Arkansas Association of Defense Counsel

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PROPOSED AMENDMENT TO RULE 4 OF THE ARCP WOULD LIMIT THE APPLICATION OF THE STRICT-COMPLIANCE STANDARD TO DEFAULT SITUATIONS ONLY

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On January 28, 2016, the Arkansas Supreme Court issued a Per Curiam opinion containing proposed changes to the Arkansas Rules of Civil Procedure, made by the Arkansas Supreme Court Committee on Civil Practice. The most noteworthy proposal is the committee's recommendation to eliminate a strict-compliance standard for process and service of process under Rule 4, in all except default situations.

The proposed amendment would substantially revise Rule 4 by adding a new provision that reestablishes a substantial-compliance standard for process and service of process under Rule 4 when the defendant has actual notice of the complaint and has filed a timely answer or Rule 12(b) motion. The new subdivision (k) to Rule 4 would provide as follows:

> (k) *Disregard of Error; Actual Notice*. Any error as to the sufficiency of process or the sufficiency of service of process shall be disregarded if the court determines that the plaintiff substantially complied with the provisions of this rule and that the defendant received actual notice of the complaint and filed a timely answer or a timely motion pursuant to Rule 12(b).

2016 Ark. 29, 2016 Ark. LEXIS 31, *11. According to the Reporter's Notes to the proposed amendment, the purpose of the new subdivision (k) is to return to older Arkansas authority that held the plaintiff to a substantial-compliance standard, both as to the summons and service of process, in cases where default is not at issue. *E.g., Ford Life Ins. Co. v. Parker*, 277 Ark. 516, 644 S.W.2d 239 (1982) (holding the defendants were not prejudiced by defective summonses, which incorrectly stated the number of days defendant had to answer and advised defendants to serve their answers on plaintiff's counsel instead of filing them, because the defendants timely responded to the complaint).

The Committee recognizes that newer cases apply the strict-compliance standard, but asserts that the strict-compliance standard grew out of cases addressing default and should be limited to default cases. "Insistence on strict compliance is a helpful shield in the default situation. But the same standard should not be a sword when the defect in process or service of process was minor and the defendant had actual notice of the complaint and filed a timely response." 2016 Ark. 29, 2016 Ark. LEXIS 31, *19. "When a defendant has actual notice of the complaint and does not default…, due-process concerns are not present and the strict-compliance rule should not apply." *Id.* Therefore, if adopted, the amendment to Rule 4 would permit the use of a strict-compliance standard only as a shield to a default judgment. "Subdivision (k) retains the strict-compliance rule in default situations, while reviving the substantial-compliance standard when the defendant had actual notice of a complaint and files a timely response. In the latter instance, due process is satisfied even if marginal defects in the summons or the service exist." *Id.*

OTHER NOTABLE CHANGES

Other proposed amendments to ARCP include adding language to subdivision 4(b) to provide that, in multi-party cases, only the first-listed party on each side of the case must be stated in the case caption of the summons. Also, the phrase "directed from the State of Arkansas to the defendant to be served" has been added to reflect the holding of *Gatson v. Billings*, 2011 Ark. 125 (holding all judicial process shall run in the name of the State of Arkansas). This new language also makes clear that the summons must be directed to the defendant "to be served." Notably, in a case with multiple defendants, the defendant to be served will not necessarily appear in the case caption of the summons.

Further, the committee proposes revisions to the subdivision addressing personal service inside the state (former subdivision (d), now subdivision (f)), expanding the opportunities for service. For example, in paragraph (f)(1)(B), the phrase "a place where the defendant resides" replaces its counterpart in former (d)(1), "dwelling house or usual place of abode." A person can have multiple residences but only one domicile, which is defined as one's fixed permanent home. In addition, subdivision (f)(1)(D) expands current law by permitting service at a defendant's workplace, if he or she maintains an office or other fixed location for doing business. Also, service may be made on a receptionist or "the person then apparently in charge." The quoted phrase

is taken from *May v. Bob Hankins, Distrib. Co.*, 301 Ark. 494, 785 S.W.2d 23 (1990), in which the Supreme Court upheld service on a bookkeeper who was "more or less in charge" of the office when service was made. Similarly, the subdivisions addressing service on corporate entities, limited liability companies, and partnerships would permit service on the secretary or assistant of those individuals authorized to receive service under the Rule.

Regarding service by warning order, the Committee proposes extending the response time for filing an answer when service is by warning order from 30 days to 60 days, a change reflected in both proposed Rule 4(g) and Rule 12(a)(1).

The Committee also proposes changes to the Official Form of Summons. The introduction to the form would state that the form may be modified as needed in special circumstances, and additional notices, if required, should be inserted as appropriate. Examples include the notices required by statute in unlawful-detainer and replevin actions, and the notice of consent jurisdiction of a state district court that must be included with the summons pursuant to the Committee's proposed amendment to Ark. Sup. Ct. Admin. Order No. 18(6)(d)(1).

Lastly, the Committee proposes two amendments addressing the format of pleadings. First, the Committee proposes amending Rule 10(a) to require all pleadings to contain the name, bar number, mailing address, telephone number, fax number, and email address of the attorney signing the pleading. Second, the Committee proposes amending Administrative Order No. 2 so that it requires a two (2) inch top margin on the first page of each document submitted for filing to accommodate the court's file mark. If a document cannot be drafted to provide this space, the document must include the uniform cover page developed by the Administrative Office of the Courts and found under Forms and Publications at courts.arkansas.gov. This change is meant to ensure that file marks are legible and is necessary in light of electronic filing software.

CONCLUSION

While this article addresses the highlights of the Committee's proposed amendments to the Arkansas Rules of Civil Procedure, it is not exhaustive. The complete Per Curiam opinion, dated January 28, 2016, can be found on the Arkansas Judiciary's website, www.courts.arkansas.gov. Comments on the suggested rule changes should be made in writing before April 1, 2016, and they should be addressed to: Stacey Pectol, Clerk, Supreme Court of Arkansas, Attn.: Civil Procedure Rules, Justice

Building, 625 Marshall Street, Little Rock, Arkansas 72201.

The thanks of the AADC go out to Kimberly D. Young of Friday, Eldredge & Clark for writing this article.

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