing. *Porter v. State*, 339 Ark. 15, 2 S.W.3d 73 (1999).

See *McJames v. State*, 2010 Ark. 74 (Ark. R. Crim. P. Rule 33.3's 30-day deemed-denied provision held to be inapplicable to Rule 37 proceedings).

### **Nature of Proceedings**

The petition may be denied without a hearing if the files and records conclusively show that the petition is meritless.

The trial court must make written findings specifying the part of the record relied on in reaching its decision.

If the trial court finds that the petitioner is indigent, counsel may be appointed for any hearing held and for any appeal if one is taken.

Counsel shall continue to represent the petitioner for an appeal to the Supreme Court, unless relieved as counsel by the circuit court or the Supreme Court.

If a hearing is to be held, the court shall notify the prosecutor and counsel who represented petitioner at the trial level of the date of the hearing.

The petitioner shall be present at the hearing unless the petitioner waives the right to appear, the trial court determines that the issues to be addressed at the hearing can be fairly resolved without the presence of the petitioner, or the trial court directs that the testimony of petitioner be taken by deposition.

The Rules of Evidence shall apply at any hearing.

The court must make written findings of fact and conclusions of law.

When an order is rendered, the circuit court shall promptly mail a copy of the order to the petitioner.

Ark. R. Crim. P. 37.3.

### **Special Rule for Those Under Sentence of Death – Rule 37.5**

Rule 37.5 applies only to persons under a sentence of death.

Upon affirmance of a sentence of death by the Supreme Court of Arkansas, the clerk of the court shall forward a copy of the mandate to the circuit court that imposed the sentence of death and to the Attorney General.

The circuit court shall conduct a hearing to consider the appointment of an attorney to represent the person in post-conviction proceedings under this rule.

If the Supreme Court affirms a sentence of death, the hearing shall be held not later than twenty-one days after the mandate is issued.

The person under sentence of death shall be present at the hearing.

The circuit court shall inform the person of the existence of possible relief under this rule and shall determine whether the person desires the appointment of an attorney to represent him in proceedings under this rule.

If the person rejects the appointment of an attorney, the waiver shall be made in open court on the record.

If the circuit court determines that the person is indigent and that he either accepts the appointment of an attorney or is unable to make a competent decision whether to accept or reject an attorney, the circuit court shall issue written findings to that effect and enter a written order appointing an attorney to represent the person in proceedings under this rule.

If the circuit court determines that the person rejects the appointment of an attorney and understands the legal consequences of his decision, or that the person is not indigent, the circuit court shall issue written findings to that effect and enter a written order declining to appoint an attorney to represent the person in proceedings under this rule.

In determining whether the person is indigent, the circuit court shall consider the extraordinary cost of post-conviction proceedings in a capital case.

The written findings and order shall be issued within seven days after the required hearing. The circuit clerk shall forward a copy of the order to the Attorney General.

The appointment of an attorney under Rule 37.5 shall remain effective through any appeal to the Supreme Court.

An attorney appointed to represent a person under Rule 37.5 shall meet the following standards, unless they represented the person at the trial level or in post-conviction proceedings.

Within ten years immediately preceding the appointment, the attorney shall have represented a petitioner under sentence of death in a state or federal post-conviction proceeding; or actively participated as defense counsel in at least five felony jury trials tried

to completion, including one trial in which the death penalty was sought; and

Within ten years immediately preceding the appointment, the attorney shall have represented a petitioner in at least three state or federal post-conviction proceedings, one of which proceeded to an evidentiary hearing and all of which involved a conviction of a violent felony, including one conviction of murder; or represented a defendant in at least three appeals involving a conviction of a violent felony, including one conviction of murder, and represented a petitioner in at least one evidentiary hearing in a state or federal post-conviction proceeding; and

The attorney shall have been actively engaged in the practice of law for at least three years; and

Within two years immediately preceding the appointment, the attorney shall have completed at least six hours of continuing legal education or other professional training in the representation of persons in capital trial, capital appellate, or capital post-conviction proceedings.

The circuit court may appoint *pro hac vice* an attorney who is not licensed to practice in Arkansas but who meets the standards listed above provided the court also appoints as co-counsel an attorney who is licensed to practice in Arkansas. In such case, the attorney who is licensed to practice in Arkansas is not required to meet the foregoing standards.

The court shall make findings, either on the record or in the written order, specifying the qualifications of counsel which satisfy the standards for appointment.

If the circuit court determines that an attorney is clearly qualified because of his unique training, experience, and background to represent a person under a sentence of death in a post-conviction

proceeding, it may deviate from the foregoing qualifications under certain circumstances. The order appointing such an attorney shall contain written findings specifying the unique training, experience, and background that qualify the attorney for appointment.

The circuit court shall not appoint an attorney under this rule if the attorney represented the person under a sentence of death at trial or on direct appeal to the Supreme Court of Arkansas unless the person and the attorney request continued representation on the record. If the circuit court does appoint an attorney who represented the person at trial or on direct appeal, the circuit court shall appoint a second attorney, who did not represent the person at trial or on direct appeal, to assist in the representation of the person.

The circuit court may appoint the Capital, Conflicts, and Appellate Office of the Arkansas Public Defender Commission, unless otherwise disqualified.

If a person is under sentence of death, any attorney who represented such person at trial or on appeal in connection with the conviction that resulted in the sentence of death shall make available the complete files in connection with such conviction to the attorney who represents such person in post-conviction proceedings under this rule. The attorney who represents such person in post-conviction proceedings may inspect and photocopy such files, but the attorneys who represented such person at trial or on appeal shall maintain custody of their respective files, except for material which was admitted into evidence in any trial proceeding, for at least five years following completion of their representation of such person.

A Rule 37 petition shall be filed in the circuit court that imposed the sentence of death within ninety days after the entry of the circuit court's order from the hearing.

Upon the filing of a Rule 37 petition, the petitioner shall immediately forward a copy of the petition to the circuit judge who entered the order, the

prosecuting attorney, the Attorney General, the petitioner's counsel of record at the trial resulting in the sentence of death, and the Executive Director of the Arkansas Public Defender Commission.

When the circuit court enters an order appointing counsel to assist in post-conviction proceedings, the court shall also enter an order staying any sentence of death. The stay of execution shall remain in effect until dissolved by a court with competent jurisdiction.

The circuit court shall enter an order dissolving the stay of execution if:

- (1) A timely Rule 37 petition is not filed; or
- (2) A timely petition is filed but relief is denied by the circuit court, and the time for filing an appeal from the denial of relief has expired without the filing of a notice of appeal.

If the circuit court determines that a hearing is necessary, the hearing shall be held within one hundred eighty days from the date of the filing of the petition, unless continued for good cause shown.

If a hearing on the petition is held, the circuit court shall, within sixty days of the conclusion of the hearing, make specific written findings of fact with respect to each factual issue raised by the petition and specific written conclusions of law with respect to each legal issue raised by the petition. If no hearing on the petition is held, the circuit court shall, within one hundred twenty days after the filing of the petition, make specific written findings of fact with respect to each factual issue raised by the petition and specific written conclusions of law with respect to each legal issue raised by the petition. The time within which the circuit court shall make specific written findings of fact and conclusions of law shall be extended by thirty days if the circuit court requests or permits post-hearing briefs.

Ark. R. Crim. P. 37.5.

## **Motion for Reduction or Correction of Sentence**

Any circuit court, upon receipt of petition by the aggrieved party for relief and after the notice of the relief has been served on the prosecuting attorney, may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided in this section for the reduction of sentence.

Ark. Code Ann. § 16-90-111.

The proper time limitations are provided in Ark. R. Crim. P. 37.2.

The time limitations in the statute have been superseded to the extent that they conflict with the time limitations for postconviction relief in Rule 37.

*Heringer v. State*, 2009 Ark. 376.

## **Relevant Case Law**

An "illegal sentence" is defined as a sentence illegal on its face. *Abdullah v. State*, 290 Ark. 537, 720 S.W.2d 902 (1986).

A circuit court has jurisdiction to correct an illegal sentence even if it has been placed into execution. *Gavin v. State*, 354 Ark. 425, 125 S.W.3d 189 (2003).

An attack on the sufficiency of the evidence is not cognizable to demonstrate that a sentence was illegally imposed or is illegal. *Guire v. State*, 309 Ark. 209, 832 S.W.2d 457 (1992).

## ***Habeas Corpus***

The writ of *habeas corpus* shall be granted to any person who shall apply for the writ by petition showing, by affidavit or other evidence, probable cause to believe he or she is detained without lawful authority, is imprisoned when by law he or she is entitled to bail, or is actually innocent of the offense or offenses for which the person was convicted. Ark. Code Ann. § 16-112-103.

If an infant or married woman is unlawfully detained by or in the custody of any person, an application for *habeas corpus* may be made by his or her

father, mother, guardian or next friend. If an infant or married woman is detained by any religious or other association or an agent of the same, an application for a writ of *habeas corpus* may be made by his or her husband, parent, guardian or next friend. Ark. Code Ann. § 16-112-103.

The writ of *habeas corpus* shall be issued upon proper application by a Justice of the Supreme Court or a judge of the circuit court. Ark. Code Ann. § 16-112-102.

A bond may be required of the applicant, with surety, payable to the state or person against whom the writ is directed and conditioned on the detainee not escaping and payment of such costs and charges which may be awarded against him. Ark. Code Ann. § 16-112-104.

The writ shall be signed by the officer and be directed to the person having custody of the detainee (in his official name, in his own name, or by description if the name is unknown). It shall designate the person having custody by name or office and designate the person to be produced by name or description. The writ shall be returnable at a time and place specified before the issuing court. It shall be served by any qualified officer or by a private individual designated by the judge. Ark. Code Ann. §§ 16-112-105 – 107.

The writ shall be returned within three days of service, adding one day for every twenty miles further than twenty miles to be traveled. It shall be signed by the person served and shall set out whether or not he has the party in his custody, and if so, the authority and true cause of such custody set forth at large. The party shall also return a copy of any written authority for the custody. If the party has transferred custody before service of the writ, the party shall set out to whom, when, for what cause, and what authority custody has been transferred. Ark. Code Ann. § 16-112-108.

If the person to be produced cannot be brought before the court without danger, from sickness or other infirmity, the person in whose custody he or she is may state the fact in his or her return, verifying the fact by his or her oath. The court or judge, if satisfied of the truth of the allegations, shall

proceed thereon to dispose of the matter in the same manner as if the prisoner were brought before him. Ark. Code Ann. § 16-112-112.

Witnesses may be summoned and punished for contempt as in other proceedings. Affidavits of witnesses of either party may be taken and read in evidence in discretion of the court on reasonable notice to his agent or attorney. Ark. Code Ann. § 16-112-114.

After a hearing, the judge shall either discharge or remand the petitioner, admit the prisoner to bail, or make such order as may be proper. He or she shall adjudge the costs of the proceeding, including the charge for transporting the prisoner. The payment may be enforced by attachment or otherwise. Ark. Code Ann. § 16-112-115.

A writ can be returned only in the county in which it was issued. Therefore, the petition seeking release must be filed in the county where the petitioner is incarcerated. Ark. Code Ann. § 16-112-105.

A petition for a writ of *habeas corpus* must show that a commitment is invalid on its face or that the trial court lacked jurisdiction. *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991), *see also Carter v. Norris*, 367 Ark. 360, 240 S.W.3d 124 (2006).

Detention for an illegal period of time is precisely what a writ of *habeas corpus* is designed to correct; however, a *habeas corpus* proceeding does not afford a prisoner an opportunity to retry his case and is not a substitute for direct appeal or postconviction relief. *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005).

Ordinarily, a person must be confined in order to avail himself of *habeas corpus* relief. A person who has been released on bond, the conditions of which do not restrict his movements, is not entitled to relief through writ of *habeas corpus*. *Lane v. State*, 217 Ark. 114, 229 S.W.2d 43 (1950).

### **Relevant Case Law**

*Habeas corpus* does not provide a remedy to a defendant desirous of attacking a plea on the grounds that defendant had a history of mental illness, or that the plea was coerced or obtained by false promises, threats, misinformation, deception, or misconduct. The matter could, and should, have been raised in a petition for postconviction relief, rather than a *habeas corpus* petition.

*Graham v. State*, 358 Ark. 296, 188 S.W.3d 893 (2004).

Writ of *habeas corpus* was not the appropriate remedy for petitioner's claim that guilty pleas to capital murder were invalid due to trial court's alleged failure to establish factual basis for pleas, where the claim did not raise a question of trial court's jurisdiction or of a void or illegal sentence. *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005).

### **Based on New Scientific Evidence**

A person convicted of a crime may commence a proceeding in the court in which the conviction was entered for relief by *habeas corpus* petition when scientific evidence not available at trial establishes the petitioner's actual innocence, or the scientific predicate for the claim could not have been previously discovered through the exercise of due diligence. Ark. Code Ann. § 16-112-201.

*See Echols v. State*, 2010 Ark. 417, 373 S.W.3d 892 (death-row inmate was not required to conclusively prove that he had not committed the capital murders of which he was convicted in order to obtain new trial under *habeas* statute after postconviction DNA testing of evidence; rather, inmate was required to establish by compelling evidence that a new trial would result in an acquittal).

### **Error Coram Nobis**

Due diligence is required in making application for relief by writ of *error coram nobis*. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001).

*Error coram nobis* is a common law writ of error that is directed to a court for review of its own judgment based on alleged errors of fact. It may be brought

when there are facts, if they had been known to the trial court, which would have prevented the judgment.

### **Relevant Case Law**

*Error coram nobis* is granted only where there is an error of fact extrinsic to the record that was not known at time of trial and that would have resulted in a different verdict if known. *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984).

Circuit court can entertain petition for writ of *error coram nobis* after an appeal only if Supreme Court grants permission. *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997).

*See also Smith v. State*, 301 Ark. 374, 784 S.W.2d 595 (1990) (where the newly discovered evidence was not a basis for writ of *coram nobis*).

*And see Newman v. State*, 2009 Ark. 539, 354 S.W.3d 61 (where Supreme Court granted permission after the conviction was affirmed on appeal because defendant appeared to have a meritorious claim that he was incompetent at the time of trial).

In the review of the granting of a petition for a writ of *error coram nobis* (based upon exculpatory evidence withheld from the defendant by the prosecution), the appellate court will determine whether there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the exculpatory evidence been disclosed at trial. *State v. Larimore*, 341 Ark. 397, 17 S.W.3d 87 (2000); *See also Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001), and *Cloird v. State*, 349 Ark. 33, 76 S.W.3d 813 (2002).

*See also Strawhacker v State*, 2016 Ark. 348, 500 S.W.3d 716 holding that the grounds for a writ of error coram nobis may be expanded when necessary to ensure due process and to provide a state remedy where none exists.

### **Motion for Copy of Appeal Record**

Movant must cite some compelling need for specific documentary evidence to support some allegation contained in a petition for postconviction relief. Indigency alone not good cause to grant motion. *Austin v. State*, 287 Ark. 256, 697 S.W.2d 914 (1985).

Freedom of Information Act does not require court to provide photocopying at public expense. *See Moore v. State*, 324 Ark. 453, 921 S.W.2d 606 (1996).

### **Mandatory Death Penalty Review**

In *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999), the Arkansas Supreme Court held that in death-penalty cases, even if the defendant waives his personal right of appeal, the Supreme Court will conduct an automatic review of the record for egregious and prejudicial errors. Upon imposing a sentence of death, the circuit court shall order the circuit clerk to file a notice of appeal on behalf of the defendant within thirty days after entry of judgment.

The procedures to be followed by the circuit courts upon a sentence of death are set forth in Ark. R. App. P. Crim. 10, and include a form Notice of Appeal to be filed by the circuit court clerk.

Upon imposing a sentence of death, the circuit court shall order the circuit clerk to file a notice of appeal on behalf of the defendant within thirty days after entry of judgment. The court reporter shall transcribe all portions of the criminal proceedings consistent with Article III of the Rules of the Supreme Court and shall file the transcript with the circuit clerk within ninety days after entry of the judgment. Within thirty days after receipt of the transcript, the circuit clerk shall compile the record consistent with Article III and shall file the record with the clerk of the Arkansas Supreme Court for mandatory review consistent with this rule and for review of any additional issues the appellant may enumerate.

See the sample form in Rule 10 of the Arkansas Rules of Appellate Procedure-Criminal.

## **XIV. Judgment Enforcement**

### **Provisional Remedies**

#### **Attachment**

The Arkansas prejudgment attachment code provisions, Ark. Code Ann. §§ 16-110-101 et seq., have been struck down as unconstitutionally violative of due process rights. *McCrary v. Johnson*, 296 Ark. 231, 755 S.W.2d 566 (1988); *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990). When a statute is declared unconstitutional, it must be treated as if it had never been passed.

#### **Garnishment**

A plaintiff may apply for a writ of garnishment setting forth the claim, demand, or judgment and commanding the officer charged with the execution thereof to summon the person named as garnishee.

The summons shall order the garnishee to:

Appear at the return day of the writ and answer what goods, chattels, moneys, credits, and effects he or she may have in his or her hands or possession belonging to the defendant to satisfy the judgment, and

Answer such further interrogatories as may be exhibited against him. Ark. Code Ann. § 16-110-401.

If the garnishment is issued before the judgment, the plaintiff shall give bond in double the amount for which the garnishment is issued.

Upon application for a writ of garnishment by any qualified judgment creditor, the clerk of the court shall attach to the writ of garnishment a “Notice to the Defendant.” As an alternative, the “Notice to Defendant” may be incorporated as a part of the writ of garnishment.

A writ of garnishment together with the “Notice to Defendant” shall be directed, served, and returned in the same manner as a writ of summons.

The judgment creditor or the judgment creditor's attorney shall mail a copy of the writ of garnishment and the “Notice to Defendant” to the judgment debtor and the judgment debtor's attorney, if any, within five days from the date the writ of garnishment is served on the garnishee.

The judgment creditor or the judgment creditor's attorney is not required to mail another “Notice to Defendant” to the judgment debtor for future garnishments on the same debt within twelve months of the original garnishment.

If further garnishments are filed after the original garnishment, then the “Notice to Defendant” is required to be mailed by the judgment creditor or the judgment creditor's attorney annually.

The judgment debtor may claim exemptions according to law after service of the writ of garnishment on the garnishee by filing an exemption claim with the clerk.

Within five days after an exemption claim is filed with the clerk, the judgment debtor or the judgment debtor's attorney shall notify the judgment creditor or the judgment creditor's attorney by fax transmission and concurrent mailing of the judgment debtor's exemption claim.

A hearing shall not be required and a writ of supersedeas shall issue unless the judgment creditor files within ten days from the date the judgment debtor or judgment debtor's attorney files an exemption claim a statement in writing that the judgment debtor's claim of exemption is contested.

Ark. Code Ann. § 16-110-402.

The plaintiff shall, on the day on which he or she sues out the writ of garnishment, file all the allegations and interrogatories, touching the goods and chattels, moneys, credits, and effects of the defendant, and its value

thereof, in the garnishee's possession, at the time of the service of the writ or at any time thereafter. Ark. Code Ann. § 16-110-403.

The garnishee shall, on the return day named in the writ, exhibit and file, under his oath, full, direct, and true answers to all such allegations and interrogatories as may have been exhibited against him or her by the plaintiff. Ark. Code Ann. § 16-110-404.

If the garnishee files his or her answer to the interrogatories exhibited and the plaintiff deems the answers untrue or insufficient, he or she may deny the answer and cause his or her denial to be entered on the record.

The court, if neither party requires a jury, shall proceed to try the facts put in issue by the answer of the garnishee and the denial of the plaintiff. Ark. Code Ann. § 16-110-405.

If any garnishee that is a bank, savings bank, or trust company domiciled in this state, after having been served with a writ of garnishment ten days before the return day thereof, shall neglect to answer on or before the return day the writ or any interrogatories which have been exhibited against it, the court shall enter judgment in general terms against the garnishee. Ark. Code Ann. § 16-110-406.

If any garnishee, after having been duly served with a writ of garnishment, shall neglect or refuse to answer the interrogatories exhibited to him or her, on or before thirty days after service of the writ, the court, upon motion of the plaintiff, may issue a notice to the garnishee, requiring him or her to appear personally at a hearing not later than ten days after receipt of said notice or at such other later date as the court may fix and answer the allegations and interrogatories of the plaintiff.

Service of the notice may be made either by the clerk, or by the plaintiff, by any method prescribed by the Arkansas Rules of Civil Procedure for service of notice.

The court, after hearing and reviewing the evidence and testimony of both parties, may then render judgment against the garnishee in such amount, if any, as the court finds the garnishee held at the time of service of the writ of garnishment, of any goods, chattels, wages, credits and effects belonging to the defendant, not otherwise exempt under state or federal law; together with attorney's fees and such other reasonable expenses incurred by the plaintiff, as the court may deem appropriate under the facts and circumstances. Ark. Code Ann. § 16-110-407.

### **Relevant Case Law**

Despite the language in Ark. Code Ann. § 16-110-401, a defaulting garnishee's liability is limited to the amount of non-exempt wages held at the time of service of the writ of garnishment, plus attorney's fees and other expenses appropriate under the facts and circumstances. *Wal-Mart Stores, Inc. v. D.A.N. Joint Venture III, L.P.*, 374 Ark. 489, 288 S.W.3d 627 (2008).

The defendant may have any prejudgment garnishment discharged by filing with the clerk of the court a bond in double the amount for which the garnishment was issued, conditioned on payment of any adverse judgments. Ark. Code Ann. § 16-110-408.

If the clerk shall approve the bond, he or she shall file it and shall issue a notice directed to the garnishee notifying him or her of the filing and approval of the bond and the release of the garnishment.

The notice shall be signed by the clerk, bear the seal of the court, and be served on the garnishee by the sheriff or constable, and return shall be made thereon as in cases of other writs of process.

If on the return day of any writ of garnishment the garnishee shall surrender to the plaintiff all the goods and chattels, moneys, credits, and effects which may be in his or her hands or possession belonging to the defendant, he or she shall be discharged with costs.

The court shall enter an order releasing and discharging the garnishee from all responsibility to the defendant, in relation to the goods, chattels, moneys, credits, and effects so surrendered. Ark. Code Ann. § 16-110-409.

If the court finds in favor of the garnishee, he or she shall be discharged without further proceedings.

However, if the court finds for the plaintiff, judgment shall be entered for the amount due from the garnishee to the defendant in the original judgment, or so much thereof as will be sufficient to satisfy the plaintiff's judgment, with costs. Ark. Code Ann. § 16-110-410.

In all cases where judgment shall be rendered against any garnishee on an answer to interrogatories filed, the judgment shall have the effect to release the garnishee from all responsibility in relation to the goods and chattels, moneys, credits, and effects for which the judgment may have been rendered. Ark. Code Ann. § 16-110-411.

### **Relevant Statutes**

Garnishment of wages due by railroad: Ark. Code Ann. § 16-110-414.

Failure of bank to answer: Ark. Code Ann. § 16-110-406.

Issuance of writ of garnishment to and from another county: Ark. Code Ann. § 16-110-412.

Garnishment against state: Ark. Code Ann. § 16-110-413.

Wage garnishment: Ark. Code Ann. § 16-110-415.

### **Issuance of Execution**

An execution may issue on any final judgment order of a court of record for a liquidated sum of money and for interest and costs, or for costs alone. Ark. Code Ann. § 16-66-101.

The circuit court in which a judgment is rendered by a court of competent jurisdiction in another county of this state has been registered in accordance with the provisions of Ark. Code Ann. § 16-65-117(a)-(c) shall have power to issue writs of execution upon any such judgment. Ark. Code Ann. § 16-66-102.

An execution may be issued upon a judgment at any time until the collection of it is barred by the statute of limitations. Ark. Code Ann. § 16-66-103.

Ark. R. Civ. P. 62(a) provides that no execution or enforcement proceedings shall issue on any judgment or decree until after the expiration of ten days from the entry thereof.

The execution shall be:

Issued by the clerk of court (Ark. Code Ann. §§ 16-66-104; 16-66-105);

Endorsed with debt, damages, and costs (Ark. Code Ann. § 16-66-105);

Substantially in the form outlined in Ark. Code Ann. § 16-66-104; and

Contain notice as described in Ark. Code Ann. § 16-66-104(c).

The notice to defendant together with a copy of the writ of execution shall be served on the judgment debtor by an officer authorized to serve process simultaneously with seizure or levy of property, or the judgment creditor in the same manner as service of writs or summons before the day the officer authorized to serve process seizes or levies on property of the judgment debtor. Ark. Code Ann. § 16-66-104(d).

Upon filing a claim of exempt property, a prompt hearing shall be held to determine the validity of the claimed exemptions. Provided, no hearing shall be required and a writ of supersedeas shall issue as to the claimed exemption or exemptions if the judgment creditor files a statement in writing that the judgment debtor's claim of exemption is not contested. Ark. Code Ann. § 16-66-104(g).

Upon receipt of a writ of execution and notice to defendant, the judgment debtor shall have twenty days to file a petition to claim any of the exemptions provided by law. Ark. Code Ann. § 16-66-104(h).

If the defendant or any of them are dead, execution shall issue against their survivors or personal representative. Ark. Code Ann. § 16-66-108. The death of only part of the defendants shall not prevent execution being issued. Ark. Code Ann. § 16-66-108.

An execution operates in any county of the state without order of court. Ark. Code Ann. § 16-66-109.

Unless specifically created in the judgment, no lien attaches until the writ of execution is delivered to an officer in the property county. Ark. Code Ann. § 16-66-112.

Alias executions are available at plaintiff's expense or if an execution is returned unsatisfied in whole or in part. Ark. Code Ann. § 16-66-113.

### **Relevant Statutes**

Executions against corporation: Ark. Code Ann. § 16-66-114.

Abstract of executions: Ark. Code Ann. § 16-66-115.

Conveyance by Commissioner: Ark. Code Ann. § 16-66-116.

Bonds: Ark. Code Ann. § 16-66-117.

Immunity of Law Enforcement Officers: Ark. Code Ann. § 16-66-119.

### **Discovery to Enforce Execution**

In aid of a judgment or execution, a judgment creditor or his successor in interest, when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided by the Arkansas Rules of Civil Procedure. Ark. R. Civ. P. 69.

After execution of fieri facias directed to the county in which the judgment was rendered or to the county of the defendant's residence is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the execution, the plaintiff in the execution may institute an action in the court from which the execution issued, or in the court of any county in which the

defendant resides or is summoned, for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled to the satisfaction of the judgment.

In such actions, persons indebted to the defendant in the execution or holding the money or property in which he has an interest, or holding the evidence or securities for the same, may be also made defendants.

The answers of each defendant shall be verified by his or her own oath and the court shall enforce full and explicit discoveries in his or her answers.

The plaintiff may have an attachment against the property of the defendant in the execution, without either the affidavit or bond therein required.

A lien shall be created upon the property of the defendant, the levy of the attachment, or service of the summons with the object of the action endorsed thereon, on the person holding or controlling his property.

The court shall enforce the surrender of the money, or security therefor, or of any other property of the defendant in the execution which may be discovered in the action. For this purpose, the court may commit to jail any defendant or garnishee failing or refusing to make such surrender, until it shall be done, or the court is satisfied that it is out of his or her power to do so.

Ark. Code Ann. § 16-66-418.

Actions on all judgments and decrees shall be commenced within ten years after the cause of action accrues. Ark. Code Ann. § 16-56-114.

The plaintiff or his or her legal representatives at any time before the expiration of the lien of a judgment may sue out a scire facias to revive the judgment in accordance with Ark. Code Ann. § 16-65-501.

### **Property Subject to Execution**

The following described property shall be liable to be seized and sold under any execution upon any judgment, order, or decree of a court of record:

All goods and chattels unless exempt by statute;

The rights and shares in the stock of any bank, insurance company, or other corporation;

Any current gold or silver coin, which shall be returned as so much money collected, without exposing the current gold or silver coin to sale;

A bill or evidence of debt issued by a moneyed corporation belonging to the judgment debtor at the time the writ was issued;

All real estate, whether patented or not, of which the defendant or any person for his or her use, was seized on the day of rendition of the judgment, order, or decree upon which the execution is issued, or at any time thereafter;

Ark. Code Ann. § 16-66-201.

Unexpired leases of land subject to execution as real estate (Ark. Code Ann. § 16-66-204); and

A married woman's sole and separate estate (Ark. Code Ann. § 16-66-202).

### **Property Exempt from Execution**

The following is exempt from execution:

State property (Ark. Code Ann. § 16-66-205);

Improvements on public lands of the state (Ark. Code Ann. § 16-66-206);

Private or public graveyards (Ark. Code Ann. § 16-66-207);

The greater of:

Seventy-five percent of weekly income after all deductions required by law are withheld;

That amount of net weekly income in excess of thirty times the current minimum wage. (15 U.S.C. § 1673).

Moneys paid or payable to an insured or designated beneficiary under a life, health, or disability policy unless the funds to be collected are directed by a writ, order, seizure, or other judicial process arising from a judgment for damages for personal injury involving a felony offense for which the beneficiary has been convicted in a federal or state court (Ark. Code Ann. § 16-66-209);

Personal property of a single person, not the head of a household, up to two hundred dollars and all wearing apparel (Ark. Const. Art. 9 §1); and

Personal property of a married person or the head of household up to five hundred dollars and all family wearing apparel. (Ark. Const. Art. 9 §2).

Whenever a defendant desires to claim any of the exemptions provided for by law, he or she shall prepare a schedule, verified by affidavit, of all his or her property. This schedule shall include moneys, rights, credits, and choses in action held by himself or herself or others for him or her and specifying the particular property which he or she claims as exempt under the provisions of the Arkansas Constitution, Article 9.

Arkansas Code Annotated § 16-66-221 provides that any resident who has final judgment entered against him, shall file with the clerk, within forty-five days of entry of final judgment, verified schedule of all property and rights.

If the claim of exemption is determined to be valid, then supersedeas shall issue, staying any sale or further proceeding under the execution, process, or attachment against the property described in the schedule, and claimed as exempted, and by returning the property to the defendant. Ark. Code Ann. § 16-66-211.

If it appears that the debtor has more property in value than is exempt by law, he or she shall select his or her exemptions. The remainder of the property shall be subject to the levy of the execution, whether the property is included in any former schedule or not. Ark. Code Ann. § 16-66-211.

The plaintiff may require the clerk to appoint three appraisers to determine the value of the exempt property.

If the value of the property is within the constitutional limitations, the property shall be surrendered to the defendant and the plaintiff shall pay costs.

If the value of the property exceeds constitutional limitations, the supersedeas shall be revoked as to the excess and the defendant shall pay costs.

Ark. Code Ann. § 16-66-213.

### **Relevant Statutes**

Election of Bankruptcy Exemptions: Ark. Code Ann. § 16-66-217.

Wedding rings exempt: Ark. Code Ann. § 16-66-219.

Pensions and profit-sharing plans: Ark. Code Ann. § 16-66-220.

### **Homestead Exemption**

The following property is exempt from execution under the Arkansas Constitution:

The homestead of a married person or head of household, outside the city not exceeding up to one hundred sixty acres with selected improvements not exceeding two thousand five hundred dollars in value (Ark. Const. Art. 9 §4);  
and

The homestead, in a city, not exceeding one quarter acre with selected improvements not exceeding two thousand five hundred dollars in value (Ark. Const. Art. 9 §5).

A debtor's right of homestead shall not be lost or forfeited by his or her omission to select and claim it as exempt before the sale thereof on execution, nor by his or her failure to file a description or schedule of the homestead in the recorder's or clerk's office. Ark. Code Ann. § 16-66-212.

### **Staying a Writ of Execution**

Before a writ issues, the defendant may execute a bond to stay the judgment or decree for six months. Ark. Code Ann. § 16-66-303.

After the writ has issued, the defendant may obtain a stay of execution upon a bond for costs, interest, and half the commissions. Ark. Code Ann. § 16-66-303.

An agreement to waive the right of stay shall be specifically enforced. Ark. Code Ann. § 16-66-305.

The sale of personal property upon which an execution is levied shall be suspended at the instance of any person, other than the defendant in the execution, claiming the property, who shall execute a bond for double the value of the property conditioned upon payment of the value of the property and ten percent interest if plaintiff is entitled to the execution.

Appraisers shall be appointed by the issuing officer to determine the value of the property if such a person posts said bond;

The bond with appraisal annexed shall be returned to the levying court;

The plaintiff may move for judgment against the obligors on the bond with ten days' notice and the court shall impanel a jury to try the cause;

Said bond does not discharge the levy but leaves the property in the hands of the person with whom it was found subject to a lien pending disposition of the proceedings on the bond.

Ark. Code Ann. § 16-66-304.

### **Quashing the Execution**

Any person against whom an execution is issued may, by verified petition, apply to the issuing court to quash the execution:

For good cause shown;

With reasonable notice to the opposing party;

Upon execution of a bond conditioned on payment of the debt, damages, and costs recovered by execution; or

Upon surrender of any property subject to execution.

The court shall hear the complaint and if justified, grant the stay.

Ark. Code Ann. § 16-66-301.

## **XV. Appeals**

### **Notice of Appeal**

An appeal shall be taken by filing a notice of appeal with the clerk of the circuit court that entered the judgment, decree, or order from which the appeal is taken.

Ark. R. App. P. Civ. 3.

A notice of appeal shall be filed within thirty days from the entry of the judgment, decree, or order appealed from. Ark. R. App. P. Civ. 4.

The time for filing a notice of appeal shall be extended for all parties upon a timely filing in the circuit court of a motion for judgment notwithstanding the verdict, a motion to amend the court's findings, a motion for a new trial, or any other motion to vacate, alter, or amend the judgment made no later than ten days after entry of judgment.

The notice of appeal shall be filed within thirty days from entry of the order disposing of the last motion outstanding. However, if the circuit court neither grants nor denies the motion within thirty days of its filing, the motion shall be deemed denied by operation of law as of the thirtieth day, and the notice of appeal shall be filed within thirty days from that date. Ark. R. App. P. Civ. 4.

A notice of appeal filed after the trial court announces a decision but before the entry of the judgment or order shall be treated as filed on the day after the judgment or order is entered. Ark. R. App. P. Crim. 2.

Notification of the filing of the notice of appeal shall be given to all other parties or their representatives involved in the cause by mailing a copy of the notice of appeal to the parties or their representatives (and to the Attorney General in criminal cases), but failure to give such notification shall not affect the validity of the appeal. Ark. R. App. P. Crim. 2.

## **The Record on Appeal**

The record on appeal shall be filed with the clerk of the Arkansas Supreme Court and docketed therein within ninety days from the filing of the first notice of appeal, unless the time is extended by order of the circuit court. Ark. R. App. P. Civ. 5.

The time can be extended but in no event shall the time be extended more than seven months from the date of judgment. Ark. R. App. P. Civ. 5.

When, however, an appeal is taken from an interlocutory order the record must be filed with the clerk of the Supreme Court within thirty days from the entry of such order. Ark. R. App. P. Civ. 5.

*See Murphy v. Dumas*, 343 Ark. 608, 36 S.W.3d 351 (2001) (the rule governing extensions of time to file record will be strictly enforced.)

*See* Ark. R. App. P. Crim. 4 for the time extensions in criminal cases.

The notice of appeal shall include a certificate by the appealing party or his attorney that a transcript of the trial record has been ordered from the court reporter. Ark. R. App. P. Crim. 2.

*See* Clerk's Notice of Appeal in Death Penalty Case in Rule 10 of the Rules of Appellate Procedure--Criminal.

## **Stay and Bond for Cost – Civil**

A supersedeas is a written order commanding appellee to stay proceedings on the judgment, decree, or order being appealed from and is necessary to stay such proceedings.

A supersedeas shall be issued by the clerk of the circuit court that entered the judgment, decree, or order being appealed from unless the record has been lodged with the appellate court in which event the supersedeas shall be issued by the clerk of the appellate court.

Whenever an appellant entitled thereto desires a stay on appeal, he shall present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be to the effect

that appellant shall pay to appellee all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree, or order of the circuit court. The maximum amount of bond that may be required in any civil action is twenty-five million dollars.

If a party proves by a preponderance of the evidence that the party who has posted a bond is purposely dissipating or diverting assets outside of the ordinary course of its business for the purpose of evading ultimate payment of the judgment, the court may enter orders as are necessary to prevent dissipation or diversion, including requiring that a bond be posted equal to the full amount of the judgment.

Ark. R. App. P. Civ. 8.

### **Appeal Bond in Criminal Cases**

At the time the sentence is pronounced and judgment entered, the trial judge must advise the defendant of his right to appeal, the period of time prescribed for perfecting the appeal, and either fix or deny an appeal bond. Ark. R. Crim. P. 33.2.

When a criminal defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to an offense other than murder in the first degree, rape, aggravated robbery, or causing a catastrophe, or kidnapping or arson when classified as a Class Y felony, and he is sentenced to serve a term of imprisonment, and he has filed a notice of appeal, the trial court shall not release the defendant on bail or otherwise pending appeal unless it finds:

By clear and convincing evidence that the defendant is not likely to flee or that there is no substantial risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any juror, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person; and

That the appeal is not for the purpose of delay and that it raises a substantial question of law or fact.

When the defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to capital murder, the trial court shall not release the defendant on bail or otherwise, pending appeal for any reason.

When the defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to murder in the first degree, rape, aggravated robbery, or causing a catastrophe, or kidnapping or arson when classified as a Class Y felony, and he has been sentenced to death or imprisonment, the trial court shall not release him on bail or otherwise, pending appeal or for any reason.

Ark. R. App. P. Crim. 6.

However, there is no bond *for costs* to appeal a criminal conviction. Ark. R. App. P. Crim. 5.

### ***De Novo Appeals to Circuit Court***

Amendment 80, § 7(A) of the Arkansas Constitution establishes district courts as the trial courts of limited jurisdiction as to amount and subject matter, subject to the right of appeal to circuit courts for a trial de novo.

An appeal from a district court judgment is a continuation of the district court action. A circuit court's dismissal of a case appealed from district court leaves the district court's judgment as valid and enforceable. *Wilson v. C & M Used Cars*, 46 Ark. App. 281, 878 S.W.2d 427 (1994).

*See Wright v. City of Little Rock*, 366 Ark. 96, 233 S.W.3d 644 (2006) (timely filing of record with circuit court clerk perfected appeal even though appellants failed to perfect service).

The procedures for **criminal appeals** are provided in Ark. R. Crim. P. 36, which provides that appeals are to be filed within thirty days from the date of entry of the judgment by filing a record of the district court proceedings with the circuit court clerk and serving a notice of appeal to the prosecuting attorney.

The Supreme Court requires strict compliance with the process outlined in Rule 36. *See Collins v. State*, 2021 Ark. 80. Failure to comply with the Rule could prevent the circuit court from acquiring jurisdiction of the appeal. *Id.*

The procedures for **civil appeals** are provided in Ark. Dist. Ct. R. 9, which says that appeals are to be filed within thirty days from the date of a docket entry awarding judgment, regardless of whether a formal judgment is entered, by filing with the circuit court clerk a certified copy of the district court's docket sheet showing the award of judgment and all prior entries, or a certified copy of the record of the district court proceedings consisting of all documents and motions filed in the district court, and

A certified copy of the complaint filed in the district court, if filed in accordance with District Court Rule 10, or a certified copy of the small claims division claim form. Neither a notice of appeal nor an order granting leave to appeal shall be required.

The appealing party must serve copies of the above documents upon counsel for all other parties, and any party proceeding pro se. Service may be made by certified mail requiring a signed receipt. It may also be made by delivering copies, sending copies by a commercial delivery company, or serving on counsel by electronic transmission, as described in Ark. R. Civ. P. 5(b)(2).

Failure to serve certified copies of the district court docket sheet or district court record and a certified copy of the district court complaint or claim form shall not affect the validity of the appeal. The filing of the certified copy of the district court complaint or claim form with the clerk of the circuit court shall constitute the filing of the complaint for purposes of commencing the action in circuit court in accordance with Ark. R. Civ. P. 3(a).

If the district court clerk does not prepare or certify a record for filing in the circuit court in a timely manner, a party may take an appeal by filing an affidavit with the circuit court clerk within forty days from the date of the entry of the judgment in the district court, showing that the appealing party has requested the district court *clerk to prepare and certify the record for*

*purposes of appeal and that the clerk* has not done so within thirty days from the date of the entry of the judgment in the district court.

The appealing party shall promptly serve a copy of the affidavit upon the clerk of the district court and upon the opposing attorney or party. The circuit court shall acquire jurisdiction of the appeal upon the filing of the affidavit.

On motion of the appealing party, the circuit court may order the clerk of the district court to prepare, certify, and file the record in the circuit court.

Ark. Dist. Ct. R. 9.

If service of the certified copies of the district court docket sheet or record and the complaint or claim form is not made within one hundred twenty days after filing the district court complaint or claim form with the circuit court or within the time period established by an extension granted pursuant to this subdivision, the action shall be dismissed without prejudice upon motion or upon the court's initiative.

The court, upon written motion and a showing of good cause, may extend the time for service if the motion is made within one hundred twenty days of the filing with the circuit court the district court complaint or claim form or within the time period established by a previous extension. To be effective, an order granting an extension must be entered within thirty days after the motion to extend is filed, by the end of the one hundred twenty-day period, or by the end of the period established by the previous extension, whichever date is later.

Ark. Dist. Ct. R. 9.

All the parties shall assert all their claims and defenses in circuit court.

Within thirty days after a party serves upon counsel for all other parties, and upon any party not represented by counsel, certified copies of the district court docket sheet or district court record and a certified copy of the district court complaint or claim form, the party who was the defendant in district court shall file its answer, motions, and claims within the time and manner

prescribed by the Arkansas Rules of Civil Procedure and the case shall otherwise proceed in accordance with those rules.

At the time they file their complaint, answer, motions, and claims, the parties shall also file with the circuit clerk certified copies of any district court papers that they believe are material to the disputed issues in circuit court. Any party may also file certified copies of additional district court papers at any time during the proceeding as the need arises.

As soon as practicable after the pleadings are closed, the circuit court shall establish a schedule for discovery, motions, and trial.

Except as modified by the provisions of Arkansas District Court Rule 9, and except for the inapplicability of Rule of Civil Procedure 41, the Arkansas Rules of Civil Procedure shall govern all the circuit court proceedings on appeal of a district court judgment as if the case had been filed originally in circuit court.

Ark. Dist. Ct. R. 9.

Whenever an appellant entitled thereto desires a stay on appeal to circuit court in a civil case, he shall present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be to the effect that appellant shall pay to appellee all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree, or order of the inferior court. All proceedings in the district court shall be stayed from and after the date of the court's order approving the supersedeas bond.

Ark. Dist. Ct. R. 9.

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We would like to thank Judge Charles Yeargan, Judge Herb Wright, Judge James Cox and Judge Robert Herzfeld for making their sample scripts and materials available to you in this edition of the Benchbook. We hope that these materials are helpful to you in forming your own scripts and checklists.

## **Criminal Checklists**

### **Sufficiency of Affidavit for Arrest**

1. Is a crime alleged?
2. Is a place set forth?
3. Is the time stated?
4. Is the matter within officer's jurisdiction?
5. Is the accused named or described?
6. Is the affidavit on personal knowledge or hearsay?
7. If hearsay, is the informant reliable?
8. Does reasonable cause exist?

Ark. R. Crim. P. 7.1; 7.2.

### **Sufficiency of Arrest Warrant**

1. Is the offense named or described?
2. Is the county where crime committed named?
3. Does it command officers to arrest a person and bring him or her before judicial officer if unwilling to comply with conditions of release?
4. Is it in writing?
5. Is it in the name of the State?
6. Is it directed to all law enforcement officers in the State?
7. Is it signed by issuing official with his or her title of office?
8. Is it dated?
9. Is the accused named or sufficiently described?

10. Is there a copy of the affidavit attached?
11. Is the judge issuing warrant neutral and detached?

Ark. Code Ann. § 16-81-104; Ark. R. Crim. P. 7.2.

### **Sufficiency of Affidavit for Search & Seizure**

1. Is person or place to be searched particularly described?
2. Is person or thing to be seized particularly described?
3. Is affidavit signed?
4. Is affidavit or recorded testimony given under oath?
5. Is affidavit or recorded testimony given before a judicial officer?
6. Are facts and circumstances set forth to make a reasonable person believe that material to be seized is in the place described?
7. If affidavit or recorded testimony is based on hearsay, are facts alleged bearing on informant's reliability?
8. If affidavit or recorded testimony is based on hearsay, are the means whereby informant obtained the information disclosed?

Ark. R. Crim. P. 13.1.

### **Sufficiency of Search & Seizure Warrant**

1. Is the identity and title of the issuing judicial officer set forth?
2. Is the date and place of application stated?
3. Is there a finding of reasonable cause by the issuing judicial officer stated?
4. Is the identity of the person to be searched stated or described with particularity?
5. Is the person or thing to be seized stated or described with particularity?
6. Is the time within which the warrant is to be returned stated?

7. Is it directed to any law enforcement officer?
8. Does it command the law enforcement officer to search between the hours of 6:00 a.m. and 8:00 p.m.?
9. If search is to be conducted at night, has the judicial officer made a finding that there is reasonable cause to believe that:
  - a. The place to be searched is difficult of speedy access;
  - b. The property is in danger of imminent removal; or
  - c. The warrant can be safely or successfully executed only at night or under unpredictable circumstances?
10. Is the judge issuing warrant neutral and detached?

Ark. R. Crim. P. 13.2.

#### **Consent Searches – Without a Warrant**

1. If search of person, did person give consent?
2. If search of person under 14, did person and parent, guardian, or a person in loco parentis give consent?
3. If search of vehicle, did person to whom vehicle is registered or who is in apparent control of its operation or contents give consent?
4. If search of premises, did person who is apparently entitled to give or withhold consent give consent?
5. Was duration or physical scope of search within limits of consent?
6. Neither the United States Supreme Court nor the Arkansas Supreme Court has ever held that probable cause or reasonable suspicion is necessary in order for an officer to request consent for a search. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999).
7. Did the State prove by clear and positive evidence that consent was freely and voluntarily given and that there was no actual or implied duress or coercion?
8. Consent search of dwelling not valid unless person giving consent was advised of the right to refuse consent.

Ark. R. Crim. P. 11.1; 11.2; 11.3.

## Sufficiency of an Indictment

1. Is it in writing?
2. Is it found and presented by a grand jury to court in which grand jury is impaneled?
3. Does it charge a person with a crime?
4. Is it endorsed "a true bill"?
5. Is the endorsement signed by foreperson?
6. Are the names of witnesses examined listed?
7. Does it show under what authority it is brought?
8. Does it name proper court?
9. Does it indicate it is brought in name of the State?
10. Does it name offense charged?
11. If culpable intent is a material element of offense charged, is it alleged?
12. If knowledge is not presumed, is it alleged?
13. If time is a material element of offense charged, is it alleged?
14. Is offense charged over one which court has jurisdiction?
15. Is venue established?
16. Is defendant named?
17. Is offense properly charged?
18. If property is a subject of offense charged, is it sufficiently described?
19. If value of property is an element of offense charged, is it set forth?
20. If there is a fact or circumstance which may influence punishment, is it set forth?

Ark. Code Ann. §§ 16-85-403; 405.

## **Opening Court in a Jury Trial**

1. State the style of the case.
2. Ask attorneys if they are ready to proceed.
3. Have the clerk call jury roll.
4. Ask jurors to stand and have clerk administer voir dire oath.
5. Introduce attorney for plaintiff, plaintiff, attorney for defendant, and defendant.
6. Ask attorneys to introduce witnesses.
7. Have court reporter administer oath to witnesses.
8. Thank witnesses for their attendance and explain "The Rule." Ark. R. Evid. 615.
9. Explain the nature of the suit.
10. Excuse jurors who should be excused.
11. Make finding that remaining jurors are qualified.

## **Receiving the Verdict**

When the jury has returned from deliberation the judge should:

1. Ask the foreman if the jury has reached a verdict;
2. Instruct the foreman to deliver the verdict to the judge;
3. Ascertain that verdict is complete;
4. Read the verdict aloud;
5. Poll the jury upon request of either party; and
6. If poll discloses jury not unanimous, or in a civil case nine or more have not signed the verdict, return them for further deliberations.

## Sample Script for Jury Qualification and Orientation

Madam Clerk, please call the roll of the jury. Is there any juror present whose name was not called? Any juror summoned to appear and has failed to do so should be turned over to the Sheriff for follow up on why they did not appear.

All jurors please rise and be sworn to answer questions touching your qualifications to serve as Petit Jurors:

- **"DO YOU SOLEMNLY SWEAR OR AFFIRM THAT YOU WILL MAKE TRUE AND PERFECT ANSWERS TO SUCH QUESTIONS AS MAY BE DEMANDED OF YOUR QUALIFICATIONS TO SERVE AS PETIT JURORS AT THE PRESENT TERM OF THIS COURT?"**

Good morning ladies and gentlemen and welcome to jury duty! I am sure many of you have been looking forward to this day with great anticipation. Please, let me express my appreciation for your attendance here today.

If you have visited any of the websites dedicated to "how to get off jury duty," please know I have visited those sites and have a copy of all the excuses they list there.

Jury duty is one of the important services of being a citizen of this community. There are many ways that you as a citizen can

serve your community and this service represents your contribution to the judicial system.

We have found that busy, responsible people generally make the best jurors. In order for you to be a good juror you need to know that in no way will you be embarrassed, asked to give up a vacation or trip you may have already planned, or do anything that might cause you an undue hardship. Defining undue hardship is sometimes difficult. Please know the court will respect your schedules and accommodate you whenever possible.

Every effort will be made to see that your time is not wasted, and every consideration will be given you to avoid any discomfort or inconvenience. All we ask is that if you have a problem; please let us know about it ahead of time so we can make appropriate arrangements. If at any time you need to confer with the court about your personal welfare, please feel free to do so.

A little history:

Our jury system has its roots all the way back to the signing of the Magna Carta on June 15, 1215 by King John at Runnymede, England, and has evolved to the system we have today. A right to a trial by jury is protected by our Federal and State Constitutions and many people have given their lives in protecting these important documents.

Through the years, many people have sat where you sit today and served this community as jurors. Some of you may have had two or three generations of relatives who have previously served. And hopefully, you will have generations who will survive you to serve as well.

The point I wish to make is: **jury duty may be at times, inconvenient, lengthy, costly, and even at times, boring, but it remains and must always be considered a sacred privilege granted to each of us to assist and protect the rights of individuals and entities as set forth in our Constitutions.**

Many people do not want to serve on a jury. Please be mindful that you might, at some point in your lives, be depending on a jury's decision, or maybe you have already been through this experience. You can expect a decision to be as good or as flawed as the people who make up the jury pool. Most people, maybe even you, don't think it will ever happen to them.

Since this is the first day for the new term of this panel, I will be taking some extra time to go over your qualifications to serve as jurors and then a brief orientation of your expected duties.

**PLAY VIDEO IF AVAILABLE AND EQUIPMENT WORKING.**

The first question you may have is how did I get selected to be here today? Every registered voter who is a citizen of the United States and a resident of Arkansas and this county is an eligible

juror, if not otherwise disqualified. Each county has a computer program that assigns numbers to the voters and then a desired number is picked at random.

**Arkansas law provides few disqualifications for jury service but let me quickly go over those that are:**

**These items are now covered in the new juror questionnaire**

- Persons who are unable to read or write the English language (Court may waive);
- Persons who have been convicted of a felony and have not been pardoned;
- Person who are not of good character or approved integrity, are lacking in sound judgment or reasonable information, are intemperate, or are not of good behavior;
- Person who, by reason of a physical or mental disability are unable to render satisfactory jury service, except that no person shall be disqualified solely on the basis of loss of hearing or sight in any degree.
- Is there anyone present who would fall in any of these categories?

**Our law does provide that you may be exempted from jury service under the following conditions:**

- The state of health requires the person's absence.

- A person has a family member whose state of health requires the attention of that person.
- The interest of the person or public will be materially injured by such service.
- You have served as a grand or Petit juror within the past two years.
- Your length of service can be no longer than 4 months and you may not serve more than 10 days during that 4 month period.

Your term begins and ends: \_\_\_\_\_.

Pay: you now earn \$15.00 each day for showing up and \$50.00 for each day you serve on a jury.

**Let me also point out that Arkansas Code Annotated 16-31-106 provides that employers are prohibited from discharging you or making you use vacation time or sick leave due to your absent because of jury duty.**

I hope that these few remarks have served to help you feel at ease and provide you with a general overview of the operation of the court. I further hope I have impressed upon you the importance of your service to the community and the judicial system. When you have completed your service, I believe most of you will have a better impression of our Judicial System, and will be glad you had the opportunity to serve.

Would you now stand and be sworn on the panel?

(Administer oath by Clerk or Judge):

- **“DO SOLEMNLY SWEAR OR AFFIRM THAT YOU WILL AND TRULY TRY EACH AND ALL OF THE ISSUES, INQUISITIONS, AND OTHER MATTERS SUBMITTED TO YOU RESPECTFULLY AS JURORS DURING THE PRESENT TERM OF THIS COURT AND A TRUE VERDICT RENDERED ACCORDING TO THE LAW AND THE EVIDENCE UNLESS DISCHARGED BY THE COURT OR WITHDRAWN BY THE PARTIES.”**

You may be seated.

Let me briefly go over some matters that may assist you or help explain your duties as a juror.

I would like to take this opportunity to introduce you to the Court personnel and their duties:

1. Court Reporter: \_\_\_\_\_

2. Circuit Clerks: \_\_\_\_\_

3. Bailiff: \_\_\_\_\_

4. Judge: \_\_\_\_\_

**ORIENTATION ITEMS:**

**This may be skipped if video is shown.**

Circuit court has two divisions:

1. Criminal
2. Civil

Explain different types of trials—Criminal vs. Civil. In Civil matters you will be asked to determine facts to resolve civil disputes, and award monetary judgments, and in Criminal matters you will determine the guilt or innocence of persons charged with crimes and the punishment of those persons, if found guilty.

- Criminal matters—Prosecutor represents the state, Defendant may have public defender or private counsel.
- Criminal matters—a Defendant has the Presumption of innocence.
- Criminal burden of proof—beyond a reasonable doubt.
- Findings or conclusion of the jury in Criminal matters must be unanimous.
- Findings or conclusion of the jury in Civil matters may be by nine or more of the jurors.
- Civil burden of proof—beyond a preponderance of the evidence.

**Explain how juries are selected in Criminal vs. Civil matters.**

- **Voir dire** examinations-purpose and nature. Voir dire simply means: "**to speak the truth**". This procedure is not conducted to embarrass anyone, but simply to assure the parties they will have only fair and impartial jurors serving on the jury. It is important that all questions be answered truthfully.
- Civil selection is much faster and normally no one on one questioning.
- Criminal selection, slower and questions may be asked of you.
- What happens when they are not selected to serve.
- How often expected to be called in. Also they serve for Judge Cooper.

END OF QUALIFYING FOR TERM.

## Sample Script for Accepting a Guilty Plea

Y 10 to 40 or Life

A 6 to 30      \$15,000

B 5 to 20      \$15,000

C 3 to 10      \$10,000

D 0 to 6      \$10,000

A 1 Year      \$2,500

B 90 Days      \$500

C 30 Days      \$100

You are charged in CR \_\_\_\_ - \_\_\_\_ with \_\_\_\_\_ a class \_\_\_\_ misdemeanor/felony.  
That carries with it from \_\_\_\_ to \_\_\_\_ years in the penitentiary and up to a \$ \_\_\_\_\_ fine.

[Swear in Defendant]

Do you understand the charge(s) against you and the possible penalties?

Defendant - Yes

I am looking at 2 pieces of paper, a Terms and Conditions of Suspended Sentence / Plea Statement of Guilty. I'll show them to you and ask, did you read, understand and sign both of these documents?

Defendant - Yes

Is that your signature toward the bottom of those pages?

Defendant - Yes

Are these the result of some negotiations between you and your attorney and the prosecuting attorney's office?

Defendant - Yes

Were any promises made to you, threats made against you or coercion used upon you to get you to sign these documents?

Defendant - No

Did you sign these after discussing them with your attorney?

Defendant - Yes

Has he/she answered all of your questions?

Defendant - Yes

Do you have any questions for me?

Defendant - No/Yes

Are you under the influence today of any drug or alcohol?

Defendant - No

What do you understand to be your plea agreement? What will happen to you if I accept this deal?

Defendant - Recites his plea agreement

Are you going to pay a fine?

Defendant - Yes/No

At \$60.00 a month, beginning 90 days after your release from the Department of Corrections?

Do you understand that you have an absolute constitutional right to a jury trial, at which the state would have to prove you guilty beyond a reasonable doubt, which is a heavy burden of proof? You could have your attorney with you at trial, they could cross examine the states witnesses, and you could call witnesses on your behalf, testify on your own behalf or remain silent. If you were found guilty at trial you would have a right to appeal to the appeals court. If I accept a plea in this case do you understand that you are waiving and giving up all of those rights?

Defendant - Yes

[To Defense Counsel]

Do you think he/she understand these rights?

Counsel - Yes your Honor.

[To Prosecutor]

Is there a factual basis to the charge?

Counsel - Recites facts of the case.

Having heard that set of facts, how do you plead to the charge of \_\_\_\_\_?

Defendant - Guilty

And the facts just recited, are they the facts to which you are pleading guilty?

Defendant - Yes

Do you understand that I do not have to accept the plea agreement if I do not think it is appropriate?

Defendant - Yes

Is there any legal reason that I should not sentence you at this time?

Defendant – No

Are you satisfied with the services of your attorney?

Defendant -Yes

Do you have any complaint regarding any police officer, detective, jailer, bailiff or prosecutor associated with this case?

Defendant - No

I will accept your plea of guilty to the charge and I will accept this agreement. You are hereby sentenced to the Arkansas Department of Corrections for \_\_\_\_years, with an additional suspended imposition of sentence of \_\_\_\_years. Ninety days after your release from the Department of Corrections, you will begin making \$60.00 a month payments until court costs of \$150 are fully paid.

How much of that \_\_\_\_years you are going to do at the Department of Corrections is largely up to you but absolutely up to the Department of Corrections. Once you are out, though, you will be under the jurisdiction of this Court for \_\_\_\_\_full years, and during that period of time, you need to find some other means of making money and stay on the right side of the

law. If you can do that, you can get this behind you at some point in time, but if in that \_\_\_ years you violate the terms of this agreement or violate any other state, federal or municipal law, you can get brought back to court, and after a hearing in front of a judge, if the judge thinks it is proven that it is more than likely you violated the law, then you can get sentenced to \_\_\_ more years down there. Do you understand?

Defendant - Yes

All right. Good luck to you.

## Sample Script for taking Felony Criminal Plea

“We’re on the record in the matter of State versus \_\_\_\_\_ . Case

Number \_\_\_\_\_. Mr./Ms. \_\_\_\_\_, you understand that you are charged with the following offense(s) \_\_\_\_\_ which is a class \_\_\_\_\_ felony punishable by \_\_\_\_\_ years in the Arkansas Department of Corrections and/or a fine of up to \$ \_\_\_\_\_? The maximum possible sentence you could receive on all charges if you were sentenced consecutively could be \_\_\_\_\_ years.

You understand that if you change your plea to guilty (or no contest) that you are waiving your right to a jury trial; your right to confront witnesses against you; and your right to testify in your own defense?

Has anyone hurt you, promised you anything, or threatened you in any way in order to get you to change your plea?

To the offense of \_\_\_\_\_, how do you plead? Tell me what you did that amounts to that offense? (Make sure they establish prima facie elements; if they can’t or won’t but still want to plea, ask the state if it will accept No Contest plea—if so, the state must present the factual basis and the defense attorney should confirm that they believe the state could prove it at trial).

I find that there is a factual basis for the plea. I find that the plea is knowing, willing, and voluntary, and I hereby find the defendant guilty of \_\_\_\_\_.

The defendant shall be sentenced pursuant to the agreement with the state which sentence shall be: \_\_\_\_\_.

**ADDITIONAL NOTES:**

If the defendant is being sentenced as a Habitual Offender (or repeat DWI offender), establish proof of priors before sentencing or inquire of the Defense attorney if they are satisfied the state could prove the prior convictions at trial.

If the sentence includes a Suspended Imposition of Sentence (SIS), then you should serve them a copy of the terms *on the record*, and go over the consequences of violating those terms [imprisonment for up to the maximum term of years total].

If it is a DWI plea, don't forget that they must be have a drug/alcohol evaluation and recommendation prior to passing sentence.

If it is a misdemeanor plea, you do not have to have the defendant allocute to the facts, but you should inquire of the defense attorney if they are satisfied that the state could prove their case at trial.

# Sample Jury Trial Checklist

## **1. QUALIFICATION AND ORIENTATION**

- A. Swearing in (lots of swearing in)
- B. Welcome
- C. Paul Ells video/cd
- D. Equipment available
- E. How did they get there?
- F. List disqualifications
- G. List exemptions
- H. A.C.A 16-31-106
- I. Second oath
- J. Introduction of Court personnel
- K. Orientation discussion

## **2. CRIMINAL JURY TRIAL PROCEDURES**

- A. Call roll/announce ready/first oath for bailiff and jurors/juror cards w/numbers
- B. Announce case/read charge/introduce defendant
- C. Question to the jurors by Court
- D. Introduce lawyers/witnesses
- E. Voir dire by Court
- F. What to ask and what not to ask
- G. General voir dire by State/Defendant
- H. Procedures for challenges or accepting jurors
- I. Alternates/stipulation by attorneys
- J. Attorneys confirm jurors
- K. Second oath for jurors to serve
- L. Swear witnesses/the rule
- M. Breaks/AMI 101a and AMIb
- N. Commence trial/explain responsibilities
- O. Note taking
- P. Preliminary instructions/explaining process
- Q. Opening statements

- R. State's case presented
- S. Motions
- T. Defendant's case present
- U. Motions
- V. Rebuttal
- W. Jury instructions for innocence or guilt phase  
/procedures for presenting
- X. Closing arguments
- Y. Second bailiff oath
- Z. Verdict forms explained
- AA. Alternate juror instructions
- BB. Dealing with jury questions/evidence
- CC. Taking the verdict
- DD. Reading the verdict
- EE. Polling the jury
- FF. Proceed to penalty phase/opening Instructions
- GG. Opening statements?
- HH. Taking of evidence or stipulations
- II. Closing arguments
- JJ. Taking the verdict
- KK. Pronouncing sentence
- LL. Give appeal notice
- MM. Closing remarks to jurors/collect evidence
- NN. Juror thank you letters

### **3. CIVIL JURY TRIAL PROCEDURE**

- A. Call roll/announce ready/first oath for bailiff and  
jurors/juror cards w/numbers
- B. Announce case/introduce parties/attorneys
- C. Voir dire by Court
- D. Identify witnesses
- E. Voir dire by attorneys
- F. Process to select jurors
- G. Alternates
- H. Confirm jury by attorneys
- I. Jurors' second oath

- J. Swear the witnesses (always)/the rule
- K. AMI 101a/AMI 101b
- L. Commence trial/explain responsibilities
- M. Note taking
- N. Preliminary instructions/explaining process
- O. Opening statements
- P. Plaintiff's case presented
- Q. Motions
- R. Defendant's case presented
- S. Motions
- T. Rebuttals/motions
- U. Jury instructions
- V. Closing arguments
- W. Bailiff's second oath
- X. Explain verdict form(s)/interrogatories
- Y. Taking the verdict/assign who is to prepare precedent
- Z. Closing remarks to jurors/collect all exhibits
- AA. Juror thank you letters

## Sample Script for Civil Jury Trial

Will the Clerk please call the roll of the jurors?

- Is the Plaintiff ready for trial?
- Is the Defendant ready for trial?

Before we start, please administer the Bailiff's oath:

**OATH: “Do you solemnly swear (or affirm) that you will faithfully, impartially, and to the best of your ability, discharge the duties of bailiff of this court, to which office you have been appointed, and strictly obey all orders of the court, as bailiff during the present session now being held?”**

Will all the member of the jury panel please rise:

The Clerk will please swear the Jurors to answer questions touching their qualifications to serve as jurors in this case.

**OATH: “Do you solemnly swear that you will make true and perfect answers to such questions as may be asked of you touching your qualifications to serve as jurors in the case of \_\_\_\_\_ vs. \_\_\_\_\_?”**

You may be seated.

If any questions dictates an answer by you, for the benefit of the Attorneys and the Court Reporter, I will ask you to please stand and state your name before answering.

Ladies and Gentlemen: This is a civil case:

**(Read prepared text as to facts of case)**

- Would the Plaintiff please stand and face the Jurors.
- Would the Defendant please stand and face the Jurors.

The Plaintiff is represented by:\_\_\_\_\_.

The Defendant is represented by:\_\_\_\_\_.

- Is any juror related by blood or marriage to any of the parties in this case? (4<sup>th</sup> degree)
- Is any juror related by blood or marriage to any of the attorneys?
- Is any juror subpoenaed, or expect to be called as a witness in this case?
- Does any attorney in this case represent any juror on any unfinished legal business at this time?
- Do any of the attorneys or members of their firm regularly represent you?

The following is a list of witnesses that may or may not be called in the trial, they are: (ask each witness to stand and face the jurors)

**Read list of witnesses.**

- Are any of the witnesses related to you by blood or marriage?
- Do any of you stand or have you lately stood in relationship of Guardian-Ward, Landlord-Tenant, Employer-Employee, or do you have any form of contractual relationship with the attorneys, the Plaintiff(s), the Defendant(s) or the witnesses?
- Do any of you know the facts of this case?
- Has any juror discussed this case with any person purporting to know the facts of the case?
- Have any of you read a newspaper account of the case or heard about the matter on radio?
- Have any of you formed or expressed an opinion about the case?
- Does any juror know of any reason that if chosen to serve as a juror you could not be absolutely fair and impartial and base your verdict strictly upon the law as given to you by the Court and the evidence gained from the witness stand?

**Any questions on behalf of the Plaintiff?**

**Any questions on behalf of the Defendant?**

Will the Clerk please place the remaining juror's chips into the jury wheel?

The attorneys should prepare their own list.

The Clerk then draws eighteen (18) names.

Ladies and Gentlemen as your names are called, would you please stand so the attorneys can place your name with a face, but remain where you are until all eighteen (18) names are called.

Clerk calls the names as selected by the Judge from the computer.

**Optional:** Ladies and Gentlemen, we will have a 10 minute recess while the attorneys prepare their list. (Attorneys will prepare their strikes and those names will be removed from the box.)

**Court will come back to order.**

Members of the Jury, as your name is called, please take a seat in the jury box.

- **What says the Plaintiff as to the Jury?**
- **What says the Defendant as to the Jury?**

Is there a necessity for an alternate? Can it be stipulated by and between the parties that if misfortune should befall one or more

members of this panel, we will conclude this case with those able-bodied individuals who are able to function as a jury?

Would the members of the Jury in the box please stand and raise your right hand.

The Clerk will swear the jury to try the case:

**Oath: “Do you and each of you solemnly swear that you will well and truly try the case of \_\_\_\_\_ vs. \_\_\_\_\_ and render a true verdict unless discharged by the Court or withdrawn by the parties?”**

Be seated.

Remaining Jurors will be excused at this time. (Give date of next trial if known.)

**Is the rule requested?**

Call all witnesses forward.

Clerk will swear the witnesses.

Explanation of The Rule: Do not discuss the case among yourselves or permit anyone to discuss the case with you other than the attorneys, and they will only talk with one of you at a time. Do not relate what has transpired in the courtroom when you have come in

and testified and return to the witness room. You may now go with the Bailiff.

Consider a recess at this time. **Before first recess, read AMI**

**101. Read AMI 102 before each recess thereafter.**

## **AMI 101 General Opening and Cautionary Instructions**

### **1. How we have a fair trial:**

I will be giving you some instructions now about how to do your job as jurors. It will help you to follow them if you understand a basic principle about how our justice system works. Ours is called an “adversarial system.” Each side brings in its evidence and makes its arguments in court. I instruct you on the law to be applied. And you wait until you have heard all the evidence and instructions before making up your mind. That way all parties know what all the evidence and the law are in this case and have had an opportunity to examine and respond to them, and to hear from all parties. You would deny the parties their right to a fair trial if you based your decision on something other than the law and evidence presented to you in this courtroom, such as dislike of a party, or on facts the parties have not had an opportunity to examine and respond to, or on some legal rule other than the ones I give you. You would not be doing your job as jurors if you allowed someone or something from outside this courtroom to influence your decision. And there would be serious consequences if any

of you allowed someone or something from outside this courtroom to influence your decision, or even to appear to influence your decision. For example, I may have to declare a mistrial and retry the entire case, which would be extremely wasteful for everyone.

So the basic principle is this: ***You are to decide this case fairly, based only on the evidence I allow to be presented in this courtroom and the law as instructed by me.*** You are not to consider information from any other source. Keep an open mind throughout the trial. And do not allow sympathy, prejudice, or like or dislike of any party or any attorney in this case to influence your decision. The fairness and lawfulness of the trial depend on your following this basic principle. To help you follow this basic principle, I will now explain how we will proceed and then give you rules you must follow as jurors.

## **2. How we will proceed:**

(a) ***Opening statements:*** First the attorneys will have a chance to give you their views about the evidence at trial. These are called “opening statements.” The attorneys’ opening statements are not evidence. They are made only to help you understand the evidence and applicable law.

(b) ***Presentation of evidence:*** Next, the parties will bring their evidence into court. The introduction of evidence into court is governed by law. Evidence includes testimony of witnesses, exhibits, and anything else that I instruct you to consider. Matters the attorneys offer to present, but that I do not allow, are not evidence. What an attorney says or claims to have proven is not evidence. If such

statements, arguments, or claims have no basis in the evidence, you should disregard them. Admissions of fact by an attorney, however, are binding on his or her client.

Sometimes the attorneys will disagree about the introduction of evidence. When that happens, one of the attorneys may make an objection. I will decide whether, according to the law, the evidence may be admitted. You are to accept my decision without question. Do not guess or assume what the answer might have been or whether my ruling, or anything I may say or do during trial, indicates my views on the merits of the case. Any testimony that I order stricken from the record is not evidence. You are not to consider it. Simply treat such testimony as though it had never happened.

Sometimes the attorneys may need to speak with me up here at my desk about legal questions in the case that are not appropriate for the jury to hear. We will try to have as few of these conferences as possible and to keep them brief so that we do not keep you waiting.

Do not make up your mind during the trial about what the verdict should be. Evidence can be presented only one piece at a time. Wait until you have heard all the evidence and have discussed it thoroughly with your fellow jurors at the end of the trial during your deliberations before you decide the case.

(c) ***Recesses:*** We will periodically take breaks during the trial, called “recesses.” These recesses are for things such as coffee, rest, lunch, dinner, or to go home if the trial lasts more than one day. Your duties as a juror continue during recesses. You must follow the rules even if you are away from the courtroom, such as at lunch or at home.

(d) ***Instructions:*** At times during the trial and after closing arguments I will give you instructions, as I am doing now. It is my duty as judge to inform you of the law applicable to this case through such instructions. It is your sworn duty as jurors to accept and to follow all of them. Do not single any one instruction out to the exclusion of the others. Follow them all as a whole. You are to consider the law only as instructed by me. Do not consider any other rule of law with which you may happen to be familiar.

(e) ***Closing arguments:*** After the evidence, the attorneys will have a chance to make their final remarks to you. These are called “closing arguments.” The attorneys’ closing arguments are not evidence. They are made only to help you understand the evidence and applicable law.

(f) ***Deliberations:*** After I give you your final instructions, you will then go to the jury room to discuss the case and to decide the questions I will put on your verdict form. These discussions are called “deliberations.” They are absolutely private and neither I nor anyone else will be with you in the jury room. Your decision is your verdict. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.]

### **3. Cautionary Instructions:**

Before we begin the trial, I am going to instruct you on some rules to prevent anything from outside this courtroom influencing your decision or even appearing to influence your decision. Remember how we have a fair trial: You must keep an open mind during the trial and decide the

case based only on the evidence presented in this courtroom and the law as given by me.

(1) The Basic Rule is this: ***Do not communicate about this case by any means whatsoever with anyone at all, or look for or receive any information whatsoever about this case other than the evidence in this courtroom and the law as I instruct you, until your jury duty is complete and I have discharged you.*** It is natural to want to communicate with others and to look things up yourself, and many people are used to doing so, especially with the electronic technology we have these days. But as jurors you have a serious special responsibility which requires you to give up for purposes of this trial some of the ways you normally would do things. I will now explain what this basic rule means.

(a) When I say *you are not to communicate with anyone at all about this case* I mean anyone. That includes your family, your friends, your acquaintances, or complete strangers.

(b) When I say *you are not to communicate by any means whatsoever* I mean not by any means at all. Do not talk at all with anyone about the case or the people or places involved, not in person or by telephone, including cell phone. Do not communicate by any electronic means, such as by text message, email, chat room, or discussion list, by posting updates on social media such as Facebook or MySpace, by blogging, by “Tweeting” on Twitter, or through any other Internet-based or other electronic means. Many of you have “Electronic Devices,” such as a cell phone, iPhone, Smartphone, Blackberry, PDA, iPad, pager, or any

electronic device. You must turn them off while in the courtroom and during deliberations. If you have not already done so, turn them off now. Unless instructed otherwise, you are permitted to use such devices only during recesses and even then only concerning matters totally unrelated to this case or the people or places involved. If you would like, you will be given a telephone number at which you may be contacted while court is in session in case of an emergency.

(c) When I say *communicate*, I mean it both ways. You are not to send or transmit any information, thoughts, opinions, views, updates, or impressions about the case or the people or places involved to anyone else. And you are not to receive or allow anyone else to transmit any such information, thoughts opinions, views, updates, or impressions to you.

(e) When I say *you are not to look for or receive any information whatsoever outside this courtroom about this case or the people or places involved*, I mean from any other source at all. I will give you some examples. Do not read news stories or articles about the case, whether in print or any electronic form, or listen to any radio or television or online reports or Podcasts about the case. Do not search the Internet, such as through Google or on Wikipedia, to find out anything about this case or the people or places involved. Do not read newspapers or online news sources, watch television or online services, or listen to the radio or online sources, or use any Electronic Device to gather information, to get definitions, or to conduct any other research at all about this case. Do not go to the library and do research on the case there. Do not ask anyone – not in person, by telephone, or through any other electronic

means – for advice or information about this case. Do not visit the places involved in the case or use the Internet, such as Google Earth, to look at the places involved or at maps, descriptions, or pictures. If you happen to pass by the scene, do not stop or investigate.

In fact, until the trial is over, I suggest that you avoid all news and information media, including newspapers, news journals, television or radio newscasts, and online news sources such as Podcasts, streaming video or audio, blogs, or RSS feeds. I do not know whether there might be any reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you can do anything about it. If you would like, you may have your spouse or a friend clip or save any news stories to give you after the trial is over. I can assure you, however, that by the time you have heard all the evidence in this case, you will know more about it than anyone will learn through the news media.

(f) *When you are outside the courtroom, do not let anyone say anything to you about the case or the people or places involved.* If someone tries to say anything to you about the case or the people or places involved, notify court personnel.

(2) *Do not talk among yourselves about this case, or the people or places involved in it, until I send you to the jury room for your deliberations.* The purpose of this rule is to prevent you from influencing how your fellow jurors think about the case until after they have heard all the evidence, closing arguments, and my instructions on the applicable law. The time and place to discuss this case among

yourselves will be during deliberations in the jury room, but not before then.

(3) *During the trial do not talk with or otherwise communicate with any of the parties, lawyers, or witnesses involved in the case.* By this I mean do not speak with them at all about anything, not even to exchange pleasantries or to pass the time of day. Although it is a normal human tendency to greet and talk with other people, you must avoid even the appearance that someone has tried to influence you in this case. If someone sees you talking with a person involved in the case, suspicion about your fairness might be unnecessarily aroused. And remember that when the lawyers, parties, and witnesses do not speak with you when you pass in the hall or elsewhere, it is not because they are impolite but because they are not supposed to talk or otherwise communicate with you either.

(4) *Remember that all of these rules apply even when you are away from the courthouse, such as at recess.*

The parties have entrusted their case to you. All of us are depending on you to follow these rules so that you will fairly and justly decide the case based solely on the evidence presented in court and the law as instructed by me, and not on any other sources of information. Remember what I said earlier. Violation of these rules can have serious consequences, including a mistrial, which would be very costly and wasteful. If you become aware of any violation of any of these rules at all, notify court personnel of the violation.

**INSTRUCTION TO BE READ BEFORE EACH RECESS:**

**AMI 102 Cautionary Instructions—Reminder of Jurors' Duties  
During Recess:**

We are about to take *[our first][second]* recess. Remember that all of the rules I have given you apply even when you are away from the courthouse, such as at recess.

Now, remember the basic rule: ***Do not communicate about this case and the places and persons involved by any means whatsoever with anyone at all, or look for or receive any information whatsoever about this case other than the evidence in this courtroom and the law as I have instructed you, until your jury duty is complete and I have discharged you.***

Remember why we have this basic rule: So that you keep an open mind throughout the trial, and appear to others to keep an open mind, and so that you decide the case based only on the evidence presented at trial before the parties, and based only on the law as the Court has instructed you.

Remember to observe during our recess the other rules I gave you.

***Do not talk among yourselves about this case, or the people or places involved in it, until I send you to the jury room for your deliberations.***

***Do not talk with or otherwise communicate with any of the parties, lawyers, or witnesses involved in the case even to exchange pleasantries or to pass the time of day.***

Remember that the parties have entrusted their case to you. All of us are depending on you to follow these rules so that you will fairly and justly decide the case based solely on the evidence presented in court before the parties and the law as instructed by me, and not on any other sources of information. If you become aware of any violation of any of these rules at all, notify court personnel of the violation.

Remember what this basic rule means:

***Do not communicate with anyone at all about this case or the persons or places involved, including with your family, friends, and acquaintances.***

***Do not use any means whatsoever to communicate.*** Do not talk in person or by telephone or communicate in any other way. For example, many of you have Electronic Devices such as cell phones, iPhones, Smartphones, Blackberries, PDAs, iPads, computers, and other electronic devices. Do not use them to talk, send or receive text messages, send or receive email, participate in or read a chat room or discussion list, post updates to a website or to social media such as Facebook or MySpace, to blog, to “Tweet” on Twitter, or to communicate through any other Internet-based or other electronic means at all.

Do not share information, or your thoughts, opinions, views, updates, or impressions about the case or the people or places involved with anyone else through any means. And do not allow anyone else to share with you any such information, thoughts, opinions, views, updates, or impressions. Do not ask anyone, not in person, by

telephone, or through any other electronic means, for advice or information about this case. Do not let anyone outside the courtroom say anything to you or otherwise communicate to you about the case or the people or places involved. If someone tries to say or convey or communicate anything to you by any means about the case or the people or places involved, notify court personnel.

Do not read any news stories or articles about the case or the people or places involved, whether in print or any electronic form. Do not listen to any radio or television or online reports or Podcasts about the case.

Do not use your Electronic Devices to search the Internet, such as through Google or on Wikipedia, to find out anything about this case or the people or places involved. Do not do research in a library. Do not read newspapers or online news sources, watch television or online services, or listen to the radio or online sources, or use any electronic device to gather information, to get definitions, or to conduct any other research at all about this case.

Do not visit the places involved in the case or use the Internet, such as Google Earth, to look at the places involved or at maps, descriptions, or pictures.]

### **COMMENCEMENT OF THE TRIAL**

Ladies and Gentlemen of the jury:

You have been selected and sworn as the jury to try the case of  
\_\_\_\_\_ vs. \_\_\_\_\_.

It is your solemn responsibility to determine the facts of this case, and your verdict must be based solely on the evidence as it is presented to you in this trial and the law on which the court instructs you during and at the close of the trial.

### **JUROR NOTE-TAKING**

During the trial you will be permitted to take notes. The Court has provided you with pencils and notepaper for your convenience. For many years the practice of note taking was discouraged because the taking of notes distracts your mind from the evidence that is presented while you are busy taking notes. The other reason was that the best note-taker might have more influence on the other jurors than is wanted. Remember, each of you must individually determine the issues in this case. It is your responsibility to observe the witnesses as they testify and to listen attentively to all the testimony. At the end of the case, in deliberations, your collective minds will then reach a verdict. The notes are only to be used as a memory aid and should not be allowed to take precedence over jurors' independent memory of facts. Please understand that testimony cannot be repeated nor the trial delayed to permit the taking of accurate notes.

THERE IS NO REQUIREMENT THAT YOU TAKE NOTES.

### **OPENING STATEMENTS**

Each side may address you once during opening statements. In accordance with the rules that govern these proceedings, attorney for the Plaintiff will speak first.

\_\_\_\_\_, you may now make your opening statement for the Plaintiff(s).

\_\_\_\_\_, you may now make your opening statement for the Defendant(s).

Plaintiff, call your first witness.

### **PLAINTIFF'S CASE**

When Plaintiff(s) rest: Recess if motions are to be heard.

Defendant, call your first witness.

### **DEFENDANT'S CASE**

When Defendant(s) rest: Recess if motions are to be heard.

### **Rebuttal?**

Ladies and Gentlemen, you have heard all of the evidence in this case.

It will be necessary to settle the instructions with the Attorneys. We will recess for \_\_\_\_\_ minutes.

## **CLOSING ARGUMENTS**

Member of the Jury, it now becomes my duty to give you the law that will govern you in the trial of this case. As I have previously told you, this law will be contained in the form of various instructions and I trust that you will listen carefully to the reading of them and hope that you can better understand the law. Then it will be your duty to harmonize this law with the true facts as you determine them and render a verdict in compliance with both the law and the evidence.

### **READ THE INSTRUCTIONS**

- Any additional instructions requested by the Plaintiff?
- Any additional instructions requested by the Defendant?

The Attorneys at this time will make their final argument to you. The Attorney for the Plaintiff will have the opening argument. The Attorney for the Defendant will then have his opportunity to make his argument. The Attorney for the Plaintiff will then reply to the argument of the Defendant.

The attorneys, in making these arguments to you, will be commenting upon the testimony that you have heard and the evidence that has been presented in this case. They, as you, will be recalling the

evidence that has been presented. They will not intentionally try to mislead you. However, if their recollection of the evidence differs from what your recollection is, you must follow your own recollection. These final arguments are not to be construed by you as evidence in this case or instructions on the law. They are, however, intended to help you better understand the contentions of each side in the issues you are to decide. You should give both sides your closest attention.

- \_\_\_\_\_, you may make your first closing. (Plaintiff)
- \_\_\_\_\_, you may make your closing argument. (Defendant)
- \_\_\_\_\_, you may make your final closing argument.

Administer Bailiff's oath prior to deliberation.

**OATH: “Do you solemnly swear (or affirm) that you will keep this jury together, not allowing any person to speak to them or overhear their deliberations, nor to speak to them yourself, unless it is in the performance of your official duties as bailiff to this court.”**

Ladies and Gentlemen, I give you verdict form(s).

**(Read each of the verdict forms.)**

You may take the Jury instructions and any of the exhibits

with you to the Jury room. However, please note if you request one exhibit, then all exhibits must be taken. You may now retire to deliberate. Everyone remain seated until the Jury has left the Courtroom.

The alternate juror(s) is/are released at this time.

When Jury returns: **Ladies and Gentlemen of the Jury, have you reached a verdict?**

(Foreperson should report they have.) Please hand the verdict to the Bailiff who will hand it to the Court.

### **READ VERDICT**

- Does the Plaintiff desire to poll the Jury?

If so, call each juror's name and ask if this is his or her verdict?

**Make sure all exhibits/evidence are in the custody of the court reporter.**

**Thank each member of the Jury for his or her attendance, attention and serving on the Jury. Remind them of any future dates, if known and that they are not required to discuss their verdict with anyone if they do not wish to do so.**

**The Jury is dismissed. All remain seated until the Jurors  
have left the Courtroom.**

Assign who will prepare the precedent.

Post-trial motions?

**Court is adjourned.**

# Sample Criminal Jury Trial Procedure

## 1. PRELIMINARY MOTIONS

- a. Advise all counsel of imposition of the rule.
- b. Ask parties if they request an alternate juror – Use Alternate in ALL MURDER, RAPE OR MULTIDAY TRIALS.**
- c. Request a felony information from the prosecutor.
- d. Make sure all witnesses are in the witness room, or in a location ready when called.
- e. Make sure both sides have provided law clerk with jury instructions – ask them to review each other’s instructions and identify any issues to the law clerk.
- f. Advise the parties that they 30 minutes for Voir Dire, opening and Closing (This time limit may be adjusted if needed)

## 2. JURY SELECTION

- a. Ask Bailiff to clear the courtroom of spectators (Attorneys and press may sit inside the rail, no use of electronic devices).
- b. Ask Bailiff to bring in the panel.
- c. Ask the panel if they are sure they are in the correct place.
- d. Clerk calls roll.
- e. Ask if there is anyone present whose name was not called.
- f. 1<sup>st</sup> Oath given by clerk
- g. Introduce yourself to jury.
- h. Read information to jury.
  - i. Does anyone know anything about this matter?
- i. Introduce prosecutors.
  - i. Do you know or have dealings with these attorneys or the Pulaski County Prosecuting Attorney’s Office?
- j. Introduce Defendant and Defense counsel.
  - i. Do you recognize or have any dealings with the people?
- k. Ask Bailiff to bring the witnesses in.
- l. Ask the witnesses to announce their name and place of employment to the panel.

- m. Swear the witnesses.
  - i. Do you recognize or have any dealings with the people?
- n. Ask counsel if there are any witnesses not present, who may be called.
  - i. Do you recognize these names or have any dealings with the people?
- o. Ask the Panel if they have read, seen or looked at anything, to determine which case we may hear today?
- p. (For cases involving Sex Offenses only) Based on the nature of the charges, if anyone needs to approach the bench, to discuss anything?
- q. Ask the clerk to call 18 jurors.
- r. State Inquires
- s. Defense Inquires
- t. Strikes are made in open court, state first, then defense (Prosecution 6, Defense 8, except in a Capital case Prosecution 10, Defense 12)
- u. Repeat until you get 12 jurors.
- v. Have clerk call 3 names for alternate (may adjust if you need more than 1 alternate).
- w. State Inquires
- x. Defense Inquires
- y. Strikes are made in open court, state first, then defense (Each side gets 1 strike).
- z. Ask both sides if the jury is satisfactory.
  - aa. Clerk gives 2<sup>nd</sup> Oath
  - bb. Give the Bailiff 1<sup>st</sup> oath
  - cc. Recess for 15 minutes to allow the jurors to make calls, etc.
  - dd. Admonish jury (Long Version) – Use short version at each recess.
  - ee. Thank and dismiss remaining panel.

### **3. STATE CASE IN CHIEF**

- a. Ask state READY FOR TRIAL
- b. Ask defense READY FOR TRIAL
- c. State opens
- d. Defense opens
- e. State calls witnesses

- f. State rests
- g. Defense motions
  - i. Make record on the defendant's right to testify
  - ii. If Defense does not intend to call any witnesses go through instructions
  - iii. Let defense rest and renew motions
- h. Read Instructions to jury
- i. State close
- j. Defense Close
- k. State final close
- l. Give Bailiff 2<sup>nd</sup> oath
- m. Jurors retire
- n. Review Instructions for Phase II with counsel
- o. Jury Returns
  - i. Ask the Foreperson
    - 1. Have you reached a verdict?
    - 2. Is it unanimous?
    - 3. Please hand the instructions to the Bailiff
    - 4. Review the verdict forms and announce the verdict
    - 5. Ask Counsel if they wish to have the jury polled

#### **4. SENTENCING**

- a. Initial instruction to jury
- b. State calls witnesses
- c. State rests
- d. Defense calls witnesses
- e. Defense rests
- f. State close
- g. Defense Close
- h. State final close
- i. Jurors retire
- j. Jury Returns
  - i. Ask the Foreperson
    - 1. Have you reached a verdict?

2. Is it unanimous?
  3. Please hand the instructions to the Bailiff
  4. Review the verdict forms and announce the verdict
- k. Ask the defendant if he wishes to say anything before sentencing
  - l. Impose sentence
  - m. Give appeal notice
  - n. Thank & dismiss jury
  - o. Adjourn

**JURY SELECTION WORKSHEET**

NAME OF CASE: \_\_\_\_\_ vs. \_\_\_\_\_

COUNTY: \_\_\_\_\_ CASE NUMBER: \_\_\_\_\_ DATE: \_\_\_\_\_

**JURORS CALLED FROM PANEL FOR VOIR DIRE**

1	11	21
2	12	22
3	13	23
4	14	24
5	15	25
6	16	26
7	17	27
8	18	28
9	19	29
10	20	30

ATTORNEYS: \_\_\_\_\_

**CHALLENGES**

BY STATE/PLAINTIFF (3)

1 \_\_\_\_\_ 5 \_\_\_\_\_ 9 \_\_\_\_\_  
 2 \_\_\_\_\_ 6 \_\_\_\_\_ 10 \_\_\_\_\_  
 3 \_\_\_\_\_ 7 \_\_\_\_\_  
 4 \_\_\_\_\_ 8 \_\_\_\_\_

BY THE DEFENSE/DEFENDANT (3)

1 \_\_\_\_\_ 5 \_\_\_\_\_ 9 \_\_\_\_\_  
 2 \_\_\_\_\_ 6 \_\_\_\_\_ 10 \_\_\_\_\_  
 3 \_\_\_\_\_ 7 \_\_\_\_\_  
 4 \_\_\_\_\_ 8 \_\_\_\_\_

CHALLENGES FOR CAUSE: \_\_\_\_\_

**JURORS SELECTED**

1	7
2	8
3	9
4	10
5	11
6	12

ALTERNATES: 1 \_\_\_\_\_ 2 \_\_\_\_\_ 3 \_\_\_\_\_

**SEATING CHART**

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JURY OUT: \_\_\_\_\_ JURY IN: \_\_\_\_\_ VERDICT: \_\_\_\_\_

## Sample Jury Admonishment

### **At the beginning**

To ensure fairness, and the appearance of fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about his case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it, if someone should try to talk to you about the case, please report it to me. Do not read any newspaper accounts of the trial or listen to the radio or television reports about the case.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case-you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side even if it is simply to pass the time of day an unwarranted and unnecessary suspicion about your Fairness might be aroused. When the lawyers, parties or witnesses do not speak to you in the hall or meet anywhere, remember it is because they are not supposed to talk or visit with you either.

Fifth, do not do any research or make any investigation about the case on your own. (Since this case involved an incident that occurred at a particular location, you may be tempted to visit the scene yourself. Please do not do so.) This case must be tried solely upon the evidence presented to you in court and not upon any information or impression, whether correct or not, which you might acquire from visiting the scene. Even if you have previous information concerning (the scene of) the occurrence, (due to your familiarity with it) you should keep that information to yourself and not allow it to become a part of the deliberation.

Sixth, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Lastly, if you have a cell phone, pager, or other communication device, you must turn that device off while in the courtroom. You cannot use cell phones and other communication devices for any purpose when in the jury room during

deliberations. Unless instructed otherwise, you can use those devices only during recesses. In case of an emergency, ask anyone who needs to get a message to you to call the Court Administration office at \_\_\_\_\_.

**At recess**

We are about to take a recess and I remind you of the instruction I gave earlier. During this recess, or any other recess, you must not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about this case, please let me know about it immediately. Finally, keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

## Sample Capital Murder Jury Trial Script

THE COURT WILL COME TO ORDER.

MS. CLERK, HAVE YOU CALLED THE ROLL OF JURORS?

HOW MANY JURORS ARE PRESENT? HAVE ALL BEEN PREVIOUSLY QUALIFIED?

ASK ATTORNEYS TO APPROACH BENCH:

IS THE STATE READY FOR TRIAL?

IS THE DEFENDANT READY FOR TRIAL?

WOULD THE PANEL PLEASE RISE TO TAKE THE OATH TO ANSWER QUESTIONS TOUCHING ON YOUR QUALIFICATIONS TO SERVE IN THIS CASE.

PANEL SHOULD BE SWORN BY THE CLERK AS FOLLOWS:

**“DO YOU AND EACH OF YOUR SOLEMNLY SWEAR THAT YOU WILL MAKE TRUE AND PERFECT ANSWERS TO SUCH QUESTIONS AS MAY BE ASKED OF YOU TOUCHING YOUR QUALIFICATIONS TO SERVE AS JURORS IN THE CASE OF STATE OF ARKANSAS VS. \_\_\_\_\_.”**

THIS CASE IS FILED IN \_\_\_\_\_ COUNTY CIRCUIT COURT, AND STYLED:

**STATE OF ARKANSAS VS. \_\_\_\_\_.**

**CASE NUMBER \_\_\_\_\_.**

LADIES AND GENTLEMEN, IN THIS CASE THE STATE IS

REPRESENTED BY \_\_\_\_\_, PROSECUTING ATTORNEY  
FOR THE \_\_\_\_\_ JUDICIAL DISTRICT.

(ASK ALL TO STAND)

HE/SHE WILL BE ASSISTED BY: \_\_\_\_\_.

THE DEFENDANT IN THIS CASE IS \_\_\_\_\_.

WOULD YOU PLEASE STAND AND FACE THE JURORS?

HE IS REPRESENTED BY \_\_\_\_\_.

THE DEFENDANT IS CHARGED WITH \_\_\_\_\_:

COUNT ONE ALLEGES THAT \_\_\_\_\_

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THIS IS A CLASS Y FELONY AND IS PUNISHABLE BY A  
TERM OF LIFE WITHOUT PAROLE OR DEATH.

COUNT TWO (if applicable) ALLEGES THAT \_\_\_\_\_

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THIS IS A CLASS Y FELONY AND IS PUNISHABLE BY A TERM OF LIFE WITHOUT PAROLE OR DEATH.

YOU ARE ADVISED THAT WHAT I HAVE JUST READ IS AN "INFORMATION". AN INFORMATION IS A METHOD BY WHICH AN INDIVIDUAL IS BROUGHT TO TRIAL. IT IS NOT EVIDENCE OF GUILT AND MUST NOT BE TAKEN AS SUCH BY YOU IF YOU ARE SELECTED AS A JUROR. IT IS MERELY A STEP IN THE PROCESS OF GOING TO TRIAL.

THE TRIAL OF THIS CASE WILL OCCUR IN TWO DISTINCT PHASES. THE FIRST PHASE, WHICH WE REFER TO AS THE GUILT OR INNOCENCE PHASE, IS LIMITED TO THE QUESTION WHETHER THE STATE HAS PROVEN BEYOND A REASONABLE DOUBT THE GUILT OF THE ACCUSED. SHOULD THE ACCUSED BE FOUND GUILTY OF CAPITAL MURDER AS DESCRIBED IN THE INFORMATION, A SECOND PHASE, OR SENTENCING PHASE, WILL BE HELD TO DETERMINE WHAT TYPE OF PUNISHMENT TO BE IMPOSED.

THE STATE MUST PROVE BEYOND A REASONABLE DOUBT EACH ELEMENT OF THE OFFENSES CHARGED.

THERE IS A PRESUMPTION OF THE DEFENDANT'S INNOCENCE IN A CRIMINAL PROSECUTION. IN THIS CASE

\_\_\_\_\_ IS PRESUMED TO BE INNOCENT. THAT PRESUMPTION OF INNOCENCE ATTENDS AND PROTECTS HIM THROUGHOUT THE TRIAL AND SHOULD CONTINUE AND PREVAIL IN YOUR MINDS UNTIL YOU ARE CONVINCED OF HIS GUILT BEYOND A REASONABLE DOUBT.

**REASONABLE DOUBT** IS NOT A MERE POSSIBLE OR IMAGINARY DOUBT. IT IS A DOUBT THAT ARISES FROM YOUR CONSIDERATION OF THE EVIDENCE AND ONE THAT WOULD CAUSE A CAREFUL PERSON TO PAUSE AND HESITATE IN THE GRAVER TRANSACTIONS OF LIFE. A JUROR IS SATISFIED BEYOND A REASONABLE DOUBT IF AFTER AN IMPARTIAL CONSIDERATION OF ALL THE EVIDENCE HE HAS AN ABIDING CONVICTION OF THE TRUTH OF THE CHARGE.

- ARE YOU, AND EACH OF YOU, WILLING AND ABLE TO GIVE TO \_\_\_\_\_, THE BENEFIT OF A DOUBT THROUGHOUT THE TRIAL UNTIL AND UNLESS IT IS OVERCOME?

THE DEFENDANT, \_\_\_\_\_, IS ACCUSED OF TWO COUNTS OF CAPITAL MURDER. IF, AND ONLY IF, THE STATE PROVES ITS CASE BEYOND A REASONABLE DOUBT, THE JURY WILL THEN BE ASKED TO DECIDE THE

PUNISHMENT IN ACCORDANCE WITH ARKANSAS LAW. IN ARKANSAS THERE ARE TWO POSSIBLE PUNISHMENTS FOR CAPITAL MURDER. ONE IS LIFE WITHOUT PAROLE. THE OTHER IS DEATH BY LETHAL INJECTION.

THERE IS NO WAY OF KNOWING WHETHER THE JURY WILL FIND THE DEFENDANT GULTY. BUT IN THE EVENT THAT IT DOES, THE STATE HAS ADVISED THE COURT IT INTENDS TO ASK THE JURY TO IMPOSE THE DEATH PENALTY. THEREFORE, IT IS NECESSARY THAT I ASK YOU CERTAIN QUESTIONS ABOUT YOUR THOUGHTS AND FEELINGS ON THE DEATH PENALTY.

THE FACT THAT YOU MAY HAVE RESERVATIONS ABOUT, OR CONSCIENTIOUS OR RELIGIOUS OBJECTIONS TO, CAPITAL PUNISHMENT DOES NOT AUTOMATICALLY DISQUALIFY YOU AS A JUROR IN A CAPITAL CASE. OF PRIMARY IMPORTANCE IS WHETHER YOU CAN SUBORDINATE YOUR PERSONAL PHILOSOPHY TO YOUR DUTY TO ABIDE BY YOUR OATH AS A JUROR AND FOLLOW THE LAW AS I GIVE IT TO YOU. IF YOU ARE WILLING TO RENDER A VERDICT THAT SPEAKS THE TRUTH AS YOU FIND IT TO EXIST, EVEN THOUGH SUCH VERDICT MAY LEAD TO THE IMPOSITION OF THE DEATH PENALTY, YOU ARE QUALIFIED TO SERVE AS A JUROR IN THE CASE. IF, HOWEVER, YOU ARE POSSESSED OF SUCH STRONG

OPINIONS REGARDING CAPITAL PUNISHMENT—NO MATTER WHAT THOSE OPINIONS MAY BE—THAT YOU WOULD BE PREVENTED FROM OR SUBSTANTIALLY IMPAIRED IN THE PERFORMANCE OF YOUR DUTES AS A JUROR, YOU ARE NOT QUALIFIED TO SERVE AS A JUROR.

IT IS UP TO EACH ONE OF YOU, USING THE STANDARD DESCRIBED TO SEARCH YOUR CONSCIENCE TO DETERMINE WHETHER YOU ARE IN A POSITION TO FOLLOW THE LAW AS I GIVE IT TO YOU AND RENDER A VERDICT AS THE EVIDENCE WARRANTS. ONLY BY YOUR CANDOR CAN EITHER THE ACCUSED OR THE STATE BE ASSURED OF HAVING THIS EXTREMELY SERIOUS CASE RESOLVED BY A FAIR AND IMPARTIAL JURY.

IF YOU ARE SELECTED AS A JUROR IN THIS CASE AND THIS CASE REACHES THE PENALTY PHASE OF THE TRIAL, I WILL THEN INSTRUCT YOU ON THE LAW CONCERNING PUNISHMENT. IN ORDER FOR A JURY TO RETURN A DEATH PENALTY, THE LAW REQUIRES YOUR VERDICT TO BE UNANIMOUS AND THAT YOU RETURN THREE PARTICULAR WRITTEN FINDINGS.

THESE ARE: FIRST, THAT ONE OR MORE AGGRAVATING CIRCUMSTANCES EXISTED BEYOND A REASONABLE DOUBT. SECOND, THAT SUCH

AGGRAVATING CIRCUMSTANCES OUTWEIGH BEYOND A REASONABLE DOUBT ANY MITIGATING CIRCUMSTANCES ANY OF YOU FIND TO EXIST. AND, THIRD, THAT THE AGGRAVATING CIRCUMSTANCES JUSTIFY BEYOND A REASONABLE DOUBT THE SENTENCE OF DEATH. THIS IS THE LAW IN THE STATE OF ARKANSAS AND YOU WOULD BE BOUND BY YOUR OATH TO FOLLOW IT.

**COURT VOIR DIRE OF PANEL**

- ANY PERSON ANSWERING “YES” TO ANY OF THE FOLLOWING QUESTIONS IS TO STAND (AND SHOW JUROR NUMBER ON CARD PROVIDED) SO THAT THE ATTORNEYS MAY IDENTIFY YOUR JUROR NUMBER AND NAME FOR FUTURE QUESTIONING IF THE PERSON IS CALLED AS A PROSPECTIVE JUROR. ONCE YOU ARE RECOGNIZED BY THE COURT, PLEASE STAND AND GIVE YOUR NAME FOR THE RECORD EACH AND EVERY TIME. THIS IS NOT DONE TO EMBARASS YOU BUT ONLY TO BE SURE WE HAVE A FULL AND ACCURATE RECORD OF ALL THESE PROCEEDINGS.
- IF THERE IS ANY PARTICULAR QUESTION THAT YOU ARE ASKED AND YOU WOULD RATHER NOT GIVE AN ANSWER IN OPEN COURT, OR IF AN ANSWER YOU WOULD GIVE MIGHT AFFECT THE OTHER JURORS,

THEN PLEASE ADVISE THE COURT YOU WISH TO APPROACH THE BENCH SO THAT YOUR ANSWER OR INFORMATION MAY BE GIVEN OUT OF THE PRESENCE OF THE OTHER JURORS.

- **WOULD ANY OF YOU AUTOMATICALLY VOTE AGAINST THE DEATH PENALTY OR COULD NEVER VOTE FOR THE DEATH PENALTY REGARDLESS OF ANY EVIDENCE THAT MIGHT BE DEVELOPED AT THE TRIAL OF THIS CASE?**
- **WOULD ANY OF YOU AUTOMATICALLY IMPOSE THE DEATH PENALTY AND REFUSE TO CONSIDER MITIGATING CIRCUMSTANCES AND OTHER POSSIBLE PUNISHMENT, WHICH IS LIFE WITHOUT PAROLE?**
- **IT IS ANTICIPATED THAT THE TRIAL OF THIS CASE WILL LAST FOUR TO FIVE DAYS. IF ALL GOES AS PLANNED, TESTIMONY WILL BEGIN ON MONDAY.**
- **ARE ANY OF YOU “PERSONALLY” OR ANY IMMEDIATE MEMBER OF YOUR FAMILY RELATED TO OR ACQUAINTED WITH ANY OF THE ATTORNEYS, WITNESSES, OR THE DEFENDANT?**

- HAVE ANY OF YOU EVER BEEN REPRESENTED BY ANY ATTORNEY IN THIS CASE, OR HAVE ANY CURRENT BUSINESS WITH ANY OF THE ATTORNEYS OR ASSOCIATES?
- DO ANY OF YOU KNOW THE FACTS OF THIS CASE?
- HAVE ANY OF YOU READ OR HEARD ANYTHING ABOUT THIS ALLEGED INCIDENT?
- HAVE ANY OF YOU FORMED OR EXPRESSED AN OPINION OF THE CASE WHICH MAY INFLUENCE YOUR JUDGMENT?
- DO ANY OF YOU FEEL THAT YOU ARE BIASED OR PREJUDICED FOR OR AGAINST EITHER PARTY?
- DOES THE FILING OF A CHARGE OR AN INDICTMENT OR INFORMATION RAISE ANY INFERENCE OF GUILT IN YOUR MIND?
- DO ANY OF YOU STAND OR HAVE YOU LATELY STOOD IN RELATIONS OF GUARDIAN-WARD, LANDLORD-TENANT, EMPLOYER-EMPLOYEE, OR DO HAVE ANY FORM OF CONTRACTUAL RELATIONSHIP WITH EITHER

THE ATTORNEYS, THE STATE, THE DEFENDANT OR THE WITNESSES?

- DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT FOLLOWING MY INSTRUCTION THAT THE DEFENDANT IS PRESUMED TO BE INNOCENT UNTIL PROVEN GUILTY BEYOND A REASONABLE DOUBT BY EVIDENCE PRESENTED IN THIS COURT?
- DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT BEING ABLE TO CONSIDER THE EVIDENCE IN THIS CASE FAIRLY AND IMPARTIALLY BECAUSE OF THE CHARGES OF CAPITAL MURDER?
- DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT FOLLOWING MY INSTRUCTIONS THAT THE MERE ARREST OF THE DEFENDANT AND HIS PRESENCE HERE FOR TRIAL IS NOT TO BE CONSIDERED AS EVIDENCE AGAINST HIM IN THIS CASE?
- DO ANY OF YOU HAVE ANY DOUBTS OR RESERVATIONS ABOUT YOUR WILLINGNESS TO ACCEPT AND APPLY THE LAW AS I INSTRUCT YOU?

- AFTER THE JURY'S VERDICT IS ANNOUNCED IN OPEN COURT, THE MEMBERS OF THE JURY MAY BE CALLED UPON TO INDIVIDUALLY STATE IF THEY AGREE WITH THE VERDICT. THIS IS CALLED A "POLL OF THE JURY." WOULD ANY OF YOU BE UNWILLING TO DO SO IF YOU WERE SELECTED TO SERVE ON THE JURY?
- **DOES ANY JUROR KNOW OF ANY REASON THAT IF CHOSEN AS A JUROR WHY, HE OR SHE, COULD NOT BE ABSOLUTELY FAIR AND IMPARTIAL AND BASE YOUR VERDICT STRICTLY UPON THE LAW AS GIVEN TO YOU BY THE COURT AND THE EVIDENCE THAT IS GAINED FROM THE WITNESS STAND?**
- ANY GENERAL QUESTIONS OF THE PANEL BY THE STATE?
- ANY GENERAL QUESTIONS OF THE PANEL BY THE DEFENDANT?

CLERK, PLEASE PLACE THE JUROR'S CHIPS INTO THE JURY WHEEL AND DRAW REMAINING JURORS TO BE QUESTIONED INDIVIDUALLY IN THE ORDER THEIR NAMES ARE CALLED. EXCUSE THE REMAINING JURORS FOR TWO TO THREE HOURS.

**IN CAPITAL CASES, THE STATE HAS 10 CHALLENGES AND THE DEFENSE HAS 12.**

## **ALTERNATE JURORS**

AFTER A FULL PANEL IS SEATED, THE COURT SHOULD INQUIRE CONCERNING ALTERNATE JURORS.

**IS THERE A NECESSITY FOR ALTERNATE?**

**EACH SIDE HAS ONE STRIKE AGAINST EACH**

**ALTERNATE JUROR.**

MEMBER OF THE PANEL, AT THIS TIME WE ARE ABOUT TO RETIRE TO THE JURY ROOM WHERE THE PARTIES WILL CONDUCT A MORE IN DEPTH QUESTIONING OF PROSPECTIVE JURORS OUT OF THE HEARING OF THE REMAINING PANEL. THIS IS CALLED "SEQUESTERED VOIR DIRE," BUT DOES NOT MEAN ANYONE WILL BE REQUIRED TO REMAIN OVERNIGHT. IT IS SIMPLY A PROCESS TO GIVE A PROSPECTIVE JUROR A MORE PRIVATE SETTING TO ANSWER QUESTIONS THAT MIGHT NOT BE POSSIBLE IN FRONT OF THE ENTIRE PANEL.

IF YOU ARE SELECTED AS A JUROR, YOU WILL BE PERMITTED TO GO TO YOUR HOME, EMPLOYMENT OR PLACE OF BUISNESS UNTIL ALL THE JURORS AND ALTERNATES HAVE BEEN SELECTED AT WHICH TIME YOU WILL BE NOTIFIED TO RETURN FOR THE COMMENCMENT OF THE TRIAL. THE COURT WILL ADVISE YOU THAT YOU ARE NOT TO READ, LISTEN TO OR WATCH ANY NEWS REPORTS THAT MAY OCCUR AS A RESULT

OF THIS TRIAL IN ORDER THAT YOU MAY REMAIN FAIR AND IMPARTIAL.

DURING THE TIME WE ARE IN THE JURY ROOM, DO NOT DISCUSS THE CASE WITH YOUR FELLOW PROSPECTIVE JURORS, NOR READ ANY ARTICLES ON THE CASE, CONDUCT ANY RESEARCH, OR ALLOW ANY ONE ELSE TO DISCUSS THE CASE WITH YOU UNTIL YOU ARE DISCHARGED BY THE COURT.

YOU MAY BRING READING MATERIAL INTO THE COURTROOM UNTIL YOU ARE CALLED FOR QUESTIONING AND UNTIL THE COURT RECONVENES. YOU ARE PERMITTED TO MOVE ABOUT AND GO OUTSIDE THE COURTHOUSE, BUT YOU SHOULD NOT LEAVE THE COURTHOUSE GROUNDS. IF YOU STEP OUTSIDE, PLEASE MAKE SURE ONE OF THE BAILIFFS WILL BE AWARE OF WHERE YOU MIGHT BE IN CASE WE NEED YOU.

THE ORDER OF PROSPECTIVE JURORS TO BE QUESTIONED HAS ALREADY BEEN CONDUCTED AND APPROVED BY THE PARTIES. A LIST WILL BE MADE AVAILABLE TO YOU SO THAT YOU WILL HAVE SOME IDEA WHEN YOU WILL BE CALLED. THE FIRST PERSON TO BE CALLED WILL BE \_\_\_\_\_.

AT THIS TIME WE WILL MOVE TO THE JURY ROOM TO CONDUCT THE INDIVIDUAL VOIR DIRE.

- QUESTIONS BY THE STATE?

- QUESTIONS BY THE DEFENDANT?

ONCE QUESTIONING HAS BEEN COMPLETED, THE JUROR WILL BE ASKED TO LEAVE THE ROOM FOR COMMENTS/CHALLENGES.

WHAT SAYS THE STATE AS TO JUROR \_\_\_\_\_?  
(GOOD OR STRIKE)

WHAT SAYS THE DEFENDANT AS TO JUROR \_\_\_\_\_?  
(GOOD OR STRIKE)

JUROR WILL THEN BE ADVISED IF HE/SHE IS EXCUSED OR TO RETURN FOR SERVICE AND BE CAUTIONED.

AFTER THE STATE AND DEFENSE HAVE HAD AN OPPORTUNITY TO INQUIRE OF ALL THE JURORS, ASK:

- **WHAT SAYS THE STATE AS TO THE JURY?**
- **WHAT SAYS THE DEFENSE AS TO THE JURY?**

(BACK IN THE COURTROOM.)

WILL THE JURY PLEASE STAND, RAISE YOUR RIGHT HANDS, AND TAKE THE OATH TO SIT AS JURORS IN THIS CASE.

THE CLERK SHOULD SWEAR THE PANEL.

**OATH: “DO YOU AND EACH OF YOU SOLEMNLY SWEAR THAT YOU WILL WELL AND TRULY TRY THE CASE OF STATE VS. \_\_\_\_\_, AND**

**RENDER A TRUE VERDICT UNLESS DISCHARGED BY THE COURT OR WITHDRAWN BY THE PARTIES?" BE SEATED.**

EXCUSE THE BALANCE OF THE JURY PANEL. GIVE DATES OF NEXT TRIAL IF KNOWN.

**WITNESSES: SWEARING/IS RULE REQUESTED?**

THE WITNESSES, WHO WILL BE CALLED TO TESTIFY IN THIS CASE, SO FAR AS KNOWN BY THE COURT, ARE:

\_\_\_\_\_ (THE JUDGE SHOULD OBTAIN THIS INFORMATION FROM BOTH SIDES PRIOR TO TRIAL. AS EACH WITNESS'S NAMES ARE CALLED, THEY SHOULD RISE, OR IF OUTSIDE OF THE COURTROOM, COME INTO THE COURTROOM.)

### **EXPLANATION OF THE RULE**

ALL WITNESSES SHOULD BE SWORN BY THE CLERK AND THE EXCLUSION OF WITNESS RULE GIVEN, IF APPROPRIATE, AS FOLLOWS:

- EACH OF YOU HAS BEEN SUMMONED AS A WITNESS IN THIS CASE.

- THE COURT HAS INVOKED A RULE OF PROCEDURE WHICH REQUIRES YOUR EXCLUSION FROM THE COURTROOM AT ALL TIMES, EXCEPT DURING THE TRIAL WHEN YOU TESTIFY IN THIS MATTER.
- YOU ARE DIRECTED TO REMAIN OUT OF THE COURTROOM EXCEPT WHEN YOU ARE CALLED TO TESTIFY. WHILE YOU ARE WAITING TO TESTIFY, AND AFTER YOU HAVE DONE SO, YOU ARE NOT TO DISCUSS THIS CASE OR YOUR TESTIMONY AMONG YOURSELVES OR WITH ANYONE ELSE. YOU MAY, HOWEVER, DISCUSS YOUR TESTIMONY WITH COUNSEL FOR EITHER PARTY IN THIS CASE.
- COUNSEL FOR EACH OF THE PARTIES ARE INSTRUCTED TO ADVISE EACH OF THEIR RESPECTIVE WITNESSES THAT ARE NOT PRESENT AT THE TIME OF THE DIRECTION I HAVE JUST GIVEN THAT EACH OF THEM SHALL BE GOVERNED THEREBY.
- ANY VIOLATION OF THIS DIRECTION MAY NOT ONLY SUBJECT YOU TO CONTEMPT OF COURT BY MAY ALSO DISQUALIFY YOU AS A WITNESS IN THIS CASE.

**BREAK BEFORE COMMENCING TRIAL**

**CONSIDER TAKING A BREAK AT THIS POINT IN ORDER FOR THE JURORS TO NOTIFY EMPLOYERS, FAMILY, ETC.**

**READ THE FOLLOWING ADMONITION NOW AND BEFORE EACH RECESS:**

**AMI 101a CAUTIONARY INSTRUCTION - COMMENCEMENT OF TRIAL (MODIFIED)**

**TO ENSURE FAIRNESS, AND THE APPEARANCE OF FAIRNESS, YOU AS JURORS MUST OBEY THE FOLLOWING RULES:**

- **FIRST, DO NOT TALK AMONG YOURSELVES ABOUT THIS CASE, OR ABOUT ANYONE INVOLVED WITH IT, UNTIL THE END OF THE CASE WHEN YOU GO TO THE JURY ROOM TO DECIDE ON YOUR VERDICT.**
- **SECOND, DO NOT TALK WITH ANYONE ELSE ABOUT THIS CASE, OR ABOUT ANYONE INVOLVED WITH IT, UNTIL THE TRIAL HAS ENDED AND YOU HAVE BEEN DISCHARGED AS JURORS.**
- **THIRD, WHEN YOU ARE OUTSIDE THE COURTROOM, DO NOT LET ANY ONE TELL YOU ANYTHING ABOUT THE CASE, OR ABOUT ANYONE**

INVOLVED WITH IT. IF SOMEONE SHOULD TRY TO TALK TO YOU ABOUT THE CASE, PLEASE REPORT IT TO ME.

- **FOURTH, DURING THE TRIAL YOU SHOULD NOT TALK WITH OR SPEAK TO ANY OF THE PARTIES, LAWYERS OR WITNESSES INVOLVED IN THIS CASE - YOU SHOULD NOT EVEN PASS THE TIME OF DAY WITH ANY OF THEM. IT IS IMPORTANT NOT ONLY THAT YOU DO JUSTICE IN THIS CASE, BUT THAT YOU ALSO GIVE THE APPEARANCE OF DOING JUSTICE. IF A PERSON FROM ONE SIDE OF THE PROCEEDINGS SEES YOU TALKING TO A PERSON FROM THE OTHER SIDE - EVEN IF IT IS SIMPLY TO PASS THE TIME OF DAY - AN UNWARRANTED AND UNNECESSARY SUSPICION ABOUT YOUR FAIRNESS MIGHT BE AROUSED. WHEN THE LAWYERS, PARTIES OR WITNESSES DO NOT SPEAK TO YOU WHEN YOU PASS IN THE HALL OR MEET ANYWHERE, REMEMBER IT IS BECAUSE THEY ARE NOT SUPPOSED TO TALK OR VISIT WITH YOU EITHER.**
- **FIFTH, DO NOT READ ANY NEWS STORIES OR ARTICLES ABOUT THE CASE, OR ABOUT ANYONE INVOLVED WITH IT, OR LISTEN TO ANY RADIO OR TELEVISION REPORTS ABOUT THE CASE OR ABOUT ANYONE INVOLVED WITH IT. [IN FACT, UNTIL THE TRIAL IS OVER, I SUGGEST THAT YOU AVOID READING ANY NEWSPAPERS OR NEWS JOURNALS AT ALL, AND AVOID LISTENING TO ANY TV OR RADIO NEWS CASTS AT ALL. I DO NOT KNOW WHETHER THERE MIGHT BE ANY NEWS REPORTS OF THIS CASE, BUT IF THERE ARE YOU MIGHT INADVERTENTLY FIND YOURSELF READING OR LISTENING TO SOMETHING BEFORE YOU COULD DO ANYTHING ABOUT IT. IF YOUR WANT, YOU CAN HAVE YOUR SPOUSE OR A FRIEND**

CUT OUT ANY STORIES AND SET THEM ASIDE TO GIVE YOU AFTER THE TRIAL IS OVER. I CAN ASSURE YOUR, HOWEVER, THAT BY THE TIME YOU HAVE HEARD THE EVIDENCE IN THE CASE, YOU WILL KNOW MORE ABOUT THE MATTER THAN ANYONE WILL LEARN THROUGH THE NEWS MEDIA.]

- SIXTH, DO NOT DO ANY RESEARCH OR MAKE ANY INVESTIGATION ABOUT THE CASE ON YOUR OWN. [SINCE THIS CASE INVOLVED AN INCIDENT THAT OCCURRED AT A PARTICULAR LOCATION, YOU MAY BE TEMPTED TO VISIT THE SCENE YOURSELF. PLEASE DO NOT DO SO. THIS CASE MUST BE TRIED SOLELY UPON THE EVIDENCE PRESENTED TO YOU IN COURT AND NOT UPON ANY INFORMATION OR IMPRESSION, WHETHER CORRECT OR NOT, WHICH YOU MIGHT ACQUIRE FROM VISITING THE SCENE. EVEN IF YOU HAVE PREVIOUS INFORMATION CONCERNING THE SCENE OF THE OCCURRENCE, DUE TO YOUR FAMILIARITY WITH IT, YOU SHOULD KEEP THAT INFORMATION TO YOURSELF AND NOT ALLOW IT TO BECOME A PART OF THE DELIBERATION.]
- SEVENTH, DO NOT MAKE UP YOUR MIND DURING THE TRIAL ABOUT WHAT THE VERDICT SHOULD BE. KEEP AN OPEN MIND UNTIL AFTER YOU HAVE GONE TO THE JURY ROOM TO DECIDE THE CASE AND YOU AND YOUR FELLOW JURORS HAVE DISCUSSED THE EVIDENCE.

**INSTRUCTION TO BE READ BEFORE EACH RECESS:**

**AMI 101B CAUTIONARY INSTRUCTION - DUTIES OF JURY DURING RECESSES**

WE ARE ABOUT TO TAKE [OUR FIRST] RECESS AND I REMIND YOU OF THE INSTRUCTIONS I HAVE GIVEN YOUR EARLIER. DURING THIS RECESS OR ANY OTHER RECESS, YOU MUST NOT DISCUSS THIS CASE WITH ANYONE, INCLUDING YOUR FELLOW JURORS, MEMBERS OF YOUR FAMILY, PEOPLE INVOLVED IN THE TRIAL, OR ANYONE ELSE. IF ANYONE TRIES TO TALK TO YOU ABOUT THE CASE, PLEASE LET ME KNOW ABOUT IT IMMEDIATELY. [DO NOT READ, WATCH OR LISTEN TO ANY NEWS REPORTS OF THE TRIAL] FINALLY, KEEP AN OPEN MIND UNTIL ALL THE EVIDENCE HAS BEEN RECEIVED AND YOU HAVE HEARD THE VIEWS OF YOUR FELLOW JURORS.

**COMMENCEMENT OF THE TRIAL**

LADIES AND GENTLEMEN OF THE JURY:

YOU HAVE BEEN SELECTED AND SWORN AS THE JURY TO TRY THE CASE OF STATE VS.\_\_\_\_\_.

THIS IS A CRIMINAL CASE CHARGED BY AN INFORMATION FILED IN THIS COURT BY THE PROSECUTING ATTORNEY ALLEGING A VIOLATION OF THE LAWS RELATING TO AND STATED AS **CAPITAL MURDER**. THE ELEMENTS OF WHICH WILL BE EXPLAINED TO YOU LATER.

IT IS YOUR SOLEMN RESPONSIBILITY TO DETERMINE THE GUILT OR INNOCENCE OF THE DEFENDANT AND

YOUR VERDICT MUST BE BASED SOLELY ON THE EVIDENCE AS IT IS PRESENTED TO YOU IN THIS TRIAL AND THE LAW ON WHICH THE COURT INSTRUCTS YOU

THE JURY IS CONCERNED WITH THE FACTS; THE COURT IS CONCERNED WITH THE LAW. THE COURT IS CONCERNED WITH FACTS ONLY TO SEE THEY ARE PROPERLY AND LAWFULLY PRESENTED TO YOU. THE JURY IS CONCERNED WITH THE LAW ONLY AS THE COURT INSTRUCTS IT. THUS THE RESPONSIBILITY OF THE JURY AND THE RESPONSIBILITY OF THE COURT ARE WELL DEFINED, AND THEY DO NOT OVERLAP.

### **JUROR NOTE-TAKING**

DURING THE TRIAL YOU WILL BE PERMITTED TO TAKE NOTES. THE COURT HAS PROVIDED YOU WITH PENCILS AND NOTEPAPER FOR YOUR CONVENIENCE. FOR MANY YEARS THE PRACTICE OF JUROR NOTE-TAKING WAS DISCOURAGED BECAUSE THE TAKING OF NOTES DISTRACTS YOUR MIND FROM THE EVIDENCE THAT IS PRESENTED WHILE YOU ARE BUSY TAKING NOTES. THE OTHER REASON WAS THAT THE BEST NOTE-TAKER MIGHT HAVE MORE INFLUENCE ON THE OTHER JURORS THAN IS WANTED. REMEMBER, EACH OF YOU MUST INDIVIDUALLY DETERMINE THE ISSUES IN THIS CASE. IT IS YOUR RESPONSIBILITY TO OBSERVE THE

WITNESSES AS THEY TESTIFY AND TO LISTEN ATTENTIVELY TO ALL THE TESTIMONY. AT THE END OF THE CASE, IN DELIBERATIONS, YOUR COLLECTIVE MINDS WILL THEN REACH A VERDICT. THE NOTES ARE ONLY TO BE USED AS A MEMORY AID AND SHOULD NOT BE ALLOWED TO TAKE PRECEDENCE OVER JURORS' INDEPENDENT MEMORY OF FACTS. PLEASE UNDERSTAND THAT TESTIMONY CANNOT BE REPEATED NOR THE TRIAL DELAYED TO PERMIT THE TAKING OF ACCURATE NOTES. FINALLY, THERE IS NO REQUIREMENT THAT YOU TAKE NOTES.

IN THE EVENT YOU SHOULD EXPERIENCE A PERSONAL PROBLEM DURING THE COURSE OF THE TRIAL, YOU MAY EXPLAIN THE MATTER TO THE BAILIFF, AND THE MESSAGE WILL BE RELAYED TO THE COURT

### **PRELIMINARY INSTRUCTIONS**

BEFORE WE HEAR THE OPENING STATEMENTS OF COUNSEL AND BEGIN TO TAKE EVIDENCE, IT MAY BE HELPFUL IF YOU HAVE SOME PRELIMINARY INSTRUCTIONS TO FOLLOW IN LISTENING TO AND CONSIDERING THE EVIDENCE WHICH YOU WILL HEAR IN THIS CASE.

YOU HAVE THE EXCLUSIVE DUTY TO DECIDE ALL QUESTIONS OF FACT SUBMITTED TO YOU. IN CONNECTION WITH THIS DUTY YOU MUST DETERMINE THE EFFECT AND VALUE OF THE EVIDENCE. YOU MUST NOT BE INFLUENCED IN YOUR DECISION BY SYMPATHY, PREJUDICE OR PASSION TOWARD ANY PARTY, WITNESS OR ATTORNEY IN THE CASE.

THE ATTORNEYS FOR THE PARTIES WILL, OF COURSE, HAVE ACTIVE ROLES IN THE TRIAL. THEY WILL MAKE OPENING STATEMENT TO YOU, QUESTION WITNESSES AND MAKE OBJECTIONS AND, FINALLY, WILL ARGUE THE CASE AS THE LAST STEP BEFORE YOU COMMENCE YOUR DELIBERATIONS. REMEMBER THAT THE LAWYERS ARE NOT WITNESSES, AND SINCE IT IS YOUR DUTY TO DECIDE THE CASE SOLELY ON THE EVIDENCE WHICH YOU SEE OR HEAR IN THE CASE, YOU MUST NOT CONSIDER AS EVIDENCE ANY STATEMENT OF ANY ATTORNEY MADE DURING THE TRIAL. THERE IS AN EXCEPTION, AND THAT IS IF THE ATTORNEYS AGREE TO ANY FACT. THAT AGREEMENT, STIPULATION OR ADMISSION OF FACT WILL BE BROUGHT TO YOUR ATTENTION, AND YOU MAY THEN REGARD THAT FACT AS BEING CONCLUSIVELY PROVED WITHOUT THE NECESSITY OF FURTHER EVIDENCE.

IF A QUESTION IS ASKED AND AN OBJECTION TO THE QUESTION IS SUSTAINED, YOU WILL NOT HEAR THE ANSWER; YOU MUST NOT SPECULATE AS TO WHAT THE ANSWER MIGHT HAVE BEEN OR AS TO THE REASON FOR THE OBJECTION. IF AN ANSWER IS GIVEN TO A QUESTION AND THE COURT THEN GRANTS A MOTION TO STRIKE OUT THE ANSWER, YOU ARE TO COMPLETELY DISREGARD THAT QUESTION AND THE ANSWER AND NOT CONSIDER THEM FOR ANY PURPOSE. A QUESTION, IN AND OF ITSELF, IS NOT EVIDENCE, AND MAY BE CONSIDERED BY YOU ONLY AS IT SUPPLIES MEANING TO THE ANSWER.

WHEN AN OBJECTION IS MADE, IT DOES NOT MEAN THAT ANYONE IS TRYING TO CONCEAL EVIDENCE FROM YOU. THERE ARE RULES GOVERNING THE ADMISSIBILITY OF EVIDENCE WHICH MUST BE FOLLOWED AND THE COURT ATTEMPTS TO ACCOMPLISH THIS BY RULING ON THE OBJECTIONS. THE OBJECTION IS MADE TO CALL THE COURT'S ATTENTIONS TO A POSSIBLE TRANSGRESSION OF THE RULES. OVER THE CENTURIES, THE LAW HAS DETERMINED WHAT EVIDENCE IS RELIABLE AND WHAT IS NOT. IN ORDER TO PRESERVE THE INTEGRITY OF THE TRIAL, EACH SIDE ATTEMPTS TO ENSURE THAT ONLY RELIABLE EVIDENCE IS PRESENTED TO THE JURY. THIS IS USUALLY THE REASON FOR THE OBJECTION.

THERE WILL BE OCCASIONS WHEN THE ATTORNEYS APPROACH THE BENCH AND SPEAK TO THE COURT OUT OF YOUR HEARING. YOU MUST NOT SPECULATE AS TO THESE DISCUSSIONS, WHICH CONCERN POINTS OF LAW, BECAUSE THEY ARE NOT EVIDENCE AND IT WOULD BE UNFAIR FOR THE JURY TO BE IN ON DISCUSSIONS, WHICH ARE NOT PART OF THE EVIDENCE UPON WHICH YOU WILL BASE YOUR DECISION.

AS JURORS, YOU WILL HAVE THE SOLE AND EXCLUSIVE DUTY TO DECIDE THE CREDIBILITY OF THE WITNESSES WHO WILL TESTIFY IN THE CASE, WHICH SIMPLY MEANS THAT IT IS YOU WHO MUST DECIDE WHETHER TO BELIEVE OR DISBELIEVE A PARTICULAR WITNESS. IN MAKING THIS DETERMINATION, YOU WILL APPLY THE TESTS OF TRUTHFULNESS WHICH YOU APPLY IN YOUR DAILY LIVES. THESE TESTS INCLUDE THE APPEARANCE OF EACH WITNESS ON THE STAND; HIS OR HER MANNER OF TESTIFYING; THE REASONABLENESS OF THE TESTIMONY; THE OPPORTUNITY THE WITNESS HAD TO SEE, HEAR AND KNOW THE THINGS CONCERNING WHICH HE OR SHE TESTIFIED; THE ACCURACY OF THE WITNESS' MEMORY; FRANKNESS OR LACK OF IT; INTELLIGENCE, INTEREST AND BIAS, IF ANY. YOU ARE NOT REQUIRED TO BELIEVE THE TESTIMONY OF ANY

WITNESS SIMPLY BECAUSE IT WAS GIVEN UNDER OATH. YOU MAY BELIEVE OR DISBELIEVE ALL OR ANY PART OF THE TESTIMONY OF ANY WITNESS.

YOU SHOULD NOT DECIDE ANY ISSUE OF FACT MERELY ON THE BASIS OF THE NUMBER OF WITNESSES WHO TESTIFY ON EACH SIDE OF THAT ISSUE. RATHER, THE FINAL TEST IN JUDGING EVIDENCE SHOULD BE THE FORCE AND WEIGHT OF THE EVIDENCE, REGARDLESS OF THE NUMBER OF WITNESSES ON EACH SIDE OF AN ISSUE. THE TESTIMONY OF ONE WITNESS, BELIEVED BY YOU, IS SUFFICIENT TO PROVE ANY FACT.

OPENING STATEMENTS OF COUNSEL ARE CONCISE AND ORDERLY DESCRIPTIONS OF EACH SIDE'S CLAIMS AND DEFENSES AND THE EVIDENCE COUNSEL EXPECT TO PRODUCE IN SUPPORT OF THOSE CLAIMS AND DEFENSES.

OPENING STATEMENTS ARE NOT EVIDENCE.

THEY ARE PREVIEWS OF THE RESPECTIVES CASES, DESIGNED TO GIVE YOU SOME PERSPECTIVE ON THE EVIDENCE. THEY ARE TO BE CONSIDERED ONLY AS A GUIDE SO YOU MAY UNDERSTAND AND EVALUATE THE EVIDENCE AS IT COMES TO YOU.

WHEN THE EVIDENCE IS COMPLETED, I WILL INSTRUCT YOU ON THE LAW APPLICABLE TO THIS CASE.

AFTER THE INSTRUCTIONS ARE GIVEN, THE ATTORNEYS WILL THEN ARGUE THE MERITS OF THE CASE. WHAT THE ATTORNEYS SAY IS NOT EVIDENCE. THE ARGUMENTS ARE GIVEN FOR THE PURPOSE OF ASSISTING YOU IN EVALUATING THE EVIDENCE AND ARRIVING AT THE CORRECT CONCLUSION CONCERNING THE FACTS. THEIR ARGUMENTS MAY BE ACCEPTED OR REJECTED.

EACH SIDE MAY ADDRESS YOU ONCE DURING OPENING STATEMENTS. IN ACCORDANCE WITH THE RULES WHICH GOVERN THESE PROCEEDINGS, THE STATE WILL SPEAK FIRST.

MR./MRS. PROSECUTOR, YOU MAY NOW MAKE YOUR OPENING STATEMENT FOR THE STATE.

\_\_\_\_\_ [DEFENSE COUNSEL], YOU MAY NOW MAKE YOUR OPENING STATEMENT FOR THE DEFENDANT.

MR. PROSECUTOR, CALL YOUR FIRST WITNESS.

**STATE'S CASE**

WHEN STATE RESTS-

RECESS: (IF MOTIONS ARE TO BE HEARD)

DEFENSE, CALL YOUR FIRST WITNESS.

**DEFENDANT'S CASE**

WHEN DEFENDANT RESTS-

MOTIONS?

**ANY REBUTTAL?**

LADIES AND GENTLEMEN, YOU HAVE HEARD ALL OF THE EVIDENCE THAT YOU WILL HEAR IN THIS CASE. IT WILL BE NECESSARY TO SETTLE THE INSTRUCTIONS WITH THE ATTORNEYS. WE WILL RECESS FOR 15 MINUTES.

MEMBERS OF THE JURY, IT NOW BECOMES MY DUTY TO GIVE YOU THE LAW THAT WILL GOVERN YOU IN YOUR DELIBERATION IN THIS CASE. AS I PREVIOUSLY TOLD YOU, THIS LAW WILL BE CONTAINED IN THE FORM OF

VARIOUS INSTRUCTIONS AND I TRUST THAT YOU WILL LISTEN CAREFULLY TO THE READING OF THEM AND HOPE THAT YOU CAN BETTER UNDERSTAND THE LAW. THEN IT WILL BE YOUR DUTY TO HARMONIZE THIS LAW WITH THE FACTS.

**READ INSTRUCTIONS**

ANY ADDITIONAL INSTRUCTIONS REQUESTED BY THE STATE?

ANY ADDITIONAL INSTRUCTIONS REQUESTED BY THE DEFENDANT?

**CLOSING ARGUMENTS**

THE ATTORNEYS AT THIS TIME WILL MAKE THEIR FINAL ARGUMENT TO YOU. MR./MRS.

[PROSECUTOR]\_\_\_\_\_ WILL MAKE AN OPENING ARGUMENT. THE ATTORNEY FOR THE DEFENDANT WILL THEN HAVE HIS/HER OPPORTUNITY TO MAKE HIS/HER ARGUMENT. THEN MR./MRS.\_\_\_\_\_ WILL REPLY TO THE ARGUMENT OF THE DEFENDANT.

THE ATTORNEYS, IN MAKING THESE ARGUMENTS TO YOU, WILL BE COMMENTING UPON THE TESTIMONY THAT

YOU HAVE HEARD AND THE EVIDENCE THAT HAS BEEN PRESENTED. THEY, AS YOU, WILL BE RECALLING THE EVIDENCE THAT HAS BEEN PRESENTED. THEY WILL NOT INTENTIONALLY TRY TO MISLEAD YOU. HOWEVER, IF THEIR RECOLLECTION OF THE EVIDENCED DIFFERS FROM WHAT YOUR RECOLLECTION IS, YOU MUST FOLLOW YOUR OWN RECOLLECTION. THESE FINAL ARGUMENTS ARE NOT TO BE CONSTRUED BY YOU AS EVIDENCE IN THIS CASE OR INSTRUCTIONS ON THE LAW. THEY ARE, HOWEVER, INTENDED TO HELP YOU BETTER UNDERSTAND THE CONTENTIONS OF EACH SIDE IN THE ISSUES YOU ARE TO DECIDE.

YOU SHOULD GIVE BOTH SIDES YOUR CLOSEST ATTENTION.

MR./MRS.\_\_\_\_, YOU MAY MAKE YOUR FIRST CLOSING.

MR./MRS.\_\_\_\_, YOU MAY MAKE YOUR CLOSING ARGUMENT.

MR./MRS.\_\_\_\_, YOU MAY MAKE YOUR FINAL CLOSING.

## **VERDICT FORMS**

LADIES AND GENTLEMEN, I GIVE YOU \_\_\_\_\_  
VERDICT FORMS.

[READ EACH OF THE VERDICT FORMS]

YOU MAY TAKE THE JURY INSTRUCTIONS AND ANY OF  
THE EXHIBITS WITH YOU TO THE JURY ROOM. YOU MAY  
NOW RETIRE TO DELIBERATE.

[RETURN OF JURY...]

## **TAKING VERDICT**

AFTER THE COURT HAS BEEN NOTIFIED THAT THE  
JURY HAS REACHED A VERDICT, ALL PARTIES AND  
ATTORNEYS SHOULD BE IN PLACE, THE JURY SHOULD BE  
PUT IN THE BOX.

ASK: WILL THE FOREMAN/FOREPERSON PLEASE STAND?

HAS THE JURY REACHED ITS VERDICT?

PLEASE HAND IT TO THE BAILIFF.

THE FOREPERSON SHOULD FOLD AND DELIVER THE  
VERDICT FORM TO THE BAILIFF. THE BAILIFF SHOULD  
DELIVER THE VERDICT FORM TO THE JUDGE.

**ALL COUNSEL, PARTIES, WITNESSES, AND SPECTATORS REMAIN SEATED AND QUIET. THERE ARE TO BE NO DEMONSTRATIONS BY ANYONE AFTER THE READING OF THE VERDICT.**

**ASK THE DEFENDANT TO PLEASE RISE BEFORE READING OF THE VERDICT.**

**THE JUDGE SHOULD READ THE VERDICT AND POLL THE JURY IF REQUESTED BY EITHER PARTY.**

**IF GUILTY VERDICT:**

**THE ALTERNATE JURORS ARE RELEASED AT THIS TIME. THANK YOU FOR YOUR TIME AND SERVICE.**

**READ OPENING INSTRUCTIONS ON PHASE II OF TRIAL.**

**OPENING STATEMENTS:**

**STATE: MR./MRS. \_\_\_\_\_ YOU MAY MAKE YOUR OPENING.**

**DEFENDANT: MR./MRS. \_\_\_\_\_ YOU MAY MAKE YOUR OPENING.**

**EVIDENCE:**

STATE MAY PRESENT VICTIM IMPACT TESTIMONY  
AND/OR HISTORY OF PREVIOUS CONVICTIONS.

DEFENDANT MAY PRESENT MITIGATING  
CIRCUMSTANCES TESTIMONY.

READ SENTENCING PHASE BY INSTRUCTIONS TO  
JURY.

**CLOSING ARGUMENTS:**

READ FINAL INSTRUCTIONS AND VERDICT FORMS TO  
THE JURORS.

JURY RETIRES TO DELIBERATE ON THE  
PUNISHMENT.

WHEN JURY RETURNS:

ASK: WILL THE FOREMAN/FOREPERSON PLEASE  
STAND?

HAS THE JURY REACHED ITS VERDICT?  
PLEASE HAND IT TO THE BAILIFF.

**ALL COUNSEL, PARTIES, WITNESSES, AND SPECTATORS REMAIN SEATED AND QUIET. THERE ARE TO BE NO DEMONSTRATIONS BY ANYONE AFTER THE READING OF THE VERDICT.**

ASK THE DEFENDANT TO RISE BEFORE READING OF VERDICT.

READ VERDICT.

ASK IF DEFENSE COUNSEL WANTS THE JURY POLLED. IF SO, POLL THE JURY.

HAVE DEFENSE COUNSEL AND DEFENDANT COME TO THE PODIUM. ASK: DOES EITHER COUNSEL OR DEFENDANT HAVE ANYTHING TO SAY BEFORE SENTENCING?

ASK: ANYTHING FROM THE STATE?

ASK: COUNSEL, DO YOU KNOW OF ANY LEGAL REASON WHY SENTENCE SHOULD NOT BE PASSED AT THIS TIME?

**SENTENCING:**

\_\_\_\_\_ [DEFENDANT], IT IS THE JUDGMENT AND SENTENCE OF THIS COURT THAT YOU BE TAKEN BY

**THE SHERIFF OF \_\_\_\_\_ COUNTY AND DELIVERED TO  
THE DEPARTMENT OF CORRECTION TO:**

- 1. SERVE A TERM OF \_\_\_\_\_ YEARS, or**
- 2. SERVE LIFE IN PRISON WITHOUT PAROLE, or**
- 3. RECEIVE A SENTENCE OF DEATH BY LEATH  
INJECTION.**

(IF CONVICTED ON MULTIPLE COUNTS, SENTENCE  
AS ABOVE ON EACH COUNT.)

**NOTIFY DEFENDANT OF RIGHT TO APPEAL.**

**RELEASE THE JURY AND THANK THEM FOR THEIR  
TIME, ATTENTION AND SERVICE. THESE JURORS WILL  
BE EXCUSED FROM REMAINDER OF THE TERM.**

**BE SURE AND GET THE INSTRUCTIONS AND  
EXHIBITS FROM THE JURY MEMBERS BEFORE  
RELEASING.**

**REMIND JURORS OF NEXT TRIAL DATE, IF KNOWN.**

# Sample Scripts

## **Voir Dire Oath**

"Do each of you solemnly swear that you will truthfully answer all questions that may be asked of you by court or by counsel concerning your qualifications to serve as jurors of this case."

## **Oath of Jury - Civil**

"I do solemnly swear (or affirm) that I will well and truly try each and all of the issues submitted to me as a juror and a true verdict render according to the law and the evidence."

## **Oath of Jury- Criminal**

"You and each of you, do solemnly swear, that you will well and truly try the case of the State of Arkansas against AB., and a true verdict render, unless discharged by the court or withdrawn by the parties." (AC.A. § 16-89-109)

## **Oath of Grand Jurors**

"Saving yourselves and fellow jurors, you do swear (or affirm) that you will diligently inquire of, and present all treasons, felonies, misdemeanors, and breaches of the penal laws over which you have jurisdiction, of which you have knowledge or may receive information."

## **Admonishment Upon Recess**

"During any recess or adjournment you must not discuss this case among yourselves or with anyone else and you must not permit anyone to discuss the case with you or in your presence. If anyone attempts to discuss the case with you or in your presence, get his name and report him to me immediately."

"Furthermore, during any recess or adjournment you must not talk to any of the attorneys, parties, or witnesses about anything. You should not even pass the time of day with them in the courthouse or elsewhere. I say this, not because I think you would discuss this case with them, but simply because it is not proper for you to be seen talking with one side or the other. In other words, it is important that you be, and appear to be, impartial at all times during the trial of this case."

## **Oath to Bailiff**

"You solemnly swear that you **will** suffer no person to speak or communicate with the jury on any subject connected with the trial, nor do so yourself, except the mere showing

of the place to be viewed, and return them into court without unnecessary delay, or at \_\_\_\_\_ (specified time)."

### **Oath to Interpreter**

Before commencing his or her duties, an interpreter appointed under this subchapter shall take an oath in substantially the following form:

"Do you [swear] [affirm] that you will make a true and impartial interpretation using your best skills and judgment in accordance with the standards and ethics of the interpreter profession and that you will abide by the Arkansas Code of Professional Responsibility for Interpreters in the Judiciary, [so help you God] [under the penalty of perjury]?"

Ark. Code Ann. §16-10-1105.

### **Admonition of Jury Regarding Media**

"During the time you serve on this jury, there may appear in the newspapers or on radio or television, reports concerning this case, and you may be tempted to read, listen to or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your verdict meet certain standards - for example, a witness may testify about events he himself has seen or heard but not about matters of which he was told by others. Also, witnesses must be sworn to tell the truth and must be subject to cross-examination. News reports about the case are not subject to these standards, and if you read, listen to or watch these reports, you may be exposed to misleading or inaccurate information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, comply with this instruction."

### **Charge to Grand Jury**

Ladies and gentlemen, the court instructs you as follows upon your duties and procedure:

The law says you must inquire:

First, into the case of every person imprisoned in the county jail to answer a criminal charge in this court, and who has not been indicted (or against whom an information has not been filed by the prosecuting attorney). Second, into the condition and management of the public prisons of the county. Third, into the willful and corrupt misconduct in office of public officers of every description in the county. As regards county officials those who handle public money (and most of them do) are audited annually by the State Comptroller. If any public officer has been unfaithful or corrupt the comptroller's audit will doubtless reflect it. Therefore you are to feel free to call upon any county official to submit his or her audit for your perusal.

The law also requires that you inquire into all public offenses committed in this county and to indict such persons whom you think guilty. In this connection, you should

find an indictment only when all the evidence before you, taken together, would in your judgment, if unexplained, warrant conviction by the trial jury. You are to receive none but legal evidence and the prosecuting attorney will advise with you in this connection. It is your duty to weigh all legal evidence before you. If you believe that other evidence which can be made available will explain away the charge you should order such evidence to be produced. However, you are not bound to hear evidence for the defendant.

If a witness under examination refuses to testify, or to answer a question put to him by you, the foreman shall proceed to bring the witness before the court. The court will hear the facts and decide whether the witness is bound to testify or to answer the question propounded. If he is, and persists in his refusal, the court will proceed with him as in cases of similar refusal in open court.

If you know, or have reason to believe that a public offense has been committed in this county within the time prescribed by law, it is your duty to disclose the same to your fellow jurors, who must thereon investigate the same.

In your deliberations the following procedure will be observed:

The Court will appoint one of you as foreman.

When you retire to the grand jury room you will elect one of your number as clerk, who will preserve and keep the minutes of the proceedings and of the evidence given before you. He will also issue subpoenas for witnesses upon the request of the foreman or prosecuting attorney. Your foreman will administer the oath to all witnesses.

During the examination of witnesses or charges, no person except the prosecuting attorney and the witness under examination shall be present. The court reporter may be present if his services are needed to take any testimony. While you are deliberating or voting on a charge no person whatever shall be present, except the Jurors.

Every member of the grand jury must keep secret whatever he, or any other grand juror, may have said, or in what manner he, or any grand juror, may have voted on a matter before you. Nor shall you disclose the fact of any indictment having been found against any person not in actual confinement and until he has been arrested thereon.

The foreman will keep an abstract of all persons subpoenaed and appearing as witnesses, the number of days attended and the amount due each witness. He will also issue a certificate to each witness. Forms will be furnished you for this purpose. Upon adjournment the foreman will deliver the abstract to the clerk.

The concurrence of 12 grand jurors is required to find an indictment. When so found it must be endorsed "a true bill" and the endorsement signed by the foreman. When an indictment is found the names of all witnesses who were examined must be written at the foot of or on the indictment. It must be presented by the foreman to the court, filed with the clerk and remain in his office as a public record.

If upon the examination of any charge you do not find an indictment wherein the person has been committed or is on bail, you shall write on one of the papers in the case the word "dismissed" and your foreman shall sign it.

There are other matters of procedure which might arise, the explanation of which would unduly lengthen this charge. But the prosecuting attorney and the court will be at your service at all times to help you with any question.

I hope I have not over-burdened you with procedural matters but it is necessary for two reasons: First, the court is required to charge you relative to your duties. Second, the failure by you to observe the procedural law might compel the court to quash an indictment and thereby render several hours of hard work useless.

I can suggest a procedure by which you can perform all the duties of your office within a reasonable period and at the same time render a fine service. You are not obligated to follow this suggestion because you alone are the judges in that connection.

After you complete your deliberation relative to criminal matters you can divide into committees of three or more. One committee can inspect county property; another can inspect the jails throughout the county; another could inspect the dockets of the justices of the peace, or at least those dockets of justices who are exercising judicial functions; another can check matters relating to the general school fund; another can inspect collecting officers accounts. In the performance of these duties, any or all of the county officials and the prosecuting attorney will be at your disposal.

In conclusion, permit me to make this statement: Contrary to the belief of many people, the power or the authority of the grand jury has not been curtailed or diminished. In relatively recent years the law has been changed to permit the filing of an Information by the prosecuting attorney against any party who allegedly has violated the felony statutes. In effect this has considerably reduced the volume of work of the grand jury. Also, our county officials are now regularly audited by the State Auditorial Department by experienced auditors. This tends to further reduce the volume of work of the grand jury.

Yet these changes in the law do not reduce the power and authority and responsibility of the grand jury. The law provides that grand juries must function. It still provides that the grand jury must be composed of sixteen, from all parts of the county, persons who are temperate and of good behavior, of approved integrity, sound judgment and reasonable information. Persons who are in no way connected with the

county government, in order that you may be as impartial as possible and at the same time thoroughly diligent in the inspection of the work and activities of those who come under your jurisdiction.

Who comes under your jurisdiction? Every citizen of this county legally able to commit a crime. Every person regardless of residence who comes into this county and violates the law. Every public official who commits a willful act of misconduct in office in this county, whether he be state, district, county, city or township official.

These inspections can be made at the convenience of the committee members. When the various committees have completed their work you can reassemble and deliberate on their reports and take whatever action the grand jury as a body deems fit.

When you have completed your work I hope you will prepare and present to the court a report on conditions as you find them because in that way offenders and the public can be fully advised.

I am going to appoint \_\_\_\_\_ to serve as foreman. \_\_\_\_\_ will please stand and be sworn:

"You do solemnly swear that you will support the constitution of the State of Arkansas, and the constitution of the United States, and faithfully discharge your duties as foreman of the present grand jury as prescribed by law."

**Arraignment (Sample)**

On this \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, this cause was called with the State of Arkansas appearing by the prosecuting attorney and the defendant, \_\_\_\_\_ and his/her attorney, \_\_\_\_\_, being present in court, [capital cases only] and it appearing to the Court that the defendant [was served with a copy of the (indictment) (information) herein at least two entire days prior to this time] the Court proceeded to cause defendant to be arraigned as follows:

The name of the defendant, \_\_\_\_\_, as stated in the (indictment) (information) was called and said pleading was then read to the defendant or reading was waived and he/she was asked if he/she was guilty or not guilty as therein charged, whereupon defendant answered in person in open court \_\_\_\_\_ and the plea of \_\_\_\_\_ is now entered of record upon the Minutes of this Court.

This cause is hereby set for trial at \_\_\_\_\_ o'clock \_\_\_\_ m. on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

---

Judicial Officer

**BOND FOR RELEASE AND CONDITIONS OF RECOGNIZANCE OR BAIL**

Pursuant to the Rules of Criminal Procedure 9.1 or 9.2, the defendant is to be released from jail on this charge absent a detainer upon fulfilling the requirements indicated and, by signing this bond, acknowledges the obligation to not violate any law, to comply with the conditions to appear before this court as required and to keep the court informed in writing of any change of address or employment.

**KIND OF BOND**

- \_\_\_\_\_ Personal Recognizance
- \_\_\_\_\_ Unsecured Bond in the amount of \$ \_\_\_\_\_
- \_\_\_\_\_ Cash Deposit of 10% for bond of \$ \_\_\_\_\_
- \_\_\_\_\_ Cash, Secured or Surety bond of \$ \_\_\_\_\_

**SPECIAL CONDITIONS**

- \_\_\_\_\_ Guaranteed by \_\_\_\_\_
  - \_\_\_\_\_ Travel restricted to \_\_\_\_\_
  - \_\_\_\_\_ Submit to (drug screens) (substance abuse treatment) \_\_\_\_\_
  - \_\_\_\_\_ Other conditions \_\_\_\_\_
- \_\_\_\_\_

I UNDERSTAND THAT FAILURE TO APPEAR AT SUCH TIMES DIRECTED MAY RESULT IN FORFEITURE OF BOND, THE ISSUANCE OF A WARRANT FOR MY ARREST, ASSESSMENT OF COURT COST AND THE FILING OF ADDITIONAL CHARGES AGAINST ME. I CERTIFY THAT THE INFORMATION SUPPLIED ON THE REVERSE IS CORRECT.

\_\_\_\_\_  
Defendant's Signature



LIST NAME AND RELATIONSHIP OF AT LEAST THREE (3) ADULT MEMBERS OF YOUR IMMEDIATE FAMILY (MOTHER/FATHER, BROTHER, SISTER, GRANDPARENT, AUNT/UNCLE). GIVE ADDRESS TELEPHONE NUMBER AND PLACE OF EMPLOYMENT:

1. \_\_\_\_\_  
\_\_\_\_\_
2. \_\_\_\_\_  
\_\_\_\_\_
3. \_\_\_\_\_  
\_\_\_\_\_

LIST THREE (3) PERSONS OTHER THAN MEMBERS OF YOUR IMMEDIATE FAMILY THAT WOULD NORMALLY KNOW HOW TO CONTACT YOU. GIVE NAME, ADDRESS, TELEPHONE NUMBER AND PLACE OF EMPLOYMENT.

1. \_\_\_\_\_  
\_\_\_\_\_
2. \_\_\_\_\_  
\_\_\_\_\_
3. \_\_\_\_\_  
\_\_\_\_\_

I CERTIFY THAT THE ABOVE INFORMATION IS CORRECT:

\_\_\_\_\_  
DEFENDANT

Guarantor: \_\_\_\_\_

Guarantor: \_\_\_\_\_

Address: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Telephone: \_\_\_\_\_

Employer: \_\_\_\_\_

Employer: \_\_\_\_\_

**Commitment to Jail to Await Trial (Sample)**

State of Arkansas, County of \_\_\_\_\_.

\_\_\_\_\_ having been arrested (on a warrant) for the criminal offense of \_\_\_\_\_ and brought before me, and after hearing evidence, and having determined a criminal offense was committed and that there is probable cause that the defendant committed the offense, it is ordered that the defendant be committed for trial for the offense of \_\_\_\_\_. The jailer of \_\_\_\_\_ County is hereby ordered to receive and safely keep the defendant until discharged by due process of law.

DATED: \_\_\_\_\_, 20\_\_\_\_\_.

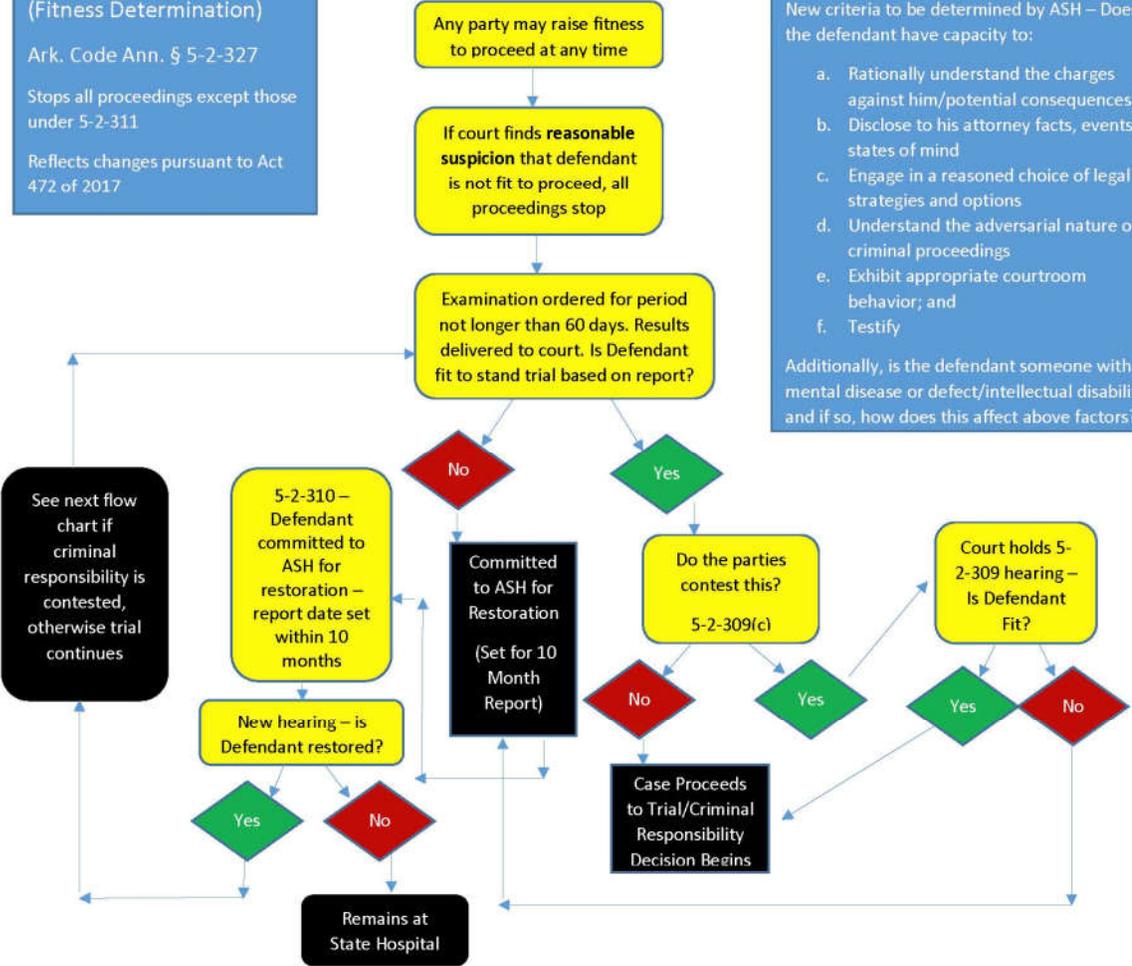
\_\_\_\_\_  
Judicial officer

**Request for Evaluation  
(Fitness Determination)**  
Ark. Code Ann. § 5-2-327  
Stops all proceedings except those under 5-2-311  
Reflects changes pursuant to Act 472 of 2017

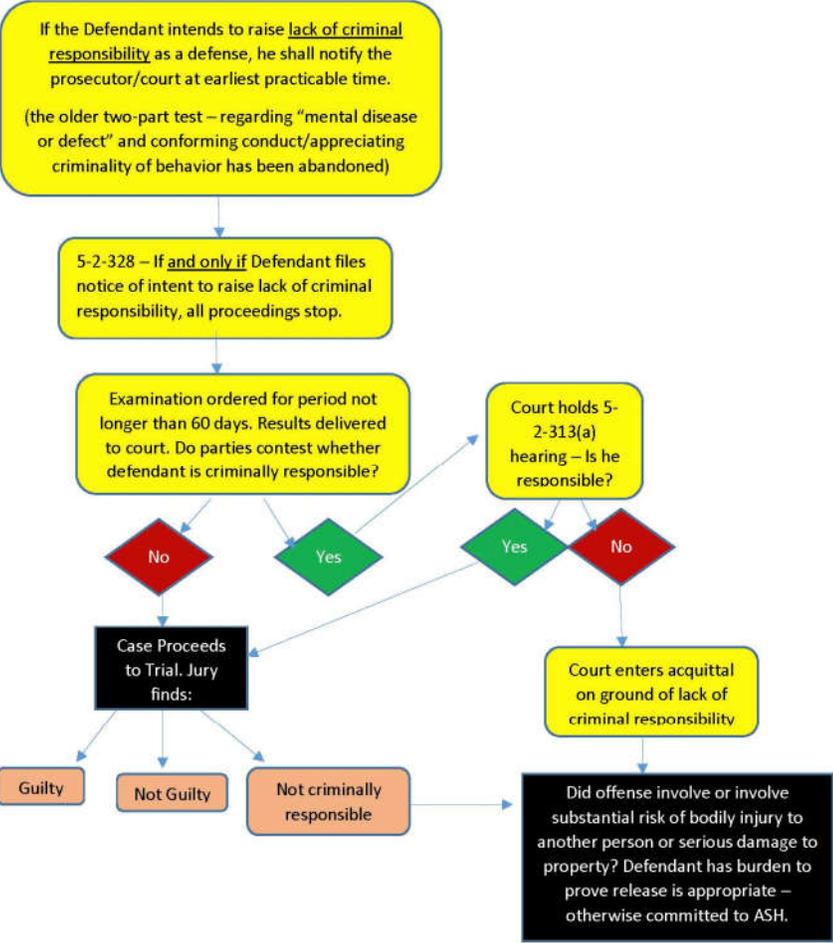
**New criteria to be determined by ASH – Does the defendant have capacity to:**

- Rationally understand the charges against him/potential consequences?
- Disclose to his attorney facts, events, states of mind
- Engage in a reasoned choice of legal strategies and options
- Understand the adversarial nature of criminal proceedings
- Exhibit appropriate courtroom behavior; and
- Testify

Additionally, is the defendant someone with a mental disease or defect/intellectual disability, and if so, how does this affect above factors?



Request for Evaluation (Criminal Responsibility)  
 Ark. Code Ann. § 5-2-312 (updated to reflect Act 472)



## DEFENDANT'S PRETRIAL INFORMATION

In order to assist the court in preparation for the trial of the above-styled criminal action on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and to enable the Court to determine the necessity of a pretrial conference in this action, the following information is voluntarily furnished the Court and the prosecutor:

As attorney for the defendant, I certify to the Court as follows: (Strike out all inapplicable words that follow)

1. Pursuant to Ark. R. CR. P. 20.4, and other applicable law, a pretrial conference in this criminal action (is) (is not) requested by the defendant at this time.
2. Defendant (has) (has not) been able to secure from the state the discovery (Ark. R. Cr. P. 17.1) he/she requested by counsel.
3. So far as known to the defendant at this time the state (will) (may) (will not) rely on prior felony convictions for purposes of impeachment of the defendant if he/she testifies at trial.
4. The defendant (will) (may) (will not) call expert witnesses to testify at trial.
5. (There is) (There is not) now in the opinion of the defendant physical evidence which should be suppressed in this case.
6. Please circle any of the following matters which in the opinion of the defendant MAY now be or become an issue on trial of this case:
  - a. Delay in arraignment.
  - b. Coercion or unlawful inducement of admissions or confessions.
  - c. Violation of the Miranda rule.
  - d. Unlawful arrest.
  - e. Illegal search and seizure.
  - f. Entrapment.
  - g. Improper lineup.
  - h. Improper use of photographs.
  - i. Accomplice testimony.

- j. Informer testimony.
  - k. Absence of counsel at preliminary hearing or other stages.
  - l. Failure of indictments or information to state an offense.
  - m. Severance and need for separate trial.
  - n. Dismissal for lack of speedy trial.
  - o. Competency, insanity or diminished mental responsibility.
  - p. Alibi.
  - q. Medical or psychiatric examination.
  - r. Other scientific tests, experiments or comparisons.
  - s. Documentary or physical evidence.
  - t. Self defense.
  - u. Privilege.
  - v. Fingerprints, and/or similar evidence.
  - w. Other (please specify on attached sheet).
7. Defendant's undersigned counsel (does) (does not) at this time know of any motion or matter the defendant desires to present to the court other than those specified on this form. (If answer is affirmative, specify on attached sheet).
  8. There (is) (is not) (may be) a probability of a disposition of this case without a trial.
  9. Defendant (will) (will not) waive a jury and ask for a court trial.
  10. Defendant (wishes) (does not wish) the state to furnish a Bill of Particulars (A.C.A. §16-85-301) without the necessity of a formal motion.
  11. Defendant (will) (will not) waive husband-wife privilege if applicable.
  12. Defendant (will) (may) (will not) testify at trial.
  13. Defendant (will) (may) (will not) call additional witnesses after he testifies.
  14. Defendant (will) (may) (will not) call character witnesses.

15. Defendant (does) (does not) desire a trial of this case in the \_\_\_\_\_ term of this Court and prefers to be tried in the \_\_\_\_\_ term of this Court.

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

---

ATTORNEY FOR DEFENDANT(S)

---

NAME(S) OF DEFENDANT(S) REPRESENTED

---

SIGNATURE(S) OF DEFENDANTS

**Miscellaneous Pretrial Stipulations**

1. That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the (Indictment) or (Information).

\_\_\_\_\_

\_\_\_\_\_

Attorney for Defendant

Defendant

2. That if \_\_\_\_\_ the official government chemist is called, qualified as an expert and sworn as a witness, he will testify that the substance referred to in the Indictment (or Information) has been chemically tested and is \_\_\_\_\_ and the weight is \_\_\_\_\_.

\_\_\_\_\_

\_\_\_\_\_

Attorney for Defendant

Defendant

3. That there has been a continuous chain of custody in Government agents from the time of the seizure of the contraband to the time of the trial.

\_\_\_\_\_

\_\_\_\_\_

Attorney for Defendant

Defendant

**OMNIBUS HEARING ORDER**

It is ORDERED that an Omnibus Hearing shall be held in this case on \_\_\_\_\_,  
20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ m. at \_\_\_\_\_, Arkansas.

The defendant(s) and counsel shall be present at the time and place stated unless excused  
by written order of the Court.

Prior to the hearing, the prosecuting attorney and defense counsel shall confer, and the  
prosecuting attorney and counsel for the defendant(s) shall complete by typewritten  
response and execute the Order on Omnibus Hearing, which is attached hereto.

The record made at the hearing, together with the completed Order on Omnibus Hearing,  
will bind each party unless relieved therefrom by written order of the Court.

DATED the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
CIRCUIT JUDGE

The clerk is directed to send copies to:

Prosecuting Attorney

Defense Counsel

**Actions Taken at Omnibus Hearing**

(Number circled shows action taken.)

**A. DISCOVERY BY DEFENDANT**

1. The defense states it has obtained full discovery and (or) has inspected the statefile (except\_\_\_\_\_).

(If state has refused discovery of certain materials, defense counsel shall state nature of material.\_\_\_\_\_.)

2. The prosecution states it has disclosed all evidence in its possession favorable to defendant on the issue of guilt.

3. The defendant requests and moves for -

a. Discovery of all oral, written or recorded statements made by defendant or co-defendant to investigating officers or to third parties and in the possession of the prosecution . (Granted) (Denied)

b. Discovery of the names of prosecution witnesses.  
(Granted) (Denied)

c. Inspection of all physical or documentary evidence in prosecution's possession.  
(Granted) (Denied)

4. Defendant, having had discovery of Items #2 and #3, request and moves for discovery and inspection of all further or additional information coming into the state's possession as to Items #2 and #3.

(Granted) (Denied)

5. The defendant requests the following information and the prosecution states -  
a. The state (will) (will not) rely on prior acts and convictions of a similar nature for proof of knowledge or intent.

- b. Expert witnesses (will) (will not) be called:
  - 1) Name of witness, qualification and subject of testimony, and reports (have been) (will be) supplied to the defense.
- c. Reports or text of physical or mental examinations in the control of the prosecution (have been) (will be) supplied.
- d. Reports of scientific tests, experiments or comparisons and other reports of experts in the control of the prosecution, pertaining to this case (have been) (will be) supplied.
- e. Inspection and/or copying of any books, papers, documents, photographs or tangible objects which the prosecution:
  - 1) obtained from or belonging to the defendant or
  - 2) which will be used at the hearing or trial, (have been) (will be) made available to defendant for inspection and copying.
- f. Information concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to defendant.
- g. State will use prior felony conviction for impeachment of defendant if he testifies,
 

Date of conviction \_\_\_\_\_

Offense \_\_\_\_\_

  - 1) Court rules (may) (may not) be used
  - 2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No)
- h. Any information state has, indicating entrapment of the defendant (has been) (will be) supplied.

**B. MOTIONS REQUIRING SEPARATE HEARING**

- 1. Motions requiring separate hearings:
  - a. To suppress physical evidence in Plaintiff's possession on the grounds of:

- 1) Illegal search.
  - 2) Illegal arrest.
- b. Hearing of motion to suppress physical evidence set for \_\_\_\_\_  
\_\_\_\_\_.
- c. To suppress admissions or confessions made by defendant on the grounds of:
- 1) Coercion or unlawful inducement;
  - 2) Violation of the Miranda Rule;
  - 3) Unlawful arrest; or
  - 4) Improper use of line up.
- d. Hearing to suppress admissions or confessions set for
- 1) Date of trial; or \_\_\_\_\_.
- e. The prosecution states:
- 1) There (was) (was not) an informer involved;
  - 2) The informer (will) (will not) be called as a witness at the trial;
  - 3) It has supplied the identity of the informer; or
  - 4) It will claim privilege of non-disclosure.
- f. Hearing on privilege set for\_\_\_\_\_.
- g. The prosecution states there (has) (has not) been any -
- 1) Electronic surveillance of the defendant or his premises;
  - 2) Leads obtained by electronic surveillance of defendant's person or premises;  
or
  - 3) All material will be supplied.

- a. The hearing on disclosure set for\_\_\_\_\_.
- b. The hearing on rape shield set for\_\_\_\_\_.

**C. MISCELLANEOUS MOTIONS**

1. The defense moves:

- A. To dismiss for failure of the information to state an offense.  
(Granted) (Denied)
- B. To dismiss the information (or court\_\_\_\_\_thereof) on the ground of duplicity. (Granted) (Denied)
- C. To sever case of defendant\_\_\_\_\_as to count\_\_\_\_\_and for a separate trial. (Granted) (Denied)
- D. To sever case of defendant\_\_\_\_\_as to count\_\_\_\_\_and for a separate trial. (Granted) (Denied)
- E. For a Bill of Particulars. (Granted) (Denied)
- F. To take a deposition of witness for testimonial purposes and not for discovery. (Granted) (Denied)
- G. To require state to secure the appearance of Witness\_\_\_\_\_, who is subject to state direction at the trial or hearing. (Granted) (Denied)
- H. To inquire into the reasonableness of bail. Amount fixed at \_\_\_\_\_(Affirmed) (Modified to)\_\_\_\_\_.
- I. Other:\_\_\_\_\_

**D. DISCOVERY BY THE STATE**

Statements by the defense in response to state requests:

1. Competency, Insanity and Diminished Mental Responsibility:

- A. There (is) (is not) claim of incompetency of defendant to stand trial.
  - B. Defendant (will) (will not) rely on a defense of insanity at the time of the offense.
  - C. Defendant (has) (has not) supplied the name of his witnesses, both lay and professional, on the above issue.
  - D. Defendant (has) (has not) permitted the prosecution to inspect and copy all medical reports under his control or the control of his attorney.
2. Alibi:
- A. Defendant (will) (will not) rely on an alibi.
  - B. Defendant (will) (will not) furnish a list of his alibi witnesses.
3. Scientific Testing:
- A. Defendant (will) (will not) furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests.
  - B. Defendant (is) (is not) ordered to produce.
4. Nature of the Defense:
- A. Defense counsel states that the general nature of the defense is:
    - 1) lack of knowledge of contraband;
    - 2) lack of specific intent;
    - 3) mental disease or defect;
    - 4) entrapment; or
    - 5) general denial. (Require state to prove)
  - B. Defense counsel states there (is) (is not) (may be) a probability of a disposition without a trial.
  - C. Defendant (will) (will not) waive a jury and ask for a court trial.

- D. Defendant (may) (will) (will not) testify.
- E. Defendant (may) (will) (will not) call additional witnesses.
- F. Character witnesses (may) (will) (will not) be called.
- G. Defense counsel will supply state with names of additional witnesses for defendant\_\_\_\_\_days before trial.

Rulings on state requests and motions:

- 5. The defendant is directed by the court, upon timely notice to defense counsel:
  - A. To appear in a lineup;
  - B. To speak for voice identification by witnesses;
  - C. To be fingerprinted;
  - D. To pose for photographs (not involving a reenactment of the crime);

- E. To wear articles of clothing;
- F. To permit taking of specimens of material under fingernails;
- G. To permit taking samples of blood, hair and other materials of his body which involve no unreasonable intrusion;
- H. To provide samples of his handwriting;
- I. To submit to a physical external inspection of his body.

**E. STIPULATIONS**

1. It is stipulated between the parties:

- A. That if \_\_\_\_\_ is called as witness and sworn he will testify he is the owner of the motor vehicle on the date referred to in the information and that on or about that date the motor vehicle disappeared or was stolen, that he never gave the defendant or any other person permission to take the motor vehicle.
- B. That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the information.
- C. That if \_\_\_\_\_, the official state chemist, is called, qualified as an expert and sworn as a witness, he will testify that the substance referred to in the information has been chemically tested and is \_\_\_\_\_, contains \_\_\_\_\_, and the weight is \_\_\_\_\_.
- D. That there has been a continuous chain of custody in state agents from the time of the seizure of the contraband to the time of the trial.
- E. Miscellaneous stipulations: \_\_\_\_\_  
\_\_\_\_\_.

**F. CONCLUSION**

1. Defense counsel states:
  - a. That defense counsel knows of no problems involving the Miranda Rule or illegal seizure or arrest, or any other constitutional problem, except as set forth above.
  - b. That defense counsel has inspected the checklist on this Action Taken form, and knows of no other motion, proceeding or request which he decides to press, other than those checked thereon.
  - c. The final date a plea negotiation will be accepted by the court is\_\_\_\_\_.

**DATED:**\_\_\_\_\_

**APPROVED:**

\_\_\_\_\_  
PROSECUTING ATTORNEY

\_\_\_\_\_  
DEFENSE ATTORNEY

\_\_\_\_\_  
CIRCUIT JUDGE

**REGISTER OF USE OF PEREMPTORY CHALLENGES**

Jury Selection – Criminal Trial

---

(Prosecutor) (Defense Attorney)

Strikes allowed:	Capital Murder:	State - 10;	Defense - 12
	Felony	State - 6;	Defense - 8
	Misdemeanor:	State - 3;	Defense - 3
	Alternate:	State - 1;	Defense - 1

Strikes made:

State:	Defense:
1. _____	1. _____
2. _____	2. _____
3. _____	3. _____
4. _____	4. _____
5. _____	5. _____
6. _____	6. _____

7. \_\_\_\_\_

7. \_\_\_\_\_

8. \_\_\_\_\_

8. \_\_\_\_\_

9. \_\_\_\_\_

9. \_\_\_\_\_

10. \_\_\_\_\_

10. \_\_\_\_\_

11. \_\_\_\_\_

12. \_\_\_\_\_

Alternate:

1. \_\_\_\_\_

1. \_\_\_\_\_

**Plea of Guilty Without Recommendation**

**DECLARATIONS, WAIVER OF RIGHTS, AND STATEMENT OF GUILT**

**NO AGREEMENT OF PUNISHMENT**

I, the defendant, appear with my attorney, \_\_\_\_\_, and with this paper show that I understand the charge(s) against me, the range of punishment, my rights as an accused, that I voluntarily waive those rights and admit my guilt. If my plea of guilty is not accepted by the judge, I may withdraw my plea and nothing here can be used against me.

\_\_\_\_\_(Initial)

I have completed \_\_\_\_\_ years of school. I am/am not able to read. I am not under the influence of any alcohol, drug or substance. I know what I am doing. I have not been promised anything and no one has threatened me in any way. \_\_\_\_\_(Initial)

I have told my lawyer all of the facts and identity of any witnesses. I have been advised of my rights and possible defenses. I am satisfied with my lawyer who has provided all of the legal services asked except:

- \_\_\_\_\_ I am giving up my right to plead not guilty and to:
- \_\_\_\_\_ Have the help of a lawyer throughout the trial and appeal if convicted.
- \_\_\_\_\_ Have a presumption of innocence in my favor.
- \_\_\_\_\_ Make the state prove my guilt beyond a reasonable doubt.
- \_\_\_\_\_ See and hear those who testify against me and ask questions of them while they are under oath.
- \_\_\_\_\_ Have my own choice to testify or not.
- \_\_\_\_\_ Make witnesses attend court and testify.
- \_\_\_\_\_ Have a verdict where all jurors agree.

\_\_\_\_\_ Have the jury set my punishment if I am found guilty of anything; and

\_\_\_\_\_ Have an appeal and review by a higher court.

I am charged as stated the range of punishment opposite and enter my written plea:

Count	Offense	M or F	Class	Punishment Range	Plea
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

We, by our signatures, certify that we understand and have reviewed the above, that the answers are correct and the plea(s) of guilty are justified by the facts.

\_\_\_\_\_

DATE                      DEFENSE ATTORNEY                      DEFENDANT

**NO AGREEMENT ON PUNISHMENT**

The defendant and defense attorney state that no promise or agreement has been made about probation, suspension, length of imprisonment, early parole, or anything else regarding punishment it being understood that the judge may set punishment up to the maximum authorized.

\_\_\_\_\_

DEFENSE ATTORNEY                      DEFENDANT

**Plea of Guilty With Recommendation**

**DECLARATIONS, WAIVER OF RIGHTS, AND STATEMENT OF GUILT**

**NO AGREEMENT OF PUNISHMENT**

I, the defendant, appear with my attorney, \_\_\_\_\_, and with this paper show that I understand the charge(s) against me, the range of punishment, my rights as an accused, that I voluntarily waive those rights and admit my guilt. The understanding of punishment is written and signed on the reverse. If either my plea of guilty or the understood punishment is not accepted by the judge, I may withdraw my plea and nothing here can be used against me. \_\_\_\_\_ (Initial)

I have completed \_\_\_\_\_ years of school. I am/am not able to read. I am not under the influence of any alcohol, drug or substance. I know what I am doing. I have not been promised anything other than that stated on the reverse and no one has threatened me in any way. \_\_\_\_\_ (Initial)

I have told my lawyer all of the facts and identity of any witnesses. I have been advised of my rights and possible defenses. I am satisfied with my lawyer who has provided all of the legal services asked. \_\_\_\_\_ (Initial)

- \_\_\_\_\_ I am giving up my right to plead not guilty and to:
- \_\_\_\_\_ Have the help of a lawyer throughout the trial and appeal if convicted.
- \_\_\_\_\_ Have a presumption of innocence in my favor.
- \_\_\_\_\_ Make the state prove my guilt beyond a reasonable doubt.
- \_\_\_\_\_ See and hear those who testify against me and ask questions of them while they are under oath.
- \_\_\_\_\_ Have my own choice to testify or not.

- \_\_\_\_\_ Make witnesses attend court and testify.
- \_\_\_\_\_ Have a verdict where all jurors agree.
- \_\_\_\_\_ Have the jury set my punishment if I am found guilty of anything; and
- \_\_\_\_\_ Have an appeal and review by a higher court.

I am charged as stated the range of punishment opposite and enter my written plea:

Count	Offense	M or F	Class	Punishment Range	Plea
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

We, by our signatures, certify that we understand and have reviewed the above, that the answers are correct and the plea(s) of guilty are justified by the facts.

\_\_\_\_\_

DATE                      DEFENSE ATTORNEY                      DEFENDANT



P. Expungement under ACT 346.

Q. Other:\_\_\_\_\_.

AS TO COUNT(S)\_\_\_\_\_ (Here specifically write provisions.)

\_\_\_\_\_

DEFENDANT

\_\_\_\_\_

STATE'S ATTORNEY

\_\_\_\_\_

DEFENSE ATTORNEY

\_\_\_\_\_

DATE

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
 \_\_\_\_\_ DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CR \_\_\_\_\_ - \_\_\_\_\_

\_\_\_\_\_

DEFENDANT

**PLEA STATEMENT**

**You are charged with:**

OFFENSE(S)	RANGE OF IMPRISONMENT	FINE
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____
4. _____	_____	_____

**in the \_\_\_\_\_ County Circuit Court. It is necessary that you fully understand the entire contents of this document.**

You are charged with a (felony / misdemeanor).

You are charged as a habitual offender. [ YES] [ NO] (CHECK APPLICABLE BOX)

You could receive a total sentence from \_\_\_\_\_ to \_\_\_\_\_ in the (state penitentiary / county jail) and/or a fine of up to \$ \_\_\_\_\_.

You have a right to plead not guilty and to be tried before the court or by a jury, with the burden on the State of proving your guilt beyond a reasonable doubt. At the trial you would have the right to testify or not testify. You would have the right to confront and cross-examine all witnesses against you, and to have compulsory attendance of all witnesses you wish to call in your behalf. If you were found not guilty, you would be released on the charges for which you were tried. If, after determining the facts with instructions on the law from the court, the jury found you guilty, then they would fix your punishment. If you waive your right to trial by jury and elect a court trial, the court would determine both the facts and the law.

**With these thoughts in mind, you must answer each of the following questions and initial your response.**

	<u>YES</u>	<u>NO</u>	<u>INITIALS</u>
Do you hereby state your judgment is not now impaired by drugs, alcohol, or medication.	_____	_____	_____
Do you understand the minimum and maximum possible sentences for the offense(s) with which you have been charged?	_____	_____	_____
Do you understand that your plea of guilty is a waiver of your right to a trial by jury and of your right to appeal to any other court?	_____	_____	_____
Do you fully understand what you are charged with having done?	_____	_____	_____
Have you discussed your case fully with your attorney and are you satisfied with his or her service?	_____	_____	_____
Are you certain that your plea of guilty has not been induced by any force, threat, or promise, apart from a plea agreement?	_____	_____	_____

(OVER)

YES      NO      INITIALS

Do you understand that the Judge is not required to carry out any understanding between you, your attorney, and the prosecuting attorney, and that power of sentencing is with the Court only?

\_\_\_\_\_

If your negotiated plea involves a sentence of imprisonment, do you state that no one has made you any promises regarding parole eligibility, earning of meritorious good time, early release, or anything of that nature in order to get you to enter this plea?

\_\_\_\_\_

Do you believe that if that this case went to trial, the State could meet its burden of proving your guilt beyond a reasonable doubt?

\_\_\_\_\_

**FOR NON-CITIZENS OF THE UNITED STATES ONLY**

If you are not a citizen of the United States of America, has your attorney informed you that by entering this plea, you will be subjecting yourself to a risk of being deported?

\_\_\_\_\_

Do you freely and voluntarily choose to enter your plea of guilty knowing that it could result in your deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service?

\_\_\_\_\_

If your answer is “yes” to each of the preceding questions, and if you fully understand every detail of your guilty plea, then carefully read the following statement and sign in the appropriate space with your attorney witnessing your signature.

**I AM AWARE OF EVERYTHING IN THIS DOCUMENT. I FULLY UNDERSTAND WHAT MY RIGHTS ARE, AND I FREELY, KNOWINGLY AND VOLUNTARILY PLEAD GUILTY BECAUSE I AM IN FACT GUILTY AS CHARGED.**

\_\_\_\_\_  
DEFENDANT’S SIGNATURE

I have carefully and completely explained this document to the accused. To the best of my knowledge he/she fully understands all of it. His/Her plea of guilty is consistent with the facts he/she has related to me and with my own investigation of the case.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
ATTORNEY FOR DEFENDANT

APPROVED:

\_\_\_\_\_  
DEPUTY PROSECUTING ATTORNEY

**PLEA STATEMENT TO REVOCATION**

I, \_\_\_\_\_, defendant, appear with my attorney and hereby acknowledge that I understand the charges against me, the possible punishments, and my rights as an accused. I HEREBY FREELY, KNOWINGLY, AND VOLUNTARILY WAIVE MY RIGHTS AND ADMIT MY GUILT. I understand that if my plea is not accepted by the Court, I may withdraw my plea and nothing contained in my attempted plea or this document may be used against me at a hearing on this matter. \_\_\_\_\_ (defendant must initial)

I understand that I have been charged with a violation of the terms or conditions of my (probation/suspended imposition of sentence) and the possible punishment(s) are as follows:

ORIGINAL CHARGE:	STATUTE:	F/M	CLASS	PUNISHMENT RANGE
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

TOTAL POSSIBLE  
PUNISHMENT: \_\_\_\_\_

My level of education is:

I can/cannot read and write.

My attorney has/has not read and explained this document and these proceedings to me in detail.

I am not under the influence of alcohol or any non-prescription narcotic drug. Within the last 24 hours I have taken the following medications: \_\_\_\_\_  
\_\_\_\_\_.

I am aware of what I am doing and the possible consequences of these proceedings and this plea.

I HAVE NOT BEEN FORCED, THREATENED, OR PROMISED ANYTHING IN EXCHANGE FOR THIS PLEA EXCEPT THE FOLLOWING PLEA AGREEMENT:

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The above agreement is a complete statement of all promises that have been made to me in exchange for my plea. I HAVE NOT BEEN PROMISED ANYTHING REGARDING ANY PAROLE, GOOD TIME, EARLY RELEASE EXCEPT AS STATED ABOVE.

---

DEFENDANT

I understand I have the following rights and that by entering this plea I am knowingly and voluntarily waiving these rights:

- \_\_\_\_\_ The right to plead not guilty.
- \_\_\_\_\_ The right to be presumed innocent and to have the State prove my guilt by a preponderance of the evidence.
- \_\_\_\_\_ The right to confront and cross-examine all witnesses.
- \_\_\_\_\_ The right to testify or to remain silent.
- \_\_\_\_\_ The right to have compulsory attendance of all witnesses to testify in my behalf.
- \_\_\_\_\_ The right to appeal to any other court.

I understand that in order to sustain this Revocation Petition, the State must prove by a preponderance of the evidence each of the following elements:

1. That I either was convicted of or plead guilty to a felony in this case.
2. That I was represented by an attorney at the time of the conviction or plea.

3. That I was placed on probation for a period of time.
4. That as a condition of probation, I was given and received written rules of conduct to abide by.
5. That during the period of probation, I willfully disobeyed the rules.

I am satisfied with the services of my attorney. I am satisfied that my attorney is fully informed as to all of the facts surrounding my case. My attorney has discussed with me all possible defenses and I have given my attorney the names of all possible witnesses in my behalf and discussed their possible testimony with my attorney. My attorney has advised me as to all proof the State could present at trial of this matter and has fully explained each element of each charge that the State would have to prove at trial. I am convinced the State could prove each element of the offense with which I am charged by preponderance of the evidence if a trial were held.

I AM HEREBY PLEADING GUILTY BECAUSE I AM GUILTY AND FOR NO OTHER REASON.

---

DEFENDANT

As attorney for defendant herein, I hereby certify that I have explained the foregoing plea statement to the defendant, the defendant understands the plea statement and these proceedings. The statements contained herein are true and correct to the best of my knowledge and belief, the plea(s) is/are justified by the facts and the defendant signed the statement in my presence.

---

ATTORNEY

---

DATE

**ORDER FOR PRETRIAL CONFERENCE**

On \_\_\_\_\_, 20\_\_\_\_, the defendant together with his/her counsel,\_\_\_\_  
\_\_\_\_\_, appeared in person before the court for arraignment;  
\_\_\_\_\_the attorney for the state, also being present, the Court  
delivered a copy of the Indictment/Information to the defendant.

Thereupon, came the defendant in person and by counsel and waived formal  
arraignment and entered his/her plea of “Not Guilty” to the (Indictment) (Information), which  
was accepted by the Court.

IT IS NOW ORDERED AND ADJUDGED by the Court that this cause be and the  
same is hereby assigned for a Pretrial Conference on the \_\_\_\_\_ day of \_\_\_\_\_,  
20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ m.

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_

CIRCUIT JUDGE

## PROSECUTOR'S PRETRIAL INFORMATION

In order to assist the Court in preparation for the trial of the above-styled criminal action on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and to enable the Court to determine the necessity of a pretrial conference in this action, the following information is voluntarily furnished the Court and the attorneys for the defendants:

As attorney for the state, I certify to the Court as follows: (Strike out all inapplicable words that follow:

1. Pursuant to Ark. R. Crim. P. 20.4, and other applicable law, a pre-trial conference (is) (is not) requested by the state at this time.
2. The state (will) (will not) voluntarily disclose the discovery available to defendant under Ark. R. Crim. P. 17.1.
3. Copies of all indictments or informations in this case are attached hereto for use of the Court.
4. The state (will) (may) (will not) rely on prior felony convictions for purposes of impeachment of the defendant if he/she testifies at trial.
5. The state (will) (may) (will not) call expert witnesses to testify at trial.
6. Please circle any of the following matters which in the opinion of the state should be reviewed by the court with all counsel prior to trial:
  - a. Delay in arraignment.
  - b. Coercion or unlawful inducement of admissions or confessions.
  - c. Violation of the Miranda rule.
  - d. Unlawful arrest.
  - e. Illegal search and seizure.
  - f. Entrapment.
  - g. Improper lineup.
  - h. Improper use of photographs.
  - i. Accomplice testimony.

- j. Informer testimony.
  - k. Absence of counsel at preliminary hearing or other stages.
  - l. Failure of indictments or information to state an offense.
  - m. Severance and need for separate trial.
  - n. Dismissal for lack of speedy trial.
  - o. Competency, insanity or diminished mental responsibility.
  - p. Alibi.
  - q. Medical or psychiatric examination.
  - r. Other scientific tests, experiments or comparisons.
  - s. Documentary or physical evidence.
  - t. Self defense.
  - u. Privilege.
  - v. Fingerprints, and/or similar evidence.
  - w. Other (please specify on attached sheet).
7. The grand jury proceedings (were) (were not) reported by a stenographer or recorded.
  8. The state (will) (will not) furnish a Bill of Particulars without the necessity for a formal motion.
  9. The state (does) (does not) at this time know of any motion or matter it desires to present to the Court other than those specified on this form. (If answer is in the affirmative, specify on attached sheet.)
  10. There (is) (is not) (may be) a probability of a disposition of this case without trial.
  11. The state (does) (does not) desire a trial of this case in the \_\_\_\_\_ term of this Court and prefers the trial in the \_\_\_\_\_ term of this Court.

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

---

ATTORNEY FOR THE STATE

**(SAMPLE)**

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
CIVIL DIVISION

JOHN DOE

PLAINTIFF

VS.

CASE NO. \_\_\_\_\_

JANE DOE

DEFENDANT

**SCHEDULING ORDER**

Now on this \_\_\_\_ day of \_\_\_\_ [Month] of \_\_\_\_ [Year], IT IS HEREBY ORDERED that the above styled case is set for first-out jury trial on \_\_\_\_\_ [Date] at \_\_\_\_ A.M. in the \_\_\_\_ County Courthouse, \_\_\_\_\_, Arkansas, before Circuit Judge \_\_\_\_\_. Counsel should be present in chambers no later than \_\_\_\_ A.M. Any objections to this trial date should be made in writing within ten (10) days from the date of this order to \_\_\_\_\_, Case Coordinator, \_\_\_\_\_ [Address]. The pre-trial in this matter will be held on \_\_\_\_\_ [Date] at \_\_\_\_ A.M.

The purpose of this order is to make certain that on the pre-trial date the case will be ready for trial. This is for the Court's benefit as well as the parties. Any changes herein must be approved by the Court. The attorneys who will try the case must be present at the pre-trial. FAILURE TO COMPLY WITH THIS ORDER IN ITS ENTIRETY MAY RESULT IN THE EXCLUSION OF EVIDENCE, ASSESSMENT OF COSTS AND/OR OTHER SANCTIONS.

In preparation for trial, all discovery, including evidentiary depositions, shall be completed no later than 30 days prior to trial. MOTIONS FOR SUMMARY JUDGMENT SHALL BE FILED NOT LESS THAN 34 DAYS PRIOR TO THE PRE-TRIAL DATE. This is to allow sufficient time for the response to the motion and any reply as required under Rule 56 of the Arkansas Rules of Civil Procedure. Any motions or pleadings that need to be brought to the

**(SAMPLE)**

attention of the Court prior to any hearing should be mailed or faxed to the Court at \_\_\_\_\_, and/or faxed to \_\_\_\_\_.

Any discovery or procedural problem should be brought to the Court's attention promptly after the issue arises and not delayed until the motion deadline. By agreement, the parties may conduct additional discovery beyond this deadline, but the Court will not be available to resolve discovery disputes for this agreed-to discovery.

Each of you shall submit to the Court and opposing counsel no later than two (2) days prior to pre-trial.

- (1) A brief summary of claims and relief sought. (No more than one page in length);
- (2) A concise summary of facts. (No more than one page in length);
- (3) Issues of fact expected to be contested;
- (4) Issues of law expected to be contested;
- (5) Estimated length of trial.
- (6) Prospects for settlement, if any. (Note, the Court expects attorneys to confer and explore the possibility of settlement prior to answering these inquiries);
- (7) The basis for jurisdiction or objections to jurisdiction;
- (8) A list of pending motions;
- (9) All proposed stipulations;
- (10) Witness list;
- (11) Exhibit list; (all exhibits are to be pre-marked)
- (12) Proposed jury instructions;
- (13) Will you agree to mediation?
- (14) Any motions filed after the cutoff date must be made in good faith, and for good cause, otherwise they will be denied as untimely.

**(SAMPLE)**

(15) Pre-trial may be waived if there are no issues that need to be brought to the Court's attention. Counsel should notify the Court in writing prior to a pre-trial setting.

(16) Counsel shall attempt to resolve and edit depositions to be read and the Court will rule upon any remaining objections prior to trial.

In the event of settlement, contact the Case Coordinator immediately at \_\_\_\_\_ . All settlement efforts should be completed prior to a jury being called, which is normally 3-4 days.

IT IS SO ORDERED.

---

Circuit Judge

**WAIVER OF COUNSEL**

I understand that under the constitutions and criminal case law of the United States and the statutes and criminal rules of procedure of the State of Arkansas, I am entitled to and will be provided counsel free of charge if I am financially unable to obtain one without causing substantial hardship to myself or to my family.

I understand further that this Court will not continue further in this proceeding until counsel is provided if I request it, and knowing this, I hereby voluntarily and with knowledge of the above rights waive counsel. I further understand that my waiver of counsel at this time shall not preclude me from claiming a right to counsel in future proceedings in this cause, and I have been so informed orally of this by the court.

DATED AND SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_

Defendant

I have questioned the defendant and find that he/she intelligently and knowingly waived counsel and was competent to do so.

\_\_\_\_\_

Judicial Officer

**APPROVED MOTION TO WAIVE JURY TRIAL AND ACCEPTANCE**

I, the defendant, understand that I am charged with:

Count	Offense	M/F	Punishment	Plea
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

I understand that I have a right to a jury trial where no verdict would be accepted unless all twelve jurors agreed. If the jury found me to be guilty of anything, I would have the right to have the jury to set my punishment.

I waive my right to have a jury trial. I ask that the judge hear and weigh the evidence and, after applying the law, make a decision if I am guilty of anything. If the judge finds me guilty, the judge sets my punishment.

I understand that I keep all of my other rights.

**APPROVED:**

\_\_\_\_\_  
DEPUTY PROSECUTING ATTORNEY

\_\_\_\_\_  
DEFENDANT  
\_\_\_\_\_  
DEFENSE ATTORNEY

**MOTION GRANTED.**

\_\_\_\_\_  
CIRCUIT JUDGE

\_\_\_\_\_  
DATE

# SAMPLE ORDER

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS

NAME

PLAINTIFF

VS.

NO. CV 2022- ###

NAME

DEFENDANT

## MEDIATION ORDER

Pursuant to Ark. Code Ann. § 16-7-202(b), the parties are hereby ordered and directed to participate in mediation of [*specify all issues or specific issues*] which are pending before the Court. The parties may choose an appropriate mediator from the Roster of Certified Mediators provided by the Arkansas Alternative Dispute Resolution Commission. In the alternative, the parties may select a mediator who is not on the Commission's Roster and submit the name of the mediator to the Court for approval.

A copy of the Roster is available online at <https://www.arcourts.gov/administration/adr/certified-mediators>, or the attorneys may contact Jennifer Taylor at the Administrative Office of the Courts (501) 682-9400 to obtain a copy of the Roster. Within \_\_\_\_ days of this order, the attorneys for the parties shall provide the Court, in writing, with the name of the selected mediator and the date(s) of the mediation. Mediation must be completed \_\_\_\_ days prior to the final hearing.

The cost of the mediation shall be [split the cost of the mediation/or apportion in some other way], unless otherwise agreed by the parties.

Within \_\_\_\_ days of completion of mediation, \_\_\_\_\_ shall notify the Court regarding the status of the pending issues.