



ARKANSAS JUDICIARY

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## Rule 2. Appealable Matters; Priority.

(a) An appeal may be taken from a circuit court to the Arkansas Supreme Court from: (1) A final judgment or decree entered by the circuit court; (2) An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action; (3) An order which grants or refuses a new trial; (4) An order which strikes out an answer, or any part of an answer, or any pleading in an action; (5) An order which vacates or sustains an attachment or garnishment; (6) An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused; (7) An interlocutory order appointing a receiver, or refusing to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder; (8) An order which disqualifies an attorney from further participation in the case; (9) An order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure; (10) An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official; (11) An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the circuit court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay, and has executed the certificate required by Rule 54(b) of the Rules of Civil Procedure; (12) An order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. 16-108-219 (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration) and 28-1-116 (all orders in probate cases, except an order removing a fiduciary for failure to give a new bond or render an accounting required by the court or an order appointing a special administrator); and (13) A civil or criminal contempt order, which imposes a sanction and constitutes the final disposition of the contempt matter. (b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment. An appeal from an order disposing of a postjudgment motion under Rule 4(b)(1) brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from. (c) Except as provided in Rule 6-9 of the Rules of the Supreme Court and Court of Appeals, appeals in juvenile cases shall be made in the same time and manner provided for appeals from circuit court. (1) In delinquency cases, the state may appeal only under those circumstances that would permit the state to appeal in criminal proceedings. (2) Pending an appeal from any case involving a juvenile out-of-home placement, the circuit court retains jurisdiction to conduct further hearings. (3) In juvenile cases where an out-of-home placement has been ordered, orders resulting from the hearings set below are final appealable orders: (A) adjudication and disposition hearings; (B) review and permanency

planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P. Rule 54(b); and (C) termination of parental rights. (d) All final orders awarding custody are final appealable orders. (e) Appeals in criminal cases have priority over all other business. With respect to civil cases, appeals under subdivisions (a)(6), (a)(7), (a)(9), (c)(3), and (d) of this rule take precedence. (f)(1) The Supreme Court may, in its discretion, permit an appeal from an order denying a motion for a protective order pursuant to Rule of Civil Procedure 26(c), an order pursuant to Rule of Civil Procedure 37 compelling production of discovery, or an order denying a motion to quash production of materials pursuant to Rule 45 when the defense to production is any privilege recognized by Arkansas law or the opinion-work-product protection. A petition for permission to appeal must be filed with the Supreme Court within 14 calendar days after the order is entered. The circuit court's order shall be supported by factual findings and shall address the factors (a)-(f) listed below. The decision of the Supreme Court to grant permission to appeal will be guided by: (a) the need to prevent irreparable injury; (b) the likelihood that the petitioner's claim of privilege or protection will be sustained; (c) the likelihood that an immediate appeal will delay a scheduled trial date; (d) the diligence of the parties in seeking or resisting an order compelling the discovery in the circuit court; (e) the circuit court's written statement of reasons supporting or opposing immediate review; and (f) any conflict with precedent or other controlling authority as to which there is substantial ground for difference of opinion. (2) The petition must address the factors listed in subdivision (f)(1) and shall be limited to 10 pages exclusive of supporting materials. Petitioner shall attach in an addendum sufficient supporting documentation from the circuit court record for the Supreme Court to understand the dispute and the issues that would be presented in the permissive appeal. A party may file a response within 10 calendar days after the petition is served. Any response shall also be limited to 10 pages exclusive of any supplementary addendum. Replies and petitions for rehearings shall not be allowed. (3) Neither the petition nor the grant of permission for an appeal shall delay any scheduled trial or lower-court proceeding unless the circuit court or the Supreme Court orders. If the Supreme Court grants the petition, the petitioner must file a notice of appeal with the circuit clerk within 10 calendar days of the Supreme Court's order and file the record on appeal within 30 calendar days from the entry of the order allowing the appeal.

### **Comment Text:**

**Addition to Reporter's Notes, 2012 Amendment:** Arkansas Rules of Appellate Procedure-Civil 2(b) and 3(a) contained an ambiguity (same language in both rules) that could have been misconstrued as creating, under limited circumstances, a 180-day period in which to file the notice of appeal of a judgment (or intermediate order). Both rules stated that "[a]n appeal from an order disposing of a postjudgment motion under Rule 4 brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from." The reference in Rules 2(b) and 3(a) to orders disposing of postjudgment motions under Rule 4 (without designation of a specific subdivision under Rule 4) was intended to apply only to orders disposing of the postjudgment motions included in Rule 4(b)(1) (motions for judgment notwithstanding the verdict, motions to amend the court's findings of fact or to make additional findings, or any other motions to vacate, alter, or amend the judgment). However, the general reference to Rule 4 in Rules 2(b) and 3(a) could have been read as allowing appellate review of the original judgment (or intermediate order) "brought up for review" by an order disposing of any postjudgment motion allowed under Rule 4. Since motions for extension of time to file a belated appeal are also included under Rule 4

(Rule 4(b)(3)), orders denying belated appeal motions could have been considered to bring up for review the original judgment (or intermediate order). Because belated appeal motions under Rule 4(b)(3) may be filed up to 180 days following the judgment, the effect would have been to create a 180-day period in which to appeal the original judgment (or intermediate order). The amendment clarifies the original intent of Rules 2(b) and 3(a) by specifically limiting the postjudgment motions that bring up for review original judgments or intermediate orders to the postjudgment motions included in Rule 4(b)(1). The addition of new paragraph (f) gives the Arkansas Supreme Court discretion to grant permission to take an interlocutory appeal of an order under Ark. R. Civ. P. 37 compelling production of materials or information or an order under Ark. R. Civ. P. 45 denying a motion to quash production of materials for which a privilege or opinion-work-product is claimed. In part the rule is modeled on the successful federal court discretionary interlocutory appeal procedures found in Title 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 23(f). The availability of interlocutory appellate review of privilege and work product matters was previously restricted by statements in several Arkansas cases that interlocutory review will not be allowed ?even when the alleged discovery violation pertains to material the petitioning party claims are privileged.? *Cooper Tire & Rubber Co. v. Phillips Cnty.* Circuit Court, 2011 Ark. 9 Cite as 2012 Ark. 236 183, at 6, \_\_\_ S.W.3d \_\_\_; *Monticello Healthcare Center, LLC v. Goodman*, 2010 Ark. 339, at 18, \_\_\_ S.W.3d \_\_\_; *Baptist Health v. Circuit Court of Pulaski Cnty.*, 373 Ark. 455, 284 S.W.3d 499 (2008). The concern expressed by the court was that allowing interlocutory review could lead to its having to make piecemeal decisions whenever an application for discovery is unsuccessfully resisted at the trial court level. However, a privilege issue that arises within the context of a discovery request also implicates substantive rights that extend well beyond the scope of discovery concerns. See generally Sarah Blassingame Leflar, *Reviving the Privilege Doctrine: The appealability of Orders Compelling the Production of Privileged Information*, 62 Ark. L. Rev. 283, 288 (2009). See also Jonathan P. Rich, Note, *The Attorney-Client Privilege in Congressional Investigations*, 88 Colum. L. Rev. 145, 165 (1988). In addition, the Arkansas Supreme Court has recognized an exception to the general doctrine barring interlocutory appellate review of discovery matters where the issue is not merely the resolution of a discovery matter but involves another area of law that could be impacted by the resolution of the discovery matter. *Cooper Tire & Rubber Co. v. Phillips Cnty.* Circuit Court, 2011 Ark. 183, at 6. (Cooper involved an order to produce confidential trade secret information for which privilege protection is recognized under Rule 507 of the Arkansas Rules of Evidence.) New subdivision (f)(1) recognizes that the integrity of certain relationships and information will be irretrievably compromised if appellate review of a privilege-contested order allowing discovery must wait until after the circuit court enters a final judgment. Belated vindication cannot re-cloak the disclosed information. The amendment establishes a mechanism by which the court can balance the interest of judicial efficiency and the values inherent in substantive-privilege law. The concern with allowing piecemeal interlocutory appeals of discovery matters is addressed by narrowly limiting the appeal process to privilege matters and by giving the court authority to allow an appeal only if in the court's discretion the matter is worthy of further appellate consideration. Subdivision (f)(1) establishes guidelines for the court's decision whether to allow the appeal. To help ensure development of an adequate record for the Supreme Court's consideration of whether to allow an appeal, the trial court is required to make factual findings and address the guideline factors (a) through (f) (see also corresponding Ark. R. Civ. P. 26 (f)). In contrast to the factual findings required under Ark. R. Civ. P. 54 (b), subdivision (f)(1) does not make the findings a requirement of the court's jurisdiction on appeal (see Ark. R. Civ. P. 54 (b)(2)). The contents of the petition to allow an appeal and associated procedures are prescribed, in part, by subdivision (f)(2). The subdivision (f)(2) procedures allow the filing of a response but prohibit a reply or a petition for

rehearing. Under subdivision (f)(3) appeal proceedings are not to delay trial or other lower-court proceedings unless ordered by the circuit court or the Supreme Court. The initial procedures to be followed if the court allows an appeal are also prescribed by subdivision (f)(3).

**Addition to Reporter's Notes, 2014 Amendment:** A 2012 amendment to Ark. R. App. P. Civil 2 created a new paragraph (f) that gave the Arkansas Supreme Court discretion to grant permission to take an interlocutory appeal of an order under Ark. R. Civ. P. 37 compelling production of materials or information or an order under Ark. R. Civ. P. 45 denying a motion to quash production of materials for which a privilege or opinion-work-product is claimed. Paragraph (f) is now amended to add appeals from orders denying motions for a protective order under Ark. R. Civ. P. 26(c) to the list of permissive interlocutory appeals of privilege issues allowed under Ark. R. App. P. Civil 2(f). Adding denial of motions for protective orders to the list of permissive interlocutory appeals allowed under the rule is consistent with the policy underlying paragraph (f) of balancing the interests of judicial efficiency and the values inherent in substantive-privilege law and will not significantly enhance the likelihood of piecemeal interlocutory appeals of discovery matters.

### **History Text:**

History. Amended July 12, 1982; amended March 18, 1985; amended November 11, 1991, effective January 1, 1992; amended November 8, 1993, effective January 1, 1994; adopted and amended July 10, 1995, effective January 1, 1996; adopted and amended effective March 4, 1999; amended January 27, 2000; amended February 1, 2001; amended June 7, 2001, effective July 1, 2001; amended March 13, 2003; amended May 18, 2006, effective July 1, 2006; Amended June 17, 2010, effective July 1, 2010; Amended May 24, 2012, effective July 1, 2012; amended March 13, 2014, effective July 1, 2014.

### **Associated Court Rules:**

Rules of Appellate Procedure?Civil

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