

# HEARING CIVIL CASES

Presented by:

Judge Timothy Davis Fox

Friday, January 9, 2009

**HANDLING CIVIL CASES**  
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## **INTRODUCTION**

Let me preface my comments by stating the suggestions I make during this session are what seem to work for me in my courtroom. They may or may not work in your litigation environment. I have only been on the bench for six years and will be the first to admit I don't have all of the answers. I have however been presented with many of the questions you will be required to answer and I think the most important thing we can accomplish during this segment is to go over some of those questions and issues so you can start thinking how you will address them. Always remember we have a very gifted and generous trial bench in this State who are willing to help if you just ask.

## JUDICIAL PHILOSOPHY

We each have as our common denominator graduation from law school and successful completion of the bar examination. From that point forward there have been more differences in our individual professional experiences than similarities. The size of our firms, solo, small group, or large outfit; government or private practice; prosecutor, criminal defense, domestic, juvenile, plaintiff tort litigation, insurance defense, worker's compensation, class action, environmental work, the list is lengthy.

If you were in practice by yourself you may have barked your shins more frequently than those fortunate enough to have a mentor. Regardless of the nature of your practice you eventually had to develop your own professional style and procedure based upon your own experiences and ethical interpretations. You now have to develop your own judicial procedure since you've successfully asked the voters to entrust you with a judicial position.

You do not have to start from wholecloth, after all part of the reason you were elected was approval of how you conducted yourself personally and how you addressed your professional responsibilities while you practiced law. The practice precepts you wish to keep will need to be reexamined to insure they fit in your new role in the judicial system. You still have a role in the conflict but you must no longer be any part of the conflict. Do not be surprised during the first few months if you find yourself going to bed exhausted about 8:30 p.m. after a jury trial. The mental exertion required for you to administrate and adjudicate at the same time is not an exercise you performed while practicing law.

Acknowledge to yourself you now occupy a different position in the system. It will take everyone awhile, you included, to adjust. People, including friends you wish would still call you by your first name, will instead call you "Judge." The reasons for this are myriad; some may not

know your name, it helps others with transitioning your role in their thought process, some because they are proud of you and for you, and for a few it is a form of mockery. Whatever the reason get up every morning, go to work, and try to earn the title. Whispers of “robe-itis” inevitably begin as soon as you make your very first ruling. It’s just human nature and you don’t need to worry as long as you have irrevocably authorized several good friends to come up to you in chambers and slap you upside the back of the head in the event they believe you have actually become infected. Try your best in every case and one day you’ll look around and discover you no longer feel like an “imposter to the robe.” It has been my experience that our fellow lawyers are extremely supportive of any individual making a genuine effort to competently perform their judicial duties.

In my personal opinion the very first item on your agenda should be development of your own personal judicial philosophy. My assignment for this College is the handling of civil trials. My comments concerning judicial philosophy are addressed specifically to civil legal matters. Criminal cases and equitable proceedings have additional ethical and adjudicatory provisions that need to be considered by the trial judge in developing his or her juridical ideology.

I think the best starting point is for you to answer the following question:

**Do you believe a civil jury trial is:**

- (a) a quest for the truth; or**
- (b) purely an adversarial proceeding, governed by the rules of civil procedure, evidence, and ethics.**

The answer to this question will dictate how you resolve many of the issues presented to you on a daily basis. It is extremely important you be consistent in your rulings, you can’t wake up in a new judicial world every day. I’m not saying if you discover you’re doing something wrong that you don’t alter your procedure. If you know why you do something in either your administrative or adjudicatory capacity you will be able to explain your thought process to the professionals

practicing in front of you. They may disagree with how or why you make your decisions but at least they will be able to prepare for trial in your court and to properly advise their clients.

Start thinking about and defining your judicial philosophy. As you do remember the gavel in the litigants' and attorneys' mind's eye is much larger than the one resting on your bench.

## **JURY ORIENTATION**

In the Sixth Circuit each of the judges whose case allocation consists primarily of civil or criminal cases summons their own venire panels. Every one of us addresses jury orientation differently. I have found what works best for my division is a two-part orientation. My entire jury orientation takes about an hour. During the first section the deputy circuit clerk and my bailiff call roll and go over certain matters. This normally takes about 15-20 minutes. My bailiff then calls the courtroom to order and I do the bulk of the orientation. My goals are to make the jurors feel comfortable and welcome in the courtroom environment, to assuage their concerns about how time consuming they believe the service will be, and finally and most importantly to tell them face to face how important their service is in our system of justice.

### **DEPUTY CLERK/BAILIFF – Before Judge Takes Bench**

1. Collect Completed Questionnaires (sent with Summons) As Jurors Enter.
2. Call Roll.
3. Ask For Names Not Called.
4. Divide Jurors Into Reporting Panels - Tuesday/Wednesday/Thursday Panels.
5. Bailiff Goes Over Reporting Procedure to Juror Contact Phone Number.
6. Bailiff Goes Over Parking Protocol.

### **JUDGE**

7. Bailiff Calls Court to Order/Please Rise.
8. Judge Takes Bench, Introduces Self and Position, Counties in Circuit.
9. Introduces Staff and Brief Description of How Jurors Contact Them.
10. Explain Case Allocation.
11. Juror Term of Service.
12. Compensation for Juror Service.
13. Parking (reinforcing bailiff info because parking is a big problem in downtown LR).
14. Heating/Air in Courtroom – (problem in Pulaski County) – tell them to dress comfortably, layered.
15. Explain “All Rise” as “All Rise If You Are Physically Able,” not designed to create a hardship on anybody just to focus attention on the proceedings.
16. Have Deputy Clerk swear panel.
17. Ask them to be seated and have them swear to juror qualifications.
18. When I was assigned criminal cases I also told them one or more of the attorneys might ask them during voir dire if they had any problem “sitting in judgment of

another person.” I told the jurors that in my opinion that is not what we do in a court of law. As a society we have criminal laws and civil laws and regulations so that we may all live together. In the courtroom it is the job of the finder of fact to determine if one or more of those laws or precepts has been broken or violated. If so, in a criminal case it is the job of the jury to determine the penalty within a range established by the Arkansas Legislature. In a civil case they will have instructions to follow concerning awarding damages or other requested relief.

19. General Length of Trials.
20. Purpose of Juror Questionnaires.
21. Talking To Attorneys After Trial.
22. Typing On My Laptop.
23. Voir Dire Process – Purpose, Strikes for Causes, Preemptory Strikes, and Personal Questions.
24. No Questions and Why.
25. TIME MANAGEMENT DURING TRIAL
26. Trial Framework –
  - (a) Opening Statements
  - (b) Testimony/Evidence
  - (c) Bench Conferences/White Noise
  - (d) Jury Instructions
  - (e) Closing Arguments
  - (f) Jury Deliberation – 9 of 12 for civil, unanimous for criminal
27. Responsibility and Privilege – whether case seems large or small, it is something the parties could not resolve between themselves and their jury trial will be the one time ever they will have an opportunity to have a jury decide their case.

## SCHEDULING ORDERS

I believe there are two basic reasons for issuing a *Scheduling Order*, to assist attorneys in being ready for trial on the scheduled date(s) by providing an external preparatory framework and to more efficiently utilize the docket days available for civil jury trials. All other reasons can be placed into these two general categories.

I do not generally issue *Scheduling Orders* in one-day trials, bench or jury. My two-day jury trial order is the same as my multi-day jury trial order except the multi-day adds a mediation requirement. I am open to adding mediation on the two-day order if the parties believe it will be helpful. The mediation requirement does not delay getting the multi-day case to a jury and it is generally cost-effective for the parties to engage in mediation for a case that is going to take three or more days to try.

If your docket window is nine months or more for multi-day civil cases you should be able to implement an effective *Scheduling Order* that does not delay a trial setting. It has been my experience the calendars of the attorneys handling the multi-day type cases are normally further out than my trial docket.

My *Scheduling Order* does not presently set a separate expert witness name/report disclosure deadline but I think I am going to be adding that additional requirement. I'm having more and more requests for such provision as the parties in some cases are waiting until very close to discovery cutoff to disclose experts.

You need to be prepared with a consistent response to requests for extensions of discovery deadlines as well as the proposed use of witnesses or exhibits not submitted in accordance with the *Scheduling Order*. The deadlines I use are designed to get discovery completed so the parties will have all necessary information prior to the court-ordered mediation

and to structure all dispositive motions so they will be ripe for decision at the pre-trial conference. I generally advise attorneys that if they wish to enter into modification agreements between themselves that is up to them, but that I am not modifying the *Order* or sanctioning such agreements, so they better know whom they're dealing with because if there is a dispute as to any agreement I will be strictly enforcing the *Scheduling Order* deadlines. My general position is the failure to disclose witnesses or exhibits if required by the *Order* means those witnesses and/or exhibits will not be used during the trial.

In my court it is the plaintiff's obligation to insure that sufficient days are allotted for the case to be fully tried. I don't tell attorneys how long it will take them to try their case, but however many days they request are all that trial will be allotted. The litigants in the case set for the next day's docket may have waited a year or a year and a half to get their day in court and they have a right to go to trial as scheduled.

I also feel very strongly that jury trials should not be an endurance contest. We start with the jury promptly at 9:00 a.m., take one mid-morning break, one mid-afternoon break, and an hour for lunch. If the case is a one day case we stay until we get it done, however late that may be. But on multi-day settings I let the jury go at about 4:30 p.m. to 5:00 p.m., except on the last day, when we stay however late as is necessary to finish. Information overload sets in after a full day in the box and most of are used to working a regular work day. Letting the jurors know that their evening activities will not be adversely impacted not only makes it easier to seat a jury but I believe leads to a more attentive panel for the time they are in the box.

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
\_\_\_\_\_ DIVISION

\_\_\_\_\_  
PLAINTIFF(S)  
VS. CASE NO. CV \_\_\_\_\_  
\_\_\_\_\_  
DEFENDANT(S)

**SCHEDULING ORDER**  
**(Multi-Day Jury Trial Setting)**

The scheduling of this case is set as follows:

**JURY TRIAL ( \_ DAYS)** \_\_\_\_\_, 2010 at 9:00 a.m.  
**(Counsel must be present in chambers on jury trial days at 8:30 a.m.)**

**PRE TRIAL CONFERENCE** \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.  
[pick a date approx. 30-45 days prior to trial]

**DISCOVERY** (completed by) \_\_\_\_\_ Sixty (60) days prior to Pre-Trial date.

**MOTION CUT-OFF** \_\_\_\_\_ Thirty (30) days prior to Pre-Trial date.

**MEDIATION\*\*** (completed by) \_\_\_\_\_ Thirty (30) Days prior to Pre-Trial date.

**WITNESS/EXHIBIT LISTS** \_\_\_\_\_ Two weeks prior to Trial Date.

**JURY INSTRUCTIONS\*\*\*** \_\_\_\_\_ 9:00 a.m., Business day prior to Trial date.

Failure to comply with the pre-trial requirements may result in removal from jury trial docket, dismissal of claims; striking of affirmative defenses, or the prohibition of the introduction of certain testimony and/or exhibits.

IT IS SO ORDERED.

\_\_\_\_\_  
\_\_\_\_\_, CIRCUIT JUDGE

DATE: \_\_\_\_\_

\* All motions other than motions in limine.

\*\* Ordered pursuant to A.C.A. 16-7-202. (Each party is to bear its respective proportion of the mediation costs.)  
Notification by correspondence to the Court of compliance with the mediation deadline is required.

\*\*\* The instructions shall be entitled "Jury Instruction No. \_\_\_\_" and shall contain no language identifying them as Plaintiff's or Defendant's requested instructions. Instructions must be submitted both in paper form and on disk (preferably in "Word" format).

CC: \_\_\_\_\_, Esq.  
\_\_\_\_\_, Esq.

## **MEDIA IN THE COURTROOM**

Supreme Court Administrative Order No. 6 governs media in the courtroom. Order No. 6 gives you the authority to authorize broadcast, recording or photographing in the courtroom provided the participants will not be distracted nor the dignity of the courtroom impaired.

The exceptions to your authority are:

1. If an objection is timely made by a party or an attorney.
2. Witnesses have separate right to be informed of their right to refuse and an objection timely made by witness shall prevent media of that witness.
3. Juvenile proceedings.
4. In camera proceedings without express consent of court.
5. Jurors, minors without parental consent, victims in sex offense crimes, and undercover officers or informants.

The order specifies a pooling procedure where necessary and gives you the authority to terminate media coverage at any time. The equipment is to be installed and removed only when court is not in session and it is prohibited to use audio equipment to record attorney-client conversations or bench conferences.

## RIGHT TO TRIAL BY JURY

### *Arkansas Constitution, Amendment 7*

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

### *A.R.C.P. Rule 38. Jury trial of right.*

(a) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by filing with the clerk a demand therefore in writing at any time after the commencement of the action and not later than 20 days prior to the trial date. Such demand may be indorsed upon a pleading of the party.

(b) *Same; Specification of Issues.* In his demand, a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand, or such lesser time as the court may order, may file a demand for trial by jury of any other or all of the other issues of fact in the action.

(c) *Waiver.* The failure of any party to file a demand as required by this rule and a required by Rule 5(c) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

### *Craven v. Fulton Sanitation Service, Inc.*, 361 Ark. 390, 206 S.W.3d 842 (2005)

Article 2, Section 7 of the Arkansas Constitution provides in pertinent part '[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[.]' The right to jury trial under this provision is a fundamental right. *Walker v. First Commercial Bank, N.A.*, 317 Ark. 617, 880 S.W.2d 316 (1994); *Bussey v. Bank of Malvern*, 270 Ark. 37, 603 S.W.2d 426 (Ark. App. 1980). It extends to all cases that were triable by a jury at common law. *Hopper v. Garner*, 328 Ark. 516, 944 S.W.2d 540 (1997); *McClanahan v. Gibson*, 296 Ark. 304, 756 S.W.2d 889 (1988). In other words the constitutional right to trial by jury extends only to the trial of issues of fact in civil and criminal causes. *Jones v. Reed*, 267 Ark. 237, 590 S.W.2d 6 (1979).

*Southern Farm Bureau Casualty Insurance Company v. Tallant*, 362 Ark. 17, 207 S.W.3d 468 (2005) [Issue of whether insured was made whole was not a jury triable issue. Subrogation is a doctrine of equity, no jury trial at common law in equity cases.]

## JURY INSTRUCTIONS

I require jury instructions to be tendered to the court, in both hard copy and electronic format, no later than 9:00 a.m. on the business day preceding trial. Failure to comply with such requirement may result in removal of the trial from the jury trial docket. I have my clerk review the submitted instructions to see where the disagreements are, if any. The printed copy I use to read to the jury is set in 14 point type and double-spaced for easier reading.

I really make an effort to read the jury instructions to the jurors very slowly and deliberately. I tell them they will have the jury instructions with them in the jury room so rather than try to take notes on the definitions I encourage them to just sit back and try to listen to all of the instructions. My bailiff stands by the courtroom door and no one goes in or out while I'm reading the jury instructions. I believe if you show the jurors you believe the instructions are important they reciprocate by trying to focus and understand them.

*Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003); *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W. 3d 568 (2002); *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *Coca-Cola Bottling Co. v. Priddy*, 328 Ark. 666, 945 S.W.2d 355 (1997)

Party is entitled to a jury instruction when it is a correct statement of law and there is some basis in the evidence to support giving the instruction.

Refusal to give a proffered instruction is reviewed using abuse of discretion standard

Non-AMI instructions should only be given when the court find the AMI instructions do not contain an essential instruction or do not accurately state the law applicable to the case

AMI instructions are to be used as a rule and non-AMI instructions should only be used when AMI instruction cannot be modified

## **PRE-TRIAL, DAY OF TRIAL**

I meet with the attorneys at 8:30 a.m., the attorneys are told in advance their clients are always welcome in chambers, it is after all their case, and that we are only in chambers to be outside the presence of jurors and witnesses. If the attorneys do not bring their client to chambers I announce on the record that all parties have been invited to be in attendance in chambers. I start promptly at 8:30 a.m. and the attorneys know roll call with the jurors starts exactly at 9:00 a.m. The start time is the first opportunity during the trial you have to remind the jury you know their time is important. The simple act of starting with the jury when you say you will after lunch and other breaks validates everything else you told them during orientation.

During the pre-trial I address the following issues:

- (1) Names of attorneys and others sitting at counsel table.
- (2) Names of witnesses.
- (3) Resolution of any pending motions in limine.
- (4) Confirmation of opening statement duration.
- (5) The attorneys have previously been requested to ask their clients if they are willing to try to a surviving eleven and I get the responses on the record. It takes nine out of eleven for a civil verdict.

## **VOIR DIRE**

After announcing the case and asking the attorneys if they are ready for trial I welcome all of the potential jurors. I tell them how many days the case is set for and that we are going to call the names of the first eighteen people for voir dire. I remind them there are no right answers or wrong answers just that the attorneys need information in order to intelligently utilize their peremptory strikes.

Each side gets three peremptory strikes so you need to call eighteen names to begin with. I instruct the attorneys to only call for responses from the eighteen people called. There is no need to waste time getting responses from potential jurors in the gallery. Rule 47(b) governs the seating of alternate jurors. Two is the maximum you can seat. Each side gets one additional peremptory challenge per alternate juror. So you will need to pick three potential jurors for each alternate position. You seat the first of the three potential alternates called that is not struck.

I then give the jurors a very brief description of the allegations of the parties, introduce the attorneys, the parties, and identify all of the possible witnesses. I ask them if there is any reason they are unable to serve as jurors and about any prior jury service. My involvement in voir dire is minimal as I prefer to leave the questioning to the attorneys. In the event the case involves extremely sensitive matters such as sexual abuse I will often pose questions on those subjects myself. I do this to relieve the attorneys from having to be the heavies on these questions and because these are the types of questions the jurors will raise their hands on to ask to approach the bench to answer. I let them sit in the witness chair and give me their answer. If the answer clearly constitutes cause to strike I release the juror, then call the attorneys to the bench and advise what the answer was and that I have excused the juror for cause. If the answer does not reach the "for cause" threshold I send the juror back to their seat, have the attorneys approach the bench and give them the answer to use in making their peremptory strike decisions.

Do not release the remaining jurors until the attorneys have announced the jury is satisfactory.

## **BENCH CONFERENCES/WHITE NOISE**

As part of orientation I explain to the jurors the purpose of bench conferences during the trial and about the concept of "white noise." I also advise them that bench conferences are a good time to stretch their legs, get a drink of water, or talk quietly among themselves, so long as they don't discuss the trial. I find it helps to remind them at the first bench conference about what we went over during orientation.

## **EXCLUSIONARY RULE - A.R.E. RULE 615**

If the Rule is invoked it must be given. The Rule can be invoked at any time during the trial.

*Blaylock v. Strecker*, 291 Ark. 340, 724 S.W.2d 470 (1987)

If a party requests the rule it must be given. Trial court has different levels of discretion with respect to remainder of rule. The three possible methods of enforcement available to the trial judge when a violation of the sequestration rule has occurred are: (1) citing the witness for contempt; (2) permitting comment on the witness's noncompliance in order to reflect on witness's credibility; (3) refusing to allow witness to testify.

*McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (Ark. App. 2001)

Even if an attorney violates rule in preparing a witness trial judge's discretion is more readily abused by excluding the testimony than by allowing the testimony and allowing opposing counsel to comment on the violation.

*Menard v. City of Carlisle*, 309 Ark. 522, 834 S.W.2d 632 (1992)

A.R.E. Rule 615 does not give trial court discretion to refuse to grant a request for the rule solely because the trial has commenced. There is no time specified in Rule for request.

## **MOTIONS IN LIMINE**

I have three rulings I use to resolve motions in limine: granted, denied, and denied without prejudice. The attorneys who practice regularly in front of me know “denied without prejudice” is a shorthand I use to advise them I believe the subject matter of the motion is not suitable for disposition without hearing the testimony or evidence.

*Turner v. Northwest Arkansas Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 133 S.W.3d 417 (2003); *Kozy Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980).

Proper use is to prevent some specific matter, perhaps inflammatory, from being interjected prior to a determination on its admissibility outside the presence of the jury.

## **MOTIONS FOR DIRECTED VERDICT/JNOV**

In resolving a motion for directed verdict the court is to review the evidence in the light most favorable to the non-moving party.

ARCP Rule 50. Motion for directed verdict and for judgment notwithstanding the verdict.

Cross-motions for directed verdict does not constitute a waiver of right to trial by jury, *Bussey v. Bank of Malvern*, 270 Ark. 37, 603 S.W.2d 426 (1980)

A motion for judgment notwithstanding the verdict is technically only a renewal of the motion for directed verdict, *Conagra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000); *Wheeler Motor Co., Inc. v. Roth*, 315 Ark. 318, 867 S.W.2d 446 (1993).

## **JURY QUESTIONS**

The decision whether to respond to a jury question and the nature of the response is reviewed on appeal using an abuse of discretion standard. If you receive a question from the jury you must bring them into the courtroom, read the question, read your answer, and send them back to continue deliberations. This procedure may be waived by all of the parties on the record. In every jury trial I have had to date the parties have waived bringing the jury into the courtroom. I believe this is the preferable manner to deal with a jury question as any number of things could happen in they are returned to the courtroom. Prejudice is presumed if you do not follow the statutory procedure or obtain a waiver.

It is mandatory that you read the entire note to the parties. I usually ask the attorneys for their input for a response. My general response is, "Please refer to the jury instructions given and the testimony and evidence introduced." I then ask each side if they have any objection to my response. I write my response on the bottom of the note, initial the response, have the bailiff make a copy of the note and response, keep the original of the response for the record and send the copy of the response with the bailiff to give to the jury.

### **A.C.A. § 16-64-115**

After the jury has retired for deliberation, if there is a disagreement between them as to any part of the testimony or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their counsel.

## MISCELLANEOUS ISSUES

### Estimates of Damage

*Webb v. Thomas*, 310 Ark. 553, 837 S.W.2d 875 (1992)

We have held that estimates of damage are inadmissible hearsay when the person preparing the estimate has not been offered as a witness. See *Home Mut. Fire Ins. Co. v. Hagar*, 242 Ark. 693, 415 S.W.2d 65 (1967).

### Impeachment by Prior Conviction

Admissibility must be decided on a case-by-case basis.

*Swink v. Lasiter Construction, Inc.*, 94 Ark. App. 262, 229 S.W.3d 553 (2006); *Benson v. State*, 357 Ark. 43, 160 S.W.3d 341 (2004);

### A.R.E. Rule 609(a)

Evidence of conviction of a crime shall be admitted but only if crime was punishable by death or imprisonment in excess of one year and the court determines probative value of admitting outweigh the prejudice or involved dishonesty or false statement regardless of the punishment.

### Improper Jury Argument

Counsel requests jury to “send a message” – trial court has wide discretion to control counsel’s argument, not reversed absent a “manifest abuse” of that decision. *Swink v. Lasiter Construction, Inc.*, 94 Ark. App. 262, 229 S.W.3d 553 (2006)

If opposing party waits until argument is completed when out of presence of jury to make a motion for mistrial the objection was waived by not giving the trial court the opportunity to correct any error committed during the closing argument.

*Swink v. Lasiter Construction, Inc.*, 94 Ark. App. 262, 229 S.W.3d 553 (2006)

*Allred v. Demuth*, 319 Ark. 62, 890 S.W.2d 578 (1994)

failure of a party to testify in a civil case about facts peculiarly within his or her knowledge is a circumstance, which may be looked upon with suspicion by a trier of fact. *May v. Narg & Co.*, 276 Ark. 199, 633 S.W.2d 376 (1982). The failure to testify gives rise to the presumption that the testimony would have been against the party’s interest. *Starnes v. Andre*, 243 Ark. 712, 421 S.W.2d 616 (1967). Counsel may argue every plausible inference, which could be drawn from the testimony. *Abraham v. State*, 274 Ark. 506, 625 S.W.2d 518 (1981). A trial court has wide discretion in controlling, supervising and determining the propriety of counsels’ arguments, and an appellate court will not reverse absent a showing of manifest abuse. *Brown v. State*, 316 Ark. 724, 875 S.W.2d 828 (1994).

### Insurance

*Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 209 S.W.3d 393 (2005)

As a general rule, it is improper for either party to introduce or elicit evidence of the other party’s insurance coverage, *Synergy Gas Corp. v. Lindsey*, 311 Ark. 265, 843 S.W.2d 825 (1992).

Where there has been an intentional and deliberate reference to insurance when it was not an issue in the case and when the opposing party had not opened the door for its admission, a mistrial is the proper remedy. *Hacker v. Hall*, 296 Ark. 571, 759 S.W.2d 32 (1988).

However if attorney poses question with apparent sincerity and in good faith rather than in a deliberate attempt to prejudice the jury and the witness answers with a reference to insurance an admonition by the court is ordinarily sufficient to correct the error.

#### Judge's Comments/Demeanor

Refrain from impatient remarks or unnecessary comments, which might indicate personal feelings or which might tend to influence the minds of jurors to the prejudice of a litigant *Green v. State*, 343 Ark. 244, 33 S.W.3d 485 (2000)

#### Juror Disqualification

No verdict shall be void or voidable because any juror shall fail to possess the necessary qualifications unless the juror knowingly answers falsely or knowingly fails to respond to any question during voir dire relating to the qualifications propounded by the court or by counsel. Prejudice is not presumed and party must show that juror failed to be honest or deliberately concealed during voir dire and that a correct response would have provided a valid basis for challenge for cause.

*Berry v. St. Paul Fire and Marine Insurance Company*, 328 Ark. 553, 944 S.W.2d 838 (1997)  
*Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989)

#### Juror Misconduct

*Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001)

Jury misconduct is a basis for granting a new trial under Rule 59(a)(2). See *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994); *Hacker v. Hall*, 296 Ark. 571, 759 S.W.2d 32 (1988). The decision whether to grant a new trial under Ark.R.Civ. P. 59(a)(2) is discretionary with the trial judge who will not be reversed absent an abuse of that discretion. *Borden v. St. Louis Southwestern Ry.Co.*, 287 Ark. 316, 698 S.W.2d 795 (1985). The burden of proof in establishing jury misconduct is on the moving party. *Id.* The moving party must show that the alleged misconduct prejudiced his chances for a fair trial and that he was unaware of this bias until after trial. *Owens v. State*, 300 Ark. 73, 777 S.W.2d 205 (1989); *Hendrix v. State*, 298 Ark. 568, 768 S.W.2d 546 (1989). We have held that the appellant bears the burden of demonstrating that a reasonable possibility of prejudice resulted from the alleged improper contact or \*442 conduct. See *Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000); *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995).

#### Opening and Order of Trial

A.C.A. 16-64-110. Order of trial.

### Remittitur

Whether the award of damages is so great as to shock the conscience of the court or demonstrate passion or prejudice on the part of the trier of fact. Remittitur is appropriate when the compensatory damages awarded are excessive and cannot be sustained by the evidence.

*Health Facilities Management Corp. v. Hughes*, 365 Ark. 237, 227 S.W.3d 910 (2006)

*Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003)

A.R.C.P. Rule 59(a)(4) New Trial – “excessive damages appearing to have been given under the influence of passion or prejudice.”

### Specific Instances of Conduct of Witness for Purpose of Attacking or Supporting Credibility -

#### A.R.E. 608

May not be proved by extrinsic evidence but in discretion of court may be inquired into on cross-examination of witness concerning his (1) character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness is being cross-examined has testified

#### Three-part test

1. question must be asked in good faith;
2. probative value of the evidence must outweigh its prejudicial effect
3. prior conduct must relate to witness's truthfulness.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT 6

#### Rights Of The Accused

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**Publisher's Notes.** As to ratification, see Publisher's Notes to U.S. Const. Amend. 1.

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### AMENDMENT 7

#### Trial By Jury In Civil Cases

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**Publisher's Notes.** As to ratification, see Publisher's Notes to U.S. Const. Amend. 1.

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In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

## ARTICLE VI. TRIALS

**Rule 38. Jury trial of right.**

(a) *Demand.* Any party may demand a trial by jury of any issue triable of right by a jury by filing with the clerk a demand therefor in writing at any time after the commencement of the action and not later than 20 days prior to the trial date. Such demand may be indorsed upon a pleading of the party.

(b) *Same: Specification of Issues.* In his demand, a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand, or such lesser time as the court may order, may file a demand for trial by jury of any other or all of the issues of fact in the action.

(c) *Waiver.* The failure of a party to file a demand as required by this rule and as required by Rule 5(c) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties. (Amended November 11, 1991, effective January 1, 1992; Reporter's Notes amended May 24, 2001, effective July 1, 2001.)

**Reporter's Notes to Rule 38: 1.** As does FRCP 38, this rule recognizes the constitutional right to trial by jury. Rule 38 does, however, extend the period of time within which a party must request a jury trial. Under FRCP 38, the demand for jury trial must be made not later than 10 days after service of the last pleading directed to the issue subject to jury trial. Under this rule, demand for trial by jury may be made at any time up to 20 days prior to trial. Under prior Arkansas law, the time for demanding a jury trial was governed by Rule 4(c) of the Uniform Rules for Circuit and Chancery Courts. That rule permitted the trial court to determine whether any of the parties desired a trial by jury. Unless one of the parties affirmatively requested a jury trial within 10 days after being contacted by the court, the right was waived, provided, of course, that no prior demand for jury trial had been made. Thus, a party normally had until just prior to trial to request a jury trial and this procedure has seemingly worked well. For this reason, the Committee did not see the need to fix an earlier time by which demand for jury trial has to be made.

2. Since Rule 18(a) permits the joinder of legal and equitable claims, problems could arise when equitable issues are resolved in circuit court; however, Rule 18(b) permits the trial court to make such orders respecting severance and transfer as may be appropriate and this should cure most potential problems. There may be instances, however, where a circuit judge might be called upon to decide equitable issues in a case where a jury is

sitting. In those instances, the court should follow the federal practice of having the jury resolve the legal issues with the court itself resolving the equitable issues. Wright & Miller, *Federal Practice And Procedure*, Sections 2305 and 2306.

3. Under the Federal Rule, demand for a trial by jury is served upon opposing counsel. Under this rule, the demand or request for the jury is filed with the court clerk. The purpose of this provision is to insure that the court itself and its administrators will promptly know if a jury is requested.

**Addition to Reporter's Notes, 2001:** 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 . . ." Rule 38 sets out the procedure for asserting the right to a jury trial.

Constitutional Amendment 80, which merged courts of law and equity, 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 this situation, the Supreme Court held that a 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

## CASE NOTES

## ANALYSIS

Discretion of court.  
 Model instructions.  
 Standards for instructions.  
 Undue emphasis.

**Discretion of Court.**

It is within the court's discretion to send typewritten instructions to the jury room notwithstanding that all parties did not so request. *Gambill v. Stroud*, 258 Ark. 766, 531 S.W.2d 945 (1976).

In a medical malpractice action the trial court did not abuse its discretion in allowing, over plaintiffs' objection, the jury to take typewritten instructions into the jury room, since neither party may veto the judge's determination. *Gambill v. Stroud*, 258 Ark. 766, 531 S.W.2d 945 (1976).

The trial court may, within its discretion, give the instructions to the jury regardless whether they are requested. *Wagner v. Travelers Ins. Co.*, 269 Ark. 976, 601 S.W.2d 277 (Ct. App. 1980).

A trial court need not give an instruction which needs explanation, modification, or qualification, nor is a trial judge required to give repetitious or redundant instructions. *Newman v. Crawford Constr. Co.*, 303 Ark. 641, 799 S.W.2d 531 (1990).

**Model Instructions.**

When jury instructions are requested which do not conform to the Arkansas Model Jury Instructions (AMI), they should be given only when the trial judge finds the AMI instructions do not contain an essential instruction or do not accurately state the law applicable to the case, and if the model instructions given to the jury cover the matters embraced in the requested instruction, it is not error to refuse such instruction. *Newman v. Crawford Constr. Co.*, 303 Ark. 641, 799 S.W.2d 531 (1990).

**Standards for Instructions.**

Jury instructions should be based on the evidence in the case, and instructions stating only abstract legal propositions or submitting matters on which there is no evidence should not be given. *Newman v. Crawford Constr. Co.*, 303 Ark. 641, 799 S.W.2d 531 (1990).

**Undue Emphasis.**

Evidence found that one part of the instruction was emphasized at the expense of another part and constituted error. *Wagner v. Travelers Ins. Co.*, 269 Ark. 976, 601 S.W.2d 277 (Ct. App. 1980).

**16-64-115. Jury instructions — Further instruction during deliberations.**

After the jury has retired for deliberation, if there is a disagreement between them as to any part of the testimony or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their counsel.

**History.** Civil Code, § 353; C. & M. Dig., § 1296; Pope's Dig., § 1521; A.S.A. 1947, § 27-1734.

## CASE NOTES

## ANALYSIS

Discretion of court.  
 Mandatory compliance.  
 Permission to separate.

Presumption of prejudice.  
 Request for clarification.

**Discretion of Court.**

Allowing the jury to have access to

## CASE NOTES

**Signature.**

Although a special verdict finding appellant liable was not signed by one juror, but the special verdict finding 100% liability on the part of appellant was signed by such juror, this inconsistency did not entitle appellant to

a new trial where appellant had waived its objection. *Carroll Elec. Coop. Corp. v. Carlton*, 319 Ark. 555, 892 S.W.2d 496 (1995), overruled in part *Hartford Fire Ins. Co. v. Sauer*, 186 S.W.3d 229 (Ark. 2004).

**Rule 49. Verdicts and interrogatories.**

(a) *General Verdicts and General Verdicts with Interrogatories.* The court may require a jury to return only a general verdict which pronounces generally upon all the issues, or the court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(b) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event, the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. (Amended May 16, 1983; amended November 8, 1993, effective January 1, 1994.)

**Reporter's Notes to Rule 49:** 1. Rule 49 is substantially the same as FRCP 49 and to prior Arkansas law as embodied in, superseded *Ark. Stat. Ann. § 27-1741.1*, et seq. (Repl. 1962). Implicit in the Federal Rule is the right of the trial court to use a general verdict; however, it is believed that less con-

fusion and uncertainty will result if the use of general verdicts is expressly permitted in this rule. Hence, superseded *Ark. Stat. Ann. § 27-1741.1* (Repl. 1962), is retained in principle in this rule.

2. Section (b) does not specifically consider the possibility of inconsistent answers to in-

ich provided that not more than alternate jurors could be called and d. This rule continues the provision superseded *Ark. Stat. Ann. § 39-234* (62) wherein it provided that one peremptory challenge was allowed alternate jurors were used, but that tional challenge could be used only n alternate juror. Thus the only Arkansas law effected by Section (b) duction from three to two in the of alternate jurors which may be

y and was replaced by a juror from without giving either party an ad peremptory challenge, where neither d demonstrate that this irregularity y affected their substantial rights to al. *Arkansas Kraft Corp. v. Coble*, 15 25, 688 S.W.2d 319 (1985).

e. ial court is given great discretion ard to the voir dire of jurors. So long iscretion is not abused, and voir dire ohibited arbitrarily, the trial court, on t appropriate extent of voir dire phe odwin v. Harrison, 300 Ark. S.W.2d 518 (1989); *National Bank of ce v. Beavers*, 304 Ark. 81, 860 32 (1990).

s in a civil case agree upon a rdict of such jury. The parties isist of any number less than ited majority thereof shall be ny case where a verdict is less rdict shall sign the same. I nly shall sign.

utory law by permitting the parties to e that fewer than twelve jurors may se and that a stated majority thereo urn a verdict. Under actual prior in this State, juries with fewer than members have been quite common ractice has not been officially sanc previously, however.

is rule continues the requirement here the verdict is less than unanim hose consenting must sign the verdict

5-53-111, even though a new tort was gnized, and attorneys who were guilty ation were still subject to discipline. v. Redd, 367 Ark. 551, 242 S.W.3d 273

kansas, filing fees and service fees for as are authorized by statute; the trial as exactly correct in assessing these ood v. Tyler, 317 Ark. 319, 877 S.W.2d 94.

ena directing medical doctor to ap- paternity trial and bring mother's records was served by defendant, a the case, therefore, service was im- Barnes v. Barnes, 311 Ark. 287, 843 335 (1992).

a subpoena was not served at least a prior to trial, service was untimely. v. Barnes, 311 Ark. 287, 843 S.W.2d 92).

se this rule does not give the Chan- ert authority to compel an out-of-state to appear to testify, a witness' appear- ould be voluntary, and the witness t be entitled to immunity from arrest § 16-43-102. McNeas v. Mountain 93 F. 1359 (8th Cir. 1993). : W. s.v. State, 304 Ark. 279, 801 296 (1990); Truck Ctr. of Tulsa, Inc. v. 310 Ark. 260, 836 S.W.2d 359 (1992); v. State, 90 Ark. App. 183, 204 S.W.3d 15).

ne court are unnecessary; but erebefore been necessary, it is r order of the court is made or which he desires the court to and his grounds therefor; and, ling or order at the time it is ereafter prejudice him.

o changes in Arkansas practice and e.

**from Chancery Court.**

ls from the chancery court are re- e novo and there is no requirement of s to the findings, conclusions and the court to obtain review on appeal; gly, failure to object to lack of corrob-

oration in divorce case did not preclude re- view of that issue on appeal. Morrow v. Mor- row, 270 Ark. 31, 603 S.W.2d 431 (1980).

**Objections.**

Unless a party has no opportunity to object to a ruling of the court, an objection must be made at the time of the ruling, and the objecting party must make known to the court the action desired and the grounds of the objection. Pearrow v. Feagin, 300 Ark. 274, 778 S.W.2d 941 (1989).

**Preservation for Appeal.**

Where in an automobile damage case the defendant brought the subject of insurance to the attention of the jury by asking the plain- tiff if he had made a collision claim against his insurance carrier for an unrelated acci- dent occurring several months after the acci- dent at issue, and the plaintiff's attorney neither requested that the jury be instructed to disregard the question nor asked for a mistrial, the alleged prejudicial error was not preserved for purposes of appeal under this rule by merely making an objection since the attorney did not indicate to the court the

**Rule 47. Jurors.**

(a) *Examination of Jurors.* The Court shall either permit the parties or their attorneys to conduct the examination of prospective jurors or itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper.

(b) *Alternate Jurors.* The court may direct that not more than two jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the qualifications, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled. The additional peremptory challenge may be used against an alternate juror only and the other peremptory challenges allowed by law shall not be used against an alternate juror.

**Reporter's Notes to Rule 47:** 1. Section of this rule is identical to FRCP 47(a) and confers upon the trial court broad discretion in the examination of prospective jurors. *Labbee v. Roadway Express, Inc.*, 469 F. 2d 169 (C.C.A. 8th, 1972), *Kiernan v. Van Schaik*, 347 F. 2d 775 (C.C.A. 3rd, 1965). Prior Arkansas law was governed by superseded *Ark. Stat. Ann.* § 39-226 (Repl. 1962), which likewise left the mode and manner of voir dire to the

action which he desired the court to take. *Faught v. Ligon Specialized Hauler, Inc.*, 273 Ark. 259, 619 S.W.2d 627 (1981).

**Rehearing on Instructions.**

On a rehearing concerning instructions pre- sented to a jury, ARCP 51, which is specifi- cally directed toward jury instructions, con- trols over this rule. *Dodson Creek, Inc. v. Fred Walton Realty Co.*, 2 Ark. App. 128, 620 S.W.2d 947 (1981).

**Waiver.**

Where, at a hearing concerning a city's denial of a petition for the creation of a street improvement district, both the trial judge and the city's attorney orally agreed that manda- mus was the proper remedy, and the interven- ing property owner failed to raise an objec- tion, the property owner in effect agreed that mandamus was the proper procedure and he thereby waived his right to make an objection at a later time. *Powell v. Bishop*, 279 Ark. 365, 652 S.W.2d 9 (1983).

**Cited:** *Henry v. Cline*, 275 Ark. 44, 626 S.W.2d 958 (1982); *Howard Bldg. Centre v. Thornton*, 282 Ark. 1, 665 S.W.2d 870 (1984).

discretion of the trial court. This discretion did not, however, vest the trial court with arbitrary authority to prohibit voir dire by counsel. *Missouri Pacific Transp. Co. v. John- son*, 197 Ark. 1129, 126 S.W.2d 931 (1939). In drafting this rule, the Committee intended to vest the trial court with sufficient authority to limit voir dire to a reasonable inquiry, but not to prohibit reasonable voir dire by counsel.

2. Section (b) is substantially the same as

abst. ... State, 284 Ark. 206, 680 (1984); *Watson v. State*, 291 Ark. S.W.2d 478 (1987); *Garst v. Cullum*, 12, 726 S.W.2d 271 (1987); *Houston v. State*, 299 Ark. 7, 771 S.W.2d 16 (1989); *McDonald v. Wilcox*, 300 Ark. 445, 17 (1989); *Lee v. State*, 27 Ark. 770 S.W.2d 148 (1989), writ of cert. U.S. 847, 110 S.Ct. 142 (1989); *State v. Lockhart*, 921 F.2d 796 (8th Cir. 1992); *George v. State*, 306 Ark. 360, 813 (1991), amended 818 S.W.2d 951 (1991); *Vann v. State*, 309 Ark. 303, 831 (1992); *Rudd v. State*, 308 Ark. S.W.2d 565 (1992); *Evans v. State*, 38 Ark. 42, (1992); *Whitmore v. Lockhart*, 1105 (E.D. Ark. 1992), aff'd 88th Cir. Ark. 1993; *Edwards v. State*, 126, 864 S.W.2d 866 (1993); *ate*, 317 Ark. 587, 880 S.W.2d 522 (1995); *Harris v. State*, 322 Ark. 729 (1995); *Smallwood v. State*, 813, 935 S.W.2d 530 (1996); *ate*, 53 Ark. App. 266, 922 S.W.2d 927 (1996); *Burton v. State*, 327 S.W.2d 634 (1997); *Clark v. State*, 1, 944 S.W.2d 533 (1997); *Green v. State*, 956 S.W.2d 849 (1997); *ate*, 1, 953 S.W.2d 60 (1998); *Medlock v. State*, 332 Ark. S.W.2d 196 (1998); *Garling v. State*, 3, 975 S.W.2d 435 (1998); *Willis v. State*, 412, 977 S.W.2d 890 (1998); *ate*, 82 Ark. App. 165, 120 S.W.3d 275, 31 (2005); *MacKool v. State*, 365 S.W.3d 676 (2006).

in matters of religion is not reason of their nature his

resentencing where the court question, posed by the jury, as to e studies that he had attended iad inspired him was denied; the i allowed under this rule given nt had already saturated the earing with testimony of his re-

ligious beliefs and practices. *Rowe v. State*, — Ark. App. —, — S.W.3d —, 2004 Ark. App. LEXIS 409 (May 26, 2004). Cited: *Garst v. Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987).

### Rule 611. Mode and order of interrogation and presentation.

(a) *Control by Court.* 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.

(b) *Scope of Cross-Examination.* 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.

(c) *Leading Questions.* 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.

#### RESEARCH REFERENCES

U. Ark. Little Rock L.J. Gitchell, Direct Examination: Some Evidentiary and Practical Considerations, 9 U. Ark. Little Rock L.J. 255 (1997).

Survey — Evidence, 10 U. Ark. Little Rock L.J. 199 (1997).

#### CASE NOTES

*State*, 265 Ark. 315, 578 S.W.2d 206 (1979).

Although prosecutor did not address the value of stolen property on direct examination, the trial court did not abuse its discretion under § 16-43-703 and subsection (a) of this rule in allowing reexamination on the point during redirect because the value of the goods was relevant to the state's case. *Moore v. State*, 362 Ark. 70, 207 S.W.3d 493 (2005).

#### Expert Testimony.

While the proposed cross-examination on expert's extraordinary findings in other cases might have had the effect of diminishing the expert's credibility, his findings in the prior cases were not consequential to a determination of whether his present theory was to be believed in this trial; for this reason, the trial court could restrict the scope of the cross-examination. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994).

#### Harmless Error.

While a trial court erred in refusing to allow appellant to call a witness during a hearing on appellee's petition for an order of protection against appellant, appellant failed to show that he was prejudiced by the trial court's order. *Pablo v. Crowder*, 95 Ark. App. 268, 236 S.W.3d 559 (2006).

#### ANALYSIS

Control by court.  
Credibility of expert.  
Discretion of court.  
Expert testimony.  
Harmless error.  
Leading questions.  
Order of interrogation.  
Scope of cross-examination.

#### Control by Court.

The trial court's remarks to the plaintiff's attorney did not amount to an unmerited rebuke constituting prejudicial error. *Berry v. St. Paul Fire & Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997).

#### Credibility of Expert.

In a condemnation proceeding, an expert witness' knowledge, or lack of knowledge, and his record of accuracy regarding the value of property would go to the credibility to be given to his testimony as an expert witness. *Arkansas State Hwy. Comm'n v. Pulaski Inv. Co.*, 265 Ark. 584, 580 S.W.2d 679 (1979).

#### Discretion of Court.

A trial court may, in the exercise of its discretion, permit inquiry into matters outside the scope of direct examination. *Parker v.*

## ADMINISTRATIVE ORDER NUMBER 6 — BROADCASTING, RECORDING, OR PHOTOGRAPHING IN THE COURTROOM

(a) *Application — Exception.* This Order shall apply to all courts, circuit, district, and appellate, except as set out below.

(b) *Authorization.* A judge may authorize broadcasting, recording, or photographing in the courtroom and areas immediately adjacent thereto during sessions of court, recesses between sessions, and on other occasions, provided that the participants will not be distracted, nor will the dignity of the proceedings be impaired.

(c) *Exceptions.* The following exceptions shall apply:

(1) An objection timely made by a party or an attorney shall preclude broadcasting, recording, or photographing of the proceedings;

(2) The court shall inform witnesses of their right to refuse to be broadcast, recorded, or photographed, and an objection timely made by a witness shall preclude broadcasting, recording or photographing of that witness;

(3) 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, shall not be subject to broadcasting, recording, or photographing.

(4) In camera proceedings shall not be broadcast, recorded, or photographed except with consent of the court;

(5) 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.

(d) *Procedure.* The broadcasting, recording, or photographing of any court proceeding shall comply with the following rules:

(1) The court shall direct that the news media representatives enter into a pooling arrangement for the broadcasting, recording, or photographing of a trial. Any representative of a news medium wanting to broadcast, record, or photograph court proceedings shall present to the court a written statement agreeing to share with other media representatives. The media pool shall select one of its members to serve as pool coordinator. The media pool shall establish its own procedures, not inconsistent with these rules or with the wishes of the court, and the pool coordinator shall arbitrate any problems that arise. If a problem arises that requires the assistance of the court, the pool coordinator alone shall be responsible for coordinating with the court. A plan for the placement of the broadcast equipment shall be prepared and filed by the pool coordinator, subject to the final approval of the court.

(2) The court shall retain ultimate control of the application of these rules over the broadcasting, recording, or photographing of a trial. Decisions made as to the details are final and are not subject to appeal. The court may in its discretion terminate the broadcasting, recording, or photographing at any time. Such a decision should not be made in an effort to edit the proceedings but only as one necessary in the interest of justice.

(3) The media pool may have two cameras in the courtroom during the course of a trial. One camera shall be used for still photography, and one camera shall be used for television photography. Both cameras shall remain in stationary positions outside the bar of the courtroom. Videotape recording

pt. adopted May 6, 1991  
001, effective July 1, 2001

Ark. 372, 108 S.W.3d 622 (2003)  
of a criminal case was necessary to  
defendant's motion to suppress (and  
the record because an appellate  
unable to conduct a de novo review  
a complete record. *George v. State*,  
145, 151 S.W.3d 770 (2004).

h a videotape containing defense  
statements was part of the record on  
the relevant portions had not been  
l, nor had a transcript been pro-  
l the record was not a verbatim  
of what occurred below; thus, the  
mandated to the trial court to settle  
regarding which of the police offi-  
ks were objected to by defendant  
subsequently reviewed by the trial  
which portion of the videotape was  
the jury. *Williams v. State*, 362 Ark.  
W.3d 761 (2005).

he trial judge failed to make a  
record of the business's motion in  
s alone was sufficient to warrant  
the trial court's judgment. *River  
e R. Manufacturers, Inc. v. Booth*,  
p. 3 S.W.3d 611 (2005).  
bradley v. State, 351 Ark. 394, 94  
l (2003).

## ORDER 5 — CRIMINAL TRIAL UNDER AGE

that all courts of this state  
ances, give precedence to the  
criminal, when the alleged  
ely, when a case affected by  
following arraignment, the  
l inform the Administrative  
asons the case has not been  
s the trial court will inform  
use. During the pendency of  
ion of either the state or the  
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and other electronic equipment not a component part of the cameras shall be located in an area remote from the courtroom to be designated by the court.

(4) One additional audio system for radio broadcasting shall be permitted provided that all microphones and related essential wiring will be unobtrusive and located in places designated in advance by the basic courtroom plan. The pool coordinator shall permit the installation of a pickup distribution box to be located outside the courtroom area to allow additional agencies access to the audio feed.

(5) Only television or photographic equipment that does not require distracting sound or light shall be employed to cover court proceedings. No artificial lighting device shall be employed in connection with television cameras. Any court approved alterations in existing lighting or wiring shall be accomplished by and at the expense of the media pool.

(6) Camera and audio equipment shall be installed or removed only when the court is not in session. Film changes shall not be made while court is in session. No audio equipment shall be used to record conversations between attorneys and clients or conversations between attorneys and the court held outside the hearing of the jury.

(e) *Contempt.* Failure to abide by any provision of this Order can result in a citation for contempt against the news representative and his or her agency. (Adopted July 5, 1993; amended May 24, 2001; effective July 1, 2001.)

**Cross References.** As to broadcasting or publishing criminal trial information, see ARCrP 38.1.

#### CASE NOTES

#### Violations.

An alleged violation this Order is not appealable after an ARCrP 24.3(b) conditional

guilty plea. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997).

## ADMINISTRATIVE ORDER NUMBER 7 — ARKANSAS SUPREME COURT AND COURT OF APPEALS RECORDS RETENTION SCHEDULE

### Section 1. Statement of policy.

Unless otherwise provided by law or as set forth herein, all records of the Arkansas Supreme Court and Court of Appeals shall be permanently maintained.

### Section 2. Transfer of permanent records.

a. Physical custody of any record to be maintained permanently, may be transferred to any institution which maintains a special collections department by letter agreement upon approval by the Arkansas Supreme Court. Title to records which must be permanently maintained shall remain with the Arkansas Supreme Court.

b. The Clerk shall permanently maintain a log of transferred records. The log shall list record series, description of records transferred, to whom transferred, and the date of transfer.