

Cite as 2009 Ark. 534

SUPREME COURT OF ARKANSAS

No.

IN RE: ARKANSAS
SUPREME COURT
AND COURT OF APPEALS
RULES 4-1, 4-2, 4-3, 4-4, 4-7
AND 6-9

Opinion Delivered October 29, 2009

PER CURIAM

On June 4, 2009, we published for comment proposed changes to Supreme Court and Court of Appeals Rules 4-1 and 4-2. *In re Arkansas Supreme Court and Court of Appeals Rules 4-1 and 4-2*, 2009 Ark. 350 (per curiam). We thank everyone who submitted comments. Today, we are adopting amendments to these rules.

We are approving a change in the font size to 14 points and the page limit for opening briefs to 30 pages. (Rule 4-1(a) and(b)). We are declining to adopt the proposed amendment regarding insufficient abstracts and addendums that would have precluded the appellate court from going to the record to affirm and the proposal regarding noncompliant briefs to require in certain circumstances an automatic referral to the Committee on Professional Conduct. For the other changes, we encourage attorneys engaged in appellate practice to carefully review these revised rules as well as all rules affecting appellate practice.

We adopt the amendments to Rule 4-1(a), (b), and (e) and to Rule 4-2, as set out below, and republish these rules. In addition, we must amend Rules 4-3(e), 4-4(b), and 4-7(b)(2) to conform these rules with the page-limit change that was made in Rule 4-1. Because

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of the change in the font size, we are also amending Rule 6-9(e) (2) and (f)(2) with respect to the page limit for a petition on appeal and the response. All of these amendments shall be effective January 1, 2010.

Rule 4-1. Style of briefs.

(a) *Briefs - Size - Paper - Type.* All briefs shall be type written or produced with computer or word processing equipment. Briefs shall be of uniform size on opaque, unglazed 8 ½” x 11” white paper and firmly bound on the left hand margin by staples or other binding devices. If staples are used, they should be covered by tape. Briefs shall be double-spaced, except for quoted material, which may be single-spaced and indented. Footnote lines, except quotations, shall be double-spaced. Use of footnotes is not encouraged and should be used sparingly. Carbon copies are not acceptable, but copies produced by offset printing, positive photocopy, or other dry photo-duplicating process which produces a clearly legible black-on-white reproduction may be used. The abstract, statement of the case, argument, and addendum shall each be numbered sequentially from page one, and both sides of the page may be used. The margin at the top, outer edge, and bottom of each page shall be not less than one inch, and the margin at the binding edge shall be wide enough to allow the text to be read easily. Typeface shall be proportionally spaced, shall not be less than 14 points, and must include serifs, but sans-serif type may be used in headings and captions. Commercial organizations or members of the bar maintaining equipment for duplicating may submit to the Clerk samples for prior approval. If the Clerk is satisfied that such duplicating process will produce documents which conform to the specifications of this rule, it will be approved.

(b) *Length of argument.* Unless leave of the court is first obtained, the argument portion of a brief shall not exceed 30 double-spaced pages including the conclusion, if any. The appellant's reply brief shall not exceed 15 double-spaced pages and shall not include any supplemental abstract unless permitted by the court upon motion. Motions for an expansion of the page limit must set forth the reason or reasons for the request and must state that a good faith effort to comply with this rule has been made. The motion must specify the number of additional pages requested.

...

(e) *Noncompliance.* Briefs not in compliance with this rule shall not be accepted by the Clerk. When a party submits a brief on time that substantially complies with the rules, the Clerk may

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mark the brief “tendered,” grant the party a seven-day compliance extension, and return the brief to the party for correction. If the party resubmits a compliant brief within seven (7) calendar days, then the Clerk shall accept that brief for filing on the date it is received.

Rule 4-2. Contents of Briefs.

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

(1) *Table of contents.* Each brief must include a table of contents. It should reference the page number for the beginning of each of the major sections identified in Rule 4-2(a)(2)-(8). The table must also list the contents of the abstract and the addendum. The name of each witness, and the abstract page number on which his or her testimony begins, must be included. The table must identify each document in the addendum, list the addendum page number where the document begins, and list the corresponding record page number.

(2) *Informational statement and jurisdictional statement.* The Informational Statement and Jurisdictional Statement required by Supreme Court Rule 1-2(c).

(3) *Points on appeal.* The appellant shall list and separately number, concisely and without argument, the points relied upon for a reversal of the judgment or decree. The appellee must follow the same sequence and arrangement of points as contained in the appellant’s brief and may then state additional points. Either party may insert under any point not more than two citations which the party considers the principal authorities on that point.

(4) *Table of authorities.* The table of authorities shall be an alphabetical listing of authorities with a designation of the page number of the brief on which the authority appears. The authorities shall be grouped as follows:

- (A) Cases
- (B) Statutes and Rules
- (C) Books and Treatises
- (D) Miscellaneous

(5) *Abstract.* The appellant shall create an abstract of the material parts of all the transcripts (stenographically reported material) in the record. Information in a transcript is material if the information is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal.

(A) *Contents.* All material information recorded in a transcript (stenographically reported

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material) must be abstracted. Depending on the issues on appeal, material information may be found in, for example, counsel's statements and arguments, voir dire, testimony, objections, admissions of evidence, proffers, colloquies between the court and counsel, jury instructions (if transcribed), and rulings. All material parts of all hearing transcripts, trial transcripts, and deposition transcripts must be abstracted, even if they are an exhibit to a motion or other paper. Exhibits (other than transcripts) shall not be abstracted. Instead, material exhibits shall be copied and placed in the addendum. If an exhibit referred to in the abstract is in the addendum, then the abstract shall include a reference to the addendum page where the exhibit appears.

(B) *Form*. The abstract shall be an impartial condensation, without comment or emphasis, of the transcript (stenographically reported material). The abstract must not reproduce the transcript verbatim. No more than one page of a transcript shall be abstracted without giving a record page reference. In abstracting testimony, the first person ("I") rather than the third person ("He or She") shall be used. The question-and-answer format shall not be used. In the extraordinary situations where a short exchange cannot be converted to a first-person narrative without losing important meaning, however, the abstract may include brief quotations from the transcript.

(C) *Miscellaneous*. (i) In a second or subsequent appeal, material information from all transcripts filed in any prior appeal must be abstracted. (ii) If an abstract exceeds two hundred fifty pages, then the appellant may bind it separately from the other parts of the brief without filing a motion seeking permission from the appellate court to do so. (iii) To assist in the abstracting process, the court reporter shall provide the appellant at a nominal charge an electronic copy of the transcript. (iv) The Clerk will refuse to accept a brief if the abstract does not comply with this rule. The Clerk shall handle briefs with a noncompliant abstract pursuant to Rule 4-1(e) by marking the brief tendered and granting a seven-day compliance extension. As prescribed by Rule 4-1(d), the abstract must also comply with Administrative Order 19's redaction requirements for confidential information.

(6) *Statement of the Case*. The appellant's brief shall contain a concise statement of the case without argument. This statement, denoted as the "Statement of the Case," shall ordinarily not exceed two pages in length, and shall not exceed five pages without leave of the court. The pages of the statement of the case shall appear immediately before the argument and are not counted against the page limits of the argument set out in Rules 4-1(b) and 4-3(e). The statement of the case should be sufficient to enable the court to understand the nature of the case, the general fact situation, and the action taken by the trial court. The statement must include supporting page references to the abstract or addendum or both. The Clerk will refuse to accept a brief if the required references to the abstract or addendum are not included. The appellee's brief need not contain a statement of the case unless the appellant's statement is deemed to be controverted or insufficient.

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(7) *Argument.* Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. For each issue, the applicable standard of review shall be concisely stated at the beginning of the discussion of the issue. Citations of decisions of the Arkansas Supreme Court and Court of Appeals must be from the official reports, and all citations to both official and unofficial reports shall follow the format prescribed in Rule 5-2. All citations of decisions of any other court must state the style of the case and cite the official reporter (including a regional reporter so designated by the issuing court) in which the case is found. If the case is also reported by unofficial publishers, including an unofficial electronic database, one of these should also be cited. Reference in the argument portion of the parties' briefs to material found in the abstract and addendum shall be followed by a reference to the page number of the abstract or addendum at which such material may be found. The number of pages for argument shall comply with Rule 4-1(b).

(8) *Addendum.* The appellant's brief shall contain an addendum after the signature and certificate of service. The addendum shall contain true and legible copies of the non-transcript documents in the record on appeal that are essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. The addendum shall not merely reproduce the entire record of trial court filings, nor shall it contain any document or material that is not in the record.

(A) *Contents.*

(i) The addendum must include the following documents:

- the pleadings (as defined by Rule of Civil Procedure 7(a)) on which the circuit court decided each issue: complaint, answer, counterclaim, reply to counterclaim, cross-claim, answer to cross-claim, third-party complaint, and answer to third-party complaint. If any pleading was amended, the final version and any earlier version incorporated therein shall be included;
- all motions (including posttrial and postjudgment motions), responses, replies, exhibits, and related briefs, concerning the order, judgment, or ruling challenged on appeal. But if a transcript (stenographically reported material) of a hearing, deposition, or testimony is an exhibit to a motion or related paper, then the material parts of the transcript shall be abstracted, not included in the addendum. The addendum shall also contain a reference to the abstract pages where the transcript exhibit appears as abstracted;
- any document essential to an understanding of the case and the issues on appeal, such as a will, contract, lease, note, insurance policy, trust, or other writing;

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- in a case where there was a jury trial, the jury's verdict forms;
- defendant's written waiver of right to trial by a jury;
- in a case where there was a bench trial, the court's findings of fact and conclusions of law, if any;
- the order, judgment, decree, ruling, letter opinion, or administrative agency decision from which the appeal is taken. In workers' compensation appeals, the administrative law judge's opinion shall be included when it is adopted in the order of the full commission. If the order (however named) incorporates a bench ruling, then that ruling must be abstracted and the addendum must contain a reference to the abstract pages where the information appears as abstracted. The transcript (stenographically reported material) containing the ruling may also be copied in the addendum or omitted, at the appellant's choice;
- all versions of the order (however named) being challenged on appeal if the court amended the order;
- any order adjudicating any claim against any party with or without prejudice;
- any Rule of Civil Procedure 54(b) certificate making an otherwise interlocutory order a final judgment;
- all notices of appeal;
- any postjudgment motion that may have tolled the time for appeal, and is therefore necessary to decide whether a notice of appeal was timely filed;
- any motion to extend the time to file the record on appeal, and any related response, reply, or exhibit;
- any order extending the time to file the record on appeal; and
- any other pleading or document in the record that is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. For example, docket sheets, superseded pleadings, discovery related documents, proffers of documentary evidence, jury instructions given or proffered, and exhibits (such as maps, plats, photographs, computer disks, CDs, DVDs).

(ii) *Waiver of addendum obligation.* If an exhibit or other item in the record cannot be

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reproduced in the addendum, then the party making the addendum must file a motion seeking a waiver of the addendum obligation.

(B) *Form*. Each page in the addendum must also show the record page number where the original is located. Each document must be a complete and legible copy of the original, clearly showing any file mark. If an addendum exceeds two hundred fifty pages, then a party may bind it separately from the rest of the brief without filing a motion seeking permission from the appellate court to do so.

(C) *Supplemental addendum*. An appellee may include a supplemental addendum containing any document in the record on which the appellee relies in its brief and that is absent from the appellant's addendum. A cross-appellant shall likewise limit any supplemental addendum to documents of record not contained in the appellant's addendum but necessary to demonstrate appellate jurisdiction over, and to decide the issues in, the cross-appeal. A cross-appellee may include a non-duplicative supplemental addendum limited to documents concerning the cross-appeal.

(D) *Miscellaneous*. If the Clerk determines that the addendum does not comply with this rule, he or she shall refuse to accept a brief. The Clerk shall handle briefs with a noncompliant addendum pursuant to Rule 4-1(e) by marking the brief tendered and granting a seven-day compliance extension. As prescribed by Rule 4-1(d), the addendum must also comply with Administrative Order 19's redaction requirements for confidential information.

(9) *Cover for briefs*. On the cover of every brief there should appear the number and style of the case in the Supreme Court or Court of Appeals, a designation of the court from which the appeal is taken, and the name of its presiding judge, the title of the brief (e.g., "Abstract, Addendum, and Brief for Appellant"), and the name or names of individual counsel who prepared the brief, including their bar numbers, addresses, telephone and facsimile numbers, and e-mail addresses.

(b) *Insufficiency of appellant's abstract or addendum*. Motions to dismiss the appeal for insufficiency of the appellant's abstract or addendum will not be recognized. Deficiencies in the appellant's abstract or addendum will ordinarily come to the court's attention and be handled in one of three ways as follows:

(1) If the appellee considers the appellant's abstract or addendum to be defective, the appellee's brief should call the deficiencies to the court's attention and may, at the appellee's option, contain a supplemental abstract or addendum. When the case is considered on its merits, the court may upon motion impose or withhold costs, including attorney's fees, to compensate either party for the other party's noncompliance with this rule. In seeking an award of costs under this paragraph, counsel must submit a statement showing the cost of the

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supplemental abstract or addendum and a certificate of counsel showing the amount of time that was devoted to the preparation of the supplemental abstract or addendum.

(2) If the case has not yet been submitted to the court for decision, an appellant may file a motion to supplement the abstract or addendum and file a substituted brief. Subject to the court's discretion, the court will routinely grant such a motion and give the appellant fifteen days within which to file the substituted abstract, addendum, and brief. If the appellee has already filed its brief, upon the filing of appellant's substituted abstract, addendum, and brief, the appellee will be afforded an opportunity to revise or supplement its brief, at the expense of the appellant or the appellant's counsel, as the court may, upon motion, direct.

(3) Whether or not the appellee has called attention to deficiencies in the appellant's abstract or addendum, the court may address the question at any time. If the court finds the abstract or addendum to be deficient such that the court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, addendum, and brief, at his or her own expense, to conform to Rule 4-2 (a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the court may direct. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the rule.

(c) *Noncompliance.* (1) Briefs not in compliance with the format required in Rules 4-1 and 4-2 shall not be accepted for filing by the Clerk. When a party submits a noncompliant brief on time that substantially complies with the rules governing briefs, the Clerk shall mark the brief "tendered," grant the party a seven-day compliance extension, and return the brief to the party for correction. If the party resubmits a compliant brief within seven (7) calendar days, then the Clerk shall accept that brief for filing on the date it is received.

(2) If after a brief has been accepted for filing, it is determined that an appellee's brief is deficient or an appellant's brief is deficient in areas not addressed in Rule 4-2(b)(3), the court may give the party fifteen days to cure the noncompliance under the procedure described in Rule 4-2 (b)(3). If the problem is not timely corrected, then the court will take appropriate action, including affirming the judgment or decree at cost to the appellant, or otherwise giving judgment according to the requirements of the case.

(3) After the opportunity to cure deficiencies has been afforded pursuant to Rule 4-2(b)(3) or (c)(2), attorneys who fail to comply with the requirements of this rule may be referred to

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the Office of Professional Conduct, and in addition, may be subject to any of the following: (A) contempt, (B) suspension of the privilege to practice before the Supreme Court or Court of Appeals for a specified time or until the attorney can demonstrate a satisfactory competency of the rules, or (C) imposition of any of the sanctions listed in Rule 11(c) of the Rules of Appellate Procedure-Civil.

Rule 4-3. Briefs in criminal cases.

...

(e) *Page limits on briefs.* The argument portion of the appellant's and the appellee's briefs shall not exceed 30 double-spaced typewritten pages including the conclusion, if any, with a 15 typewritten page limit upon the reply brief, except that if either limitation is shown to be too stringent in a particular case, and there has been a good faith effort to comply with the page limits, it may be waived on motion.

...

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

...

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

...

Rule 4-7. Briefs in Postconviction and Civil Appeals Where Appellant is Incarcerated and Proceeding Pro Se.

...

(b) *Style of briefs.*

...

(2) *Length of argument.* Unless leave of the court is first obtained, the argument portion of a brief shall not exceed 30 double-spaced pages including the conclusion, if any. The appellant's reply brief shall not exceed 15 double-spaced pages and shall not include any supplemental

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abstract or addendum unless permitted by the court upon motion. Motions for an expansion of the page limit must set forth the reason or reasons for the request and must state that a good faith effort to comply with this rule has been made. The motion must specify the number of additional pages requested.

...

Rule 6-9. Rule For Appeals In Dependency-Neglect Cases.

...

(e) Petition on Appeal.

(1) Within thirty 30 days after transmission of the record to the Clerk of the Supreme Court, the appellant shall file an original and 16 copies of a Petition on Appeal (Form 2).

(2) The petition shall not exceed twenty (25) pages, excluding the abstract and addendum, and shall include:

...

(f) Response to Petition on Appeal or Cross Appeal.

(1) Within twenty (20) days after filing of the appellant's petition on a petition on appeal, any appellee may file an original and sixteen (16) copies of a response to the petition on appeal or cross-appeal (Form 3).

(2) The response shall not exceed twenty (25) pages, excluding the abstract and addendum and shall include:

...

DANIELSON, J., concurring. I have no problem with the majority's attempt to clarify our appellate rules, but write solely to express an additional concern. It is my opinion that the problems the appellate courts have encountered regarding noncompliance with our appellate rules cannot be attributed to the way in which the rules are written. Without predictable and consistent enforcement, a rule, no matter how clear, will not consistently be followed. I am hopeful that the amendments to the rule are not the only change and that

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enforcement is made a high priority.

Additionally, I take this opportunity to encourage further examination of all our appellate rules. We are moving forward on all fronts with the use of technology. We implemented a pilot program for electronic filing and recently became the first state to electronically publish and distribute the official report of our appellate decisions. In light of the technology now available, the reasons for many of our rules have long since passed. Rather than a piecemeal approach to making appellate rule changes, I favor a more proactive approach.