

13TH ANNUAL FREE WINTER CLE



UNIVERSITY OF
ARKANSAS | School of Law

Saturday, March 3, 2018

8:00 a.m.-12:00 p.m.

Registration 8:00 a.m.-8:30 a.m.

2018 Free Winter CLE Presents

2 Hours General CLE plus 1 Hour Ethics CLE

ARK CLE Board Program #TRL61129

Use, Analysis and Best Practices for Voir Dire

Clint Saxton

Attorney at Law, Memphis, Tennessee

Practical Demonstration of Voir Dire Skills

Clint Saxton

Attorney at Law, Memphis, Tennessee

*Ethical Considerations in Preparing and Submitting
Pleadings, Motions and Briefs to Trial
and Appellate Courts*

Howard Brill

Former Arkansas Supreme Court Chief Justice

UNIVERSITY OF ARKANSAS SCHOOL OF LAW
ANNUAL FREE WINTER CLE

Saturday, March 3rd; 8:00 a.m. – 12:00 p.m.

University of Arkansas School of Law, E.J. Ball Courtroom
1045 W. Maple Street
Fayetteville, AR

3 CLE HOURS - 2 General, 1 Ethics (requested)

8:00 – 8:30 Registration/Check-in

8:30 – 9:30 **Use, Analysis & Best Practice for Voir Dire.**

By: Clint Saxton, FedEx Express

A presentation of practical suggestions for successful *voir dire* and jury selection. Attendees will gain a greater understanding of analysis of jury pool, connecting with jurors, novel use of analogies in questioning prospective jurors and best practices for *voir dire*.

9:30-9:45 Break

9:45 - 10:45 **Practical Demonstration of Voir Dire Skills.**

By: Clint Saxton, FedEx Express

A practical *voir dire* demonstration with a mock jury pool exploring several scenarios and best practices to gain a successful, fair and impartial jury for your client.

10:45 - 11:00 Break

11:00 - 12:00 **Ethical Considerations in Preparing and Submitting Pleadings, Motions and Briefs to Trial and Appellate Courts.**

Former Chief Justice Howard Brill

This program will cover ethical considerations in submitting pleadings, motions and briefs to trial and appellate courts. Considerations include competence (Rule 1.1), the attorney-client authority (Rule 1.2), diligence (Rule 1.3), issue conflicts (Rule 1.8), meritorious or frivolous claims (Rule 3.1), candor toward the tribunal (Rule 3.3), use of inadvertently received materials (Rule 4.4), demeanor (Rule 8.2), and conduct prejudicial to the administration of justice (Rule 8.4).

Speaker Bios

Clint Saxton is an attorney in Memphis, TN. He previously served as the managing director of litigation at Federal Express. He has 45 years experience in labor law, litigation and general practice.

Mr. Saxton has lectured on the subject of jury selection at Stanford Law School, Washington & Lee University School of Law, McGeorge School of Law, University of Tennessee College of Law, Florida State University College of Law and Santa Clara University School of Law.

See attached for list of presentations

Howard W. Brill, University Professor and Vincent Foster Professor of Legal Ethics & Professional Responsibility, is a frequent Continuing Legal Education speaker on ethics and damages. His programs include: Lessons in the Law from the Life and Music of Johnny Cash; the Razorbacks, the NCAA and the Law; Lawyers in the Movies of John Grisham; the *Seven Deadly Sins* (lawyer's edition); and *The Godfather*.

From September 2015 to December 2016 Professor Brill served as the Chief Justice of the Arkansas Supreme Court. He played a role in the adoption of changes to the Code of Judicial Conduct and the Rules of Professional Conduct. His opinions included language from Bob Dylan, William Butler Yeats, and Bob Dylan.

R. CLINTON SAXTON
4260 Nellwood Lane
Memphis, TN 38117
901.763.3418

LEGAL EXPERIENCE

Federal Express Corporation, Memphis, Tennessee

- Managing Director, Government Investigation Team, 2012 to January 2017
- Managing Director, Employment Litigation Team, June 2004 to March 2012
- Senior Attorney, March 2001 to June 2004
- Managing Director responsible for FedEx's defense of conspiracy and money laundering charges brought in U.S.D.C. Northern District of California. All charges dismissed on June 13, 2016 by the government after three days of trial.
- Defense verdict-Pilot Merger Case-Savings of \$45M
- Five jury trial wins, no losses
- Five Star Award 2006 and 2014
- Diversity Champion 2008

Private Practice, West Memphis, Arkansas

- Saxton & Ayres, 1980 to 2001
- Rubens, Rubens & Saxton, 1974 to 1980
 - General civil trial practice on both the plaintiff and defense side including business, banking, construction, personal injury, zoning, trusts, annexation, and domestic relations.
 - Over 40 jury trials; hundreds of non-jury trials; held the record for the three highest verdicts in Crittenden County.

*Adjunct Professor
University of Memphis -
2018*

ADMISSIONS AND HONORS

- Tennessee 2001; Arkansas 1974
- United States Supreme Court 1987; Sixth Circuit Court of Appeals 2002; Eighth Circuit Court of Appeals 1982; Eastern District of Arkansas 2002; Western District of Arkansas 1977; and Western District of Tennessee 1979
- Rule 31 mediator qualified by the Tennessee Alternative Dispute Resolution Commission
- Martindale-Hubbell "AV" rating
- Master, Leo Bearman, Sr. American Inn of Court
- Fellow, Memphis Bar Association Foundation
- International Association of Defense Counsel
- American Board of Trial Advocates
- Best of the Bar/Corporate Counsel, *Memphis Business Journal* 2016

EDUCATION

- University of Arkansas, JD, 1974, Dean's List
- University of Alabama, B.A. in Journalism, 1971

PERSONAL

• Born December 25, 1948, in Tyler, Texas. Graduated from high school in 1966 in Little Rock, Arkansas. Attended University of Alabama on an athletic scholarship. Captain, U.S. Army (Artillery), retired. Married to Mary Carpenter Saxton for 40 years. Daughter, Elizabeth Inman, attorney at Dollar General. Son, William Saxton, attorney and presently working for Credit Suisse Bank.

REPORTED CASES (Attorney of Record)

FedEx Cases

- *Zajac v. FedEx Express Anca Station*, 68 Fed. Appx. 95 (9th Cir. 2003).
- *Blue v. Federal Express Corporation*, 66 Fed. Appx. 542 (6th Cir. 2003).
- *Scott v. Federal Express Corporation*, 54 Fed. Appx. 455 (8th Cir. 2003).
- *Wilson v. FedEx Corporation*, 2009 U.S. Dist LEXIS 60844 (W.D. Tenn. June 30, 2009).
- *Starks-Umoja v. Federal Express Corporation*, 341 F. Supp. 2d 979 (W.D. Tenn. 2003).

Private Practice Cases

- *Lair v. Oglesby, et al.*, 14 F.3d 15 (8th Cir. 1993).
- *Jackson, et al. v. Anchor Packing Co., et al.*, 994 F.2d 1295 (8th Cir. 1993).
- *Robinson, et al. v. Clark Contracting Co., Inc.*, 992 F.2d 154 (8th Cir. 1993).
- *Wiener, et al. v. Eastern Arkansas Planting Company, et al.*, 975 F.2d 1350 (8th Cir. 1992).
- *McGee v. Hester*, 815 F.2d 1193 (8th Cir. 1986).
- *Wiener, et al. v. Farm Credit Bank of St. Louis, et al.*, 759 F. Supp. 510 (E.D. Ark. 1991).
- *United States v. McClendon, et al.*, 712 F. Supp. 723 (E.D. Ark. 1988).
- *Murphy v. City of West Memphis*, 352 Ark. 315 (Ark. 2003).
- *Clement v. Larkey*, 314 Ark. 488A (Ark. 1993).
- *Clement v. Larkey*, 314 Ark. 489 (Ark. 1993).

- *MIC v. Barrett*, 313 Ark. 527 (Ark. 1993).
- *Warhurst v. White, et al.*, 310 Ark. 546 (Ark. 1992).
- *Norsworthy v. Norsworthy*, 289 Ark. 479 (Ark. 1986).
- *Boyles v. Boyles*, 268 Ark. 120 (Ark. 1980).
- *Rainey v. Holland, et al.*, 1999 Ark. App. LEXIS 292 (Ark. Ct. App. 3rd Div. May 12, 1999).

PRESENTATIONS

- Instructor, International Association of Defense Counsel Trial Academy, Stanford University. July 28 – August 4, 2017.
- *Jury Selection*, University of Memphis School of Law, October 31, 2016.
- *Use of Analogies in Voir Dire*, The Howell Edmunds Jackson American Inn of Court, Jackson, TN, April 5, 2016.
- *Jury Selection Presentation*, Butler Snow, January 28, 2016.
- *Mock Jury Selection*, Memphis Federal Bar Seminar, August 21, 2015.
- *Legal Privilege, Litigation Avoidance and Email Best Practices* Memphis Aircraft Line Maintenance, July 13, 2015.
- *Legal Privilege*, Air Ops Management, May 5, 2015.
- *Understanding Legal Privilege and Litigation Avoidance*, FedEx Global Operations Control Management Meeting, September 3, 2014.
- *Jury Selection*, Stanford University School of Law, Trial Advocacy Competition Team, November 4, 2013.
- *Jury Selection*, University of Santa Clara School of Law, Trial Advocacy Competition Team, November 4, 2013.
- *Overview of Federal Sentencing Guidelines for Organizations: Effective Compliance & Ethics Programs*, FedEx Corporate Integrity & Compliance Council, Federal Express Corporation, October 16, 2013.
- *Jury Selection*, University of Tennessee Law School, September 16, 2013.
- *Internal Investigation Protocol & Guidelines Seminar* presented APAC & Security, June 24, 2013.

- *Global Compliance & Ethics Council Internal Investigation*, Federal Express Corporation, May 16, 2013.
- *Use of Analogies in Voir Dire*, IADC Webinar, April 23, 2013.
- *Mock Voir Dire Exercise* – FedEx Express Attorneys, Irvine, CA, March 14, 2013.
- *Jury Selection*, Washington & Lee School of Law, Lexington, VA, February 20, 2013.
- *Jury Selection*, Florida State University School of Law, Tallahassee, FL, January 17, 2013.
- *Jury Selection*, University of Tennessee School of Law, Knoxville, TN, November 9, 2012.
- *Attorney Fees Awards and Contests – Everyone Talks About It But What Can Be Done?*, ALFA International, New York, NY, June 15, 2012.
- *Jury Selection, Trial Practice Seminar*, Federal Express Headquarters, Memphis, TN, May 2, 2012.
- *Jury Selection*, University of Arkansas School of Law, Fayetteville, AR, March 29, 2012.
- *Jury Selection*, McGeorge School of Law, Sacramento, CA, March 26, 2012.
- *Jury Selection*, McGeorge School of Law, Sacramento, CA, October 31, 2011.
- *Jury Selection*, Washington & Lee School of Law, Lexington, VA, October 26, 2011.
- *Trial Practice Academy*, Instructor-FedEx Ground NITA Training Program, Moon Township, PA, May 9-12, 2011.
- *Jury Selection*, Washington & Lee School of Law, Lexington, VA, December 1, 2010.
- *Lessons Learned from Large Collective Actions*, ALFA International, Laguna Niguel, CA, November 11-12, 2010.
- *Jury Selection Training*, FedEx Ground, Moon Township, PA, August 18, 2010.
- *Reducing Risk in Wage & Hour Litigation*, ALFA International, New York, NY, June 16-18, 2010.
- *Jury Selection*, Memphis Bar Association, Annual Employment Law Seminar, Memphis, TN, December 9, 2009.
- *Jury Selection*, Washington & Lee School of Law, Lexington, VA, November 4, 2009.

- *Stubbing Your Toe on the First Step: How to Avoid the Pain of Selecting The Wrong Juror*, Arkansas Bar Association, Labor & Employment Law Conference, Little Rock, AR, March 13, 2009.
- *From the Bench: A Case for Jury Questionnaires*, OPCO Litigation Roundtable, Memphis, TN, July 29, 2008.
- *Retaining Outside Counsel*, ALFA International, Half Moon Bay, CA, October 3-5, 2007.
- *Recent Developments in Discrimination Law*, ALFA International, Tucson, AZ, March 2-4, 2006.

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13TH ANNUAL FREE WINTER CLE



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Use, Analysis and Best Practices for Voir Dire.

Clint Saxton

Attorney at Law, Memphis, Tennessee

STATEMENT OF THE CASE

This is a failure-to-hire claim based on race. Plaintiff is an African-American male. Two other candidates interviewed for the job, and both are Caucasian. Plaintiff has more experience and credentials, an M.B.A. and C.P.A. designation. The women have undergraduate degrees. Plaintiff omitted his current employment and salary. Interviewers felt the Plaintiff was over qualified and were concerned about his longevity on the job. The woman who was hired worked at the employer for several years and was familiar with all the company systems.

**JURY SELECTION PRESENTATION
CLINT SAXTON, ATTORNEY
MEMPHIS, TENNESSEE**

**UNIVERSITY OF ARKANSAS SCHOOL OF LAW
2018 FREE WINTER CLE
MARCH 3, 2018**

PRESENTATION

- I. PURPOSE TODAY
 - A. Aware of Importance
 - 1. Competent Attorney
 - 2. Increase Chances to Win
 - 3. Most Overlooked
 - 4. Less Taught
 - B. Provide Guide – Outline
 - 1. Written Material
 - 2. How To – Fits All
 - 3. Clint Saxton’s Way
 - 4. Paper & Attachments
- II. TRIAL COURT WIDE DISCRETION
- III. PRACTICAL PREPARATION
 - A. Courthouse Intelligence
 - 1. Judge
 - a. What does she allow?
 - b. Questionnaires
 - c. Written questions
 - d. Oral *voir dire*
 - e. Number of jurors
 - f. Jury instructions

2. Process
 - a. Number of strikes
 - b. Seating
 - c. Podium
 - d. Striking Process – Preemp & Cause
 - 1) All at once
 - 2) Back strikes
 - 3) Insurance
 - 4) Cause
3. Conduct of *Voir Dire*
 - a. How much time
 - b. Follow up only
 - c. Pet peeves
 - d. Watch *voir dire*
4. Opponent Intelligence
 - a. Motions in limine – Improper questions
 - b. Staking out jurors
 - c. Extract a pledge – *Sneed v. Stovall*, 156 S.W. 3d 1, 6-7 (Tenn. Ct. App. 2004)
 - d. Objection – approach bench
 - e. Pre-Trial
5. Social Media & Other Investigative Tools
 - a. Review ethnical guidelines
 - b. Can't do indirectly what you can't do directly

IV. PREPARATION – *VOIR DIRE*

A. Purpose

1. Bias – Hurt You
2. Excuse for Cause
3. Themes
4. Laws – Issues

5. Arm Favorable Jurors
6. Protect Favorable Jurors

B. All Forms: Questionnaire, Written & Oral

1. Think – Case
2. Consistent With Instructions
3. Themes
4. Hear Your Story
 - a. Questionnaire
 - b. Written questions
 - c. Oral *voir dire*
5. Specific Topics: Jury Selection Toolkit, pp. 10-12
 - a. Fair and impartial
 - b. Corporate equal footing
 - c. Business judgment rule
 - d. Reasonable doubt
 - e. Damages
 - f. Preponderance of evidence
 - g. Sympathy (empathy)
 - h. All the proof is in

Nease v. State, 592 S.W. 2d 327, (Tenn.Crim. App. 1979) – caveat (read it)

V. QUESTIONNAIRES

A. Motion: Attachments – Easy Process

- Address Early
 - Joint Motion
 - Agreed Questionnaire
1. Speed
 2. Privacy for Jurors
 3. Easy Process
 4. Pay Expenses
 5. Candid

- B. Challenge for Cause
- C. Use Their Information – Your Themes & Legal Proposition
- VI. WRITTEN QUESTIONS
 - A. Does Judge have set questions?
 - B. Introductory Questions
 - C. Prepare for the Court
- VII. PREPARATION FOR ORAL *VOIR DIRE*
 - A. General & Document Preparation
 - 1. Review Questionnaires or Advance Limited List; Know Everything About Them
 - 2. Juror List – Alphabetical, Tip offs
 - 3. Rank Jurors – Alternate Strikes
 - 4. Seating Chart
 - 5. For Cause Challenges
 - a. Judges Process
 - b. Copies marked for Judge
 - c. Applicable Law
 - d. Protect the record
 - 6. Jury Instructions
 - 7. Law
 - 8. Baston List
 - B. Specific Questioning
 - 1. Idea of Unfavorable and Favorable by Questionnaire
 - 2. Trey Cox Article – Ex. I
 - 3. Individual or Group
 - a. “How do you feel?”
 - b. Alternate questions for or against corporations
 - c. Flush out and lock in unfavorable jurors for cause

- d. Positive or negative jurors
 - 1) Help with themes
 - 2) Law propositions
- 4. Analogies – Use Everyday Events Supported by Jury Instructions
 - a. Fair and Impartial – Personalize
 - 1) Sports
 - 2) Food
 - 3) Child’s basketball game
 - b. Equal Footing
 - 1) David v. Goliath
 - 2) Underdog
 - 3) Bend the rules
 - c. Business Judgment
 - 1) How do you feel about an employer make a decision ...
 - 2) Better on paper than in person
 - 3) Best position to determine whether someone will be a good fit
 - 4) Longevity on job
 - d. All the Proof In
 - 1) Twins fighting
 - e. Sympathy/Empathy
 - f. Preponderance of the Evidence

C. *Voir Dire* Outline

1. *Tenn. R. Civ. P.* 47.01: The court shall permit the parties or their attorneys to conduct the examination. At or near the beginning of jury selection, the court shall permit counsel to introduce themselves and make brief, non-argumentative remarks that inform the potential jurors of the general natural of the case.

D. Objection Response

- Criminal – Reasonable doubt
- Civil – Reasonable doubt v preponderance of the evidence
 - Damages
- Defense Instruction
 - Corporation Same as Individual
 - All the Proof Is In
 - Business Judgement
 - Hypothetical/Analogy
 - Hypotheticals (Analogies) are appropriate if related to a jury instruction or other important issues in the case. *See Pait v State*, 112 So.2d 380(1959); *U.S. v Blount*, 479 F.2d 650, 651-52 (6th Cir. 1973); *Hayes v Commonwealth of KY*, 175 S. W. 3d 574 (KY 2005)

VIII. DO'S AND DON'TS

- A. Jurors Don't Miss a Thing
- B. Be Yourself
- C. Conversational – Strong Voice
- D. Dress
- E. No Fragrances
- F. First Impression
- G. Courthouse Intelligence – Clerks – Bailiffs
- H. Polite
- I. Open-ended Questions; How Do You Feel About an Employer ...
- J. Leading Questions: Judge Foster Will Instruct You
- K. Guidance from Court in Advance
- L. Consult with Client
- M. Know Opponent – Objection – Promise – Pledge – Specific Facts *Sneed v Stovall*, 156 S. W. 3d 1, 6-7 (Tenn. Ct. App. 2004)

- N. Know Jurors
 - O. Avoid Legalese: “Down Home” Touch
 - P. Can’t Change Mind
 - Q. Don’t Be Repetitive
 - R. Avoid Being Strong and Overbearing
 - S. Listen
 - T. Use of Trial Team – Notes
- IX. FOR CAUSE DIALOG – TREY COX – EX. I, p. 16
- 1st Step: Strong opinion
 - 2nd Step: Paraphrase strong opinion
 - 3rd Step: Why feel that way
 - 4th Step: Long time
 - 5th Step: Stick by your guns or easily swayed
 - 6th Step: Like me in Alabama or other analogy
 - 1. Not a bad person
 - 2. Just the way it is
 - 7th Step: Hill to climb;
Leg up;
Not an even playing field
 - 8th Step: Hard to be fair and impartial

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Practical Demonstration of Voir Dire Skills.

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Attorney at Law, Memphis, Tennessee

**OUTLINE OF VOIR DIRE
CLINT SAXTON, ATTORNEY
MEMPHIS, TENNESSEE**

**UNIVERSITY OF ARKANSAS SCHOOL OF LAW
2018 FREE WINTER CLE
MARCH 3, 2018**

I. INTRODUCTION

1. Instruction
2. How do you feel
3. Hiring
4. Best Fit – Who in best position
5. Fair – Not test
6. Honest
7. Good on paper
8. Hire based solely on resume
9. Longevity

II. HONOR

1. Honor - Acme
2. June Smith

III. FACTS & THEMES

1. Not Discrimination
2. Smith - Longevity - Best Fit
3. Jennifer Beard
4. Not Forthcoming - Honesty

IV. PURPOSE

1. Best Juror
2. Not to Pry
3. Private - Bench
4. Questionnaires - Candid Answers
5. No wrong answer

V. FAIR & IMPARTIAL

1. Bad Person - Things in our lives
2. Better for other cases
3. Football & Liver Analogies
4. Leg up - Subconsciously

VI. EQUAL FOOTING-UNDERDOG

1. Tennis
2. Instruction by Court - All parties-Equal
3. Corporations - Questions

VII. BUSINESS JUDGMENT

VIII. ALL THE PROOF IN

1. Twins
2. Fair
3. Law
4. All the Proof In

IX. EMPATHY

1. Disconnect juror from Plaintiff
2. Honest in Application

X. STRIKE FOR CAUSE

1. Rhea
2. Walter

JUROR QUESTIONNAIRE

Please fill out completely. Do not write on the back of any page as copies will be made. If you need more room to answer a question, continue at the bottom or side of the page, or on the last page.

Name: Estes Folk

Age: 34 Gender: Male Female

1. Occupation: CEO Landscape Co. For how long: 2 yrs

Who is your present employer: Folk & Son Lawn Care

What is your title or position: CEO

What do you do at work: _____

Is your job considered a management position? YES NO

Do you supervise anyone at your job? YES NO

Have you, any member of your family, or someone close to you been involved with personnel matters on the job, including hiring/firing, employee evaluation, employee promotions or pay determination, etc.?

YES NO

If yes, please explain: I hire & fire people. Set pay

2. What is your marital status?

Single and never married

Currently married and have been for _____ years

Married in the past for _____ years

Single, but living with domestic partner for _____ years

Widowed/widower, married in the past for _____ years

Other

3. What is the last level of education you completed?

Grade school or less

Some high school

High school graduate or GED

Some college

College graduate

Post graduate work

4. Do you have any special or professional licenses?

YES NO

If yes, please describe: *City of Dyersburg License*

5. If married or living with a domestic partner, is your spouse or domestic partner employed outside the home?

YES NO

a) If Yes, what does he/she do and where is he/she employed?

b) If No, what work outside the home has he/she ever done?

6. Have you, any relatives, or anyone close to you ever been self-employed or owned a business of any kind?

YES NO

If Yes, please explain: *My Daddy owned the business before me*

7. Have you ever served as a juror in the past?

YES NO

If Yes, please explain:

8. Have you or anyone close to you ever worked for an attorney, law firm, judge, or in any other area of the law?

YES NO

If yes, please explain:

9. Have you or anyone you know ever had a serious or legal dispute with an employee or employer?

YES NO

If yes, what was the nature of the dispute?

10. Have you, any close friend, or family member ever felt discriminated against at your work because of your age, race, gender, religion or national origin?

YES NO

If yes, please explain: *Fired because he was African-American*

11. Have you ever filed a grievance or claim regarding any employment related issues?

YES NO

If yes, please explain:

12. Do you feel you have ever been denied a promotion or a job within a company based on gender, race, national origin, religion, age, etc.?

YES NO

If yes, please explain:

13. Have you ever had any training (legal, human resources, etc.) as it pertains to non-discrimination in the workplace?

YES NO

If yes, please explain: *I took an human resources course*

14. Aside from issues of discrimination, have you ever felt treated unfairly at work for any other reason?

YES NO

If yes, please explain:

15. Have you or anyone you know ever worked for ACME?

YES NO

If yes, please explain: *Neighbor & cousin work there*

16. Have you heard, or read anything suggesting that ACME is either a good company to work for or a bad company to work for?

YES NO

If yes, please explain how that has impacted your opinion of ACME:

Neighbor likes it. Cousin doesn't like it.

17. Do you currently or anyone you know ever worked for a competitor of ACME (e.g., UPS, DHL, Airborne Express)?

YES NO

If yes, please explain:

18. Have you or anyone you know ever had a personal or business experience with or financial interest in ACME that would affect your ability to render a fair and impartial verdict in this case? *NO*

19. Have you ever had any negative experiences with ACME?

YES NO

If yes, please explain:

Lost a package & didn't pay me full value

20. What are your personal feelings—good or bad—about large corporations?

Some good & some bad

21. What are your feelings about ACME?

Very positive Positive Indifferent Negative Very negative

22. The Judge will instruct you on the law that will guide your decisions. The Judge may instruct you that a corporation has a right to make decisions—be they right or wrong, good or bad, sound or unsound, fair or unfair—as long as those decisions are not discriminatory or otherwise unlawful. Would you have trouble following such an instruction, based on some life experience or feeling about employers/big business?

YES NO

If yes, please explain:

23. If, after hearing all the evidence, you determine that Plaintiff has not proven racial discrimination but you think the manner in which Plaintiff was not hired was unfair (in other words, there was something about the hiring process that you did not like), would you have any difficulty finding that there was no race discrimination?

I would have to hear the evidence

24. Do you think you might be tempted to substitute your own views of company policy for ACME's policy?

YES NO

If yes, please explain why or why not:

I might not agree

25. Have you, any close friend, or family member ever been a member of a labor union or worked under a union collective bargaining agreement?

YES NO

If yes, please explain and identify any union position held:

26. Individuals and corporations are to be treated equally and are entitled to a fair and impartial trial based on the same legal standards. Do you have any personal feelings that would prevent you from treating a large corporation equally to an individual?

YES NO

If yes, please explain:

27. Please use this space to inform the court of any further information you feel concerns your ability to serve as a trial juror.

think I would be a good juror.

JUROR QUESTIONNAIRE

Please fill out completely. Do not write on the back of any page as copies will be made. If you need more room to answer a question, continue at the bottom or side of the page, or on the last page.

Name: Katie Eleazer

Age: 45 Gender: Male _____ Female

1. Occupation: CPA For how long: 20yrs
Who is your present employer: Eleazer & Muller LPC
What is your title or position: President
What do you do at work: Advise clients, tax returns, PaLS, etc
Is your job considered a management position? YES NO _____
Do you supervise anyone at your job? YES NO _____

Have you, any member of your family, or someone close to you been involved with personnel matters on the job, including hiring/firing, employee evaluation, employee promotions or pay determination, etc.?

YES NO _____
If yes, please explain: I've dealt with all kinds of employment in the past 7-8yrs.

2. What is your marital status?
_____ Single and never married
_____ Currently married and have been for _____ years
 Married in the past for 22 years
_____ Single, but living with domestic partner for _____ years
_____ Widowed/widower, married in the past for _____ years
_____ Other

3. What is the last level of education you completed?
_____ Grade school or less
_____ Some high school
_____ High school graduate or GED
_____ Some college
 College graduate
 Post graduate work

4. Do you have any special or professional licenses?

YES NO

If yes, please describe: *CPA license*

5. If married or living with a domestic partner, is your spouse or domestic partner employed outside the home?

YES NO

a) If Yes, what does he/she do and where is he/she employed?

b) If No, what work outside the home has he/she ever done?
Car dealer

6. Have you, any relatives, or anyone close to you ever been self-employed or owned a business of any kind?

YES NO

If Yes, please explain:

See above

7. Have you ever served as a juror in the past?

YES NO

If Yes, please explain:

8. Have you or anyone close to you ever worked for an attorney, law firm, judge, or in any other area of the law?

YES NO

If yes, please explain:

My sister is a lawyer

9. Have you or anyone you know ever had a serious or legal dispute with an employee or employer?

YES NO

If yes, what was the nature of the dispute?

10. Have you, any close friend, or family member ever felt discriminated against at your work because of your age, race, gender, religion or national origin?

YES NO

If yes, please explain

I felt my former employer paid males more than females.

11. Have you ever filed a grievance or claim regarding any employment related issues?

YES NO

If yes, please explain:

12. Do you feel you have ever been denied a promotion or a job within a company based on gender, race, national origin, religion, age, etc?

YES NO

If yes, please explain:

13. Have you ever had any training (legal, human resources, etc.) as it pertains to non-discrimination in the workplace?

YES NO

If yes, please explain:

My firm has an HR consultant who provides advice.

14. Aside from issues of discrimination, have you ever felt treated unfairly at work for any other reason?

YES NO

If yes, please explain:

15. Have you or anyone you know ever worked for ACME?

YES NO

If yes, please explain:

My nephew worked at the Memphis airport during college.

16. Have you heard, or read anything suggesting that ACME is either a good company to work for or a bad company to work for?

YES NO

If yes, please explain how that has impacted your opinion of ACME:

I have read that it is one of the most admired companies in the world.

17. Do you currently or anyone you know ever worked for a competitor of ACME (e.g., UPS, DHL, Airborne Express)?

YES NO

If yes, please explain:

18. Have you or anyone you know ever had a personal or business experience with or financial interest in ACME that would affect your ability to render a fair and impartial verdict in this case?

Nope

19. Have you ever had any negative experiences with ACME?

YES NO

If yes, please explain:

They lost my package

20. What are your personal feelings—good or bad—about large corporations?

I'm ambivalent. Some are good.... others

21. What are your feelings about ACME?

are not so good.

Very positive Positive Indifferent Negative Very negative

22. The Judge will instruct you on the law that will guide your decisions. The Judge may instruct you that a corporation has a right to make decisions—be they right or wrong, good or bad, sound or unsound, fair or unfair—as long as those decisions are not discriminatory or otherwise unlawful. Would you have trouble following such an instruction, based on some life experience or feeling about employers/big business?

YES NO

If yes, please explain:

23. If, after hearing all the evidence, you determine that Plaintiff has not proven racial discrimination but you think the manner in which Plaintiff was not hired was unfair (in other words, there was something about the hiring process that you did not like), would you have any difficulty finding that there was no race discrimination?

NO

24. Do you think you might be tempted to substitute your own views of company policy for ACME's policy?

YES NO

If yes, please explain why or why not:

All depends on the policy

25. Have you, any close friend, or family member ever been a member of a labor union or worked under a union collective bargaining agreement?

YES NO

If yes, please explain and identify any union position held:

26. Individuals and corporations are to be treated equally and are entitled to a fair and impartial trial based on the same legal standards. Do you have any personal feelings that would prevent you from treating a large corporation equally to an individual?

YES NO

If yes, please explain:

27. Please use this space to inform the court of any further information you feel concerns your ability to serve as a trial juror.

JUROR QUESTIONNAIRE

Please fill out completely. Do not write on the back of any page as copies will be made. If you need more room to answer a question, continue at the bottom or side of the page, or on the last page.

Name: B. D. "Bud" Finley

Age: 61 Gender: Male Female

1. Occupation: Developer For how long: 10 yrs.

Who is your present employer: Self

What is your title or position: CEO + Chairman of Board

What do you do at work: Run a company

Is your job considered a management position? YES NO

Do you supervise anyone at your job? YES NO

Have you, any member of your family, or someone close to you been involved with personnel matters on the job, including hiring/firing, employee evaluation, employee promotions or pay determination, etc.?

YES NO

If yes, please explain: Over the years I have dealt with all of the above.

2. What is your marital status?

Single and never married

Currently married and have been for _____ years

Married in the past for 35 years

Single, but living with domestic partner for _____ years

Widowed/widower, married in the past for _____ years

Other

3. What is the last level of education you completed?

Grade school or less

Some high school

High school graduate or GED

Some college

College graduate

Post graduate work

4. Do you have any special or professional licenses?

YES NO

If yes, please describe: *Real estate*

5. If married or living with a domestic partner, is your spouse or domestic partner employed outside the home?

YES NO

a) If Yes, what does he/she do and where is he/she employed?

b) If No, what work outside the home has he/she ever done?

6. Have you, any relatives, or anyone close to you ever been self-employed or owned a business of any kind?

YES NO

If Yes, please explain: *I have been developing shopping centers & subdivisions for 10 yrs. I sold my communication business 10 yrs. ago.*

7. Have you ever served as a juror in the past?

YES NO

If Yes, please explain: *Criminal trial years ago*

8. Have you or anyone close to you ever worked for an attorney, law firm, judge, or in any other area of the law?

YES NO

If yes, please explain:

9. Have you or anyone you know ever had a serious or legal dispute with an employee or employer?

YES NO

If yes, what was the nature of the dispute? *I have had several.*

10. Have you, any close friend, or family member ever felt discriminated against at your work because of your age, race, gender, religion or national origin?

YES NO

If yes, please explain:

11. Have you ever filed a grievance or claim regarding any employment related issues?

YES NO

If yes, please explain:

12. Do you feel you have ever been denied a promotion or a job within a company based on gender, race, national origin, religion, age, etc?

YES NO

If yes, please explain:

13. Have you ever had any training (legal, human resources, etc.) as it pertains to non-discrimination in the workplace?

YES NO

If yes, please explain: *Seminars*

14. Aside from issues of discrimination, have you ever felt treated unfairly at work for any other reason?

YES NO

If yes, please explain:

15. Have you or anyone you know ever worked for ACME?

YES NO

If yes, please explain:

16. Have you heard, or read anything suggesting that ACME is either a good company to work for or a bad company to work for?

YES NO

If yes, please explain how that has impacted your opinion of ACME:

I think it is a fine company with a great leader

17. Do you currently or anyone you know ever worked for a competitor of ACME (e.g., UPS, DHL, Airborne Express)?

YES NO

If yes, please explain:

18. Have you or anyone you know ever had a personal or business experience with or financial interest in ACME that would affect your ability to render a fair and impartial verdict in this case? *NO*

19. Have you ever had any negative experiences with ACME?
 YES NO
If yes, please explain:

20. What are your personal feelings—good or bad—about large corporations?
As a general rule, I think corporations are good, but there are plenty examples of corporations having poor leadership.

21. What are your feelings about ACME? *leadership?*
 Very positive Positive Indifferent Negative Very negative

22. The Judge will instruct you on the law that will guide your decisions. The Judge may instruct you that a corporation has a right to make decisions—be they right or wrong, good or bad, sound or unsound, fair or unfair—as long as those decisions are not discriminatory or otherwise unlawful. Would you have trouble following such an instruction, based on some life experience or feeling about employers/big business?
 YES NO
If yes, please explain:

23. If, after hearing all the evidence, you determine that Plaintiff has not proven racial discrimination but you think the manner in which Plaintiff was not hired was unfair (in other words, there was something about the hiring process that you did not like), would you have any difficulty finding that there was no race discrimination? *NO*

24. Do you think you might be tempted to substitute your own views of company policy for ACME's policy?
 YES NO
If yes, please explain why or why not:
How they run their business's their business

25. Have you, any close friend, or family member ever been a member of a labor union or worked under a union collective bargaining agreement?

YES NO

If yes, please explain and identify any union position held:

26. Individuals and corporations are to be treated equally and are entitled to a fair and impartial trial based on the same legal standards. Do you have any personal feelings that would prevent you from treating a large corporation equally to an individual?

YES NO

If yes, please explain:

27. Please use this space to inform the court of any further information you feel concerns your ability to serve as a trial juror.

JUROR QUESTIONNAIRE

Please fill out completely. Do not write on the back of any page as copies will be made. If you need more room to answer a question, continue at the bottom or side of the page, or on the last page.

Name: Phil O'Connor

Age: 58 Gender: Male Female

1. Occupation: Office Manager For how long: 15 yrs.

Who is your present employer: Bruce Flooring

What is your title or position: Office Manager

What do you do at work: In Charge of Office at Manufacturing plant

Is your job considered a management position? YES NO

Do you supervise anyone at your job? YES NO

Have you, any member of your family, or someone close to you been involved with personnel matters on the job, including hiring/firing, employee evaluation, employee promotions or pay determination, etc.?

YES NO

If yes, please explain: We have employment problems from time to time

2. What is your marital status?

Single and never married

Currently married and have been for 35 years

Married in the past for years

Single, but living with domestic partner for years

Widowed/widower, married in the past for years

Other

3. What is the last level of education you completed?

Grade school or less

Some high school

High school graduate or GED

Some college

College graduate

Post graduate work

4. Do you have any special or professional licenses?
 YES NO
If yes, please describe:

5. If married or living with a domestic partner, is your spouse or domestic partner employed outside the home?
 YES NO

a) If Yes, what does he/she do and where is he/she employed? *School teacher*
b) If No, what work outside the home has he/she ever done?

6. Have you, any relatives, or anyone close to you ever been self-employed or owned a business of any kind?
 YES NO
If Yes, please explain:

7. Have you ever served as a juror in the past?
 YES NO
If Yes, please explain: *Water damage to neighbor's house.*

8. Have you or anyone close to you ever worked for an attorney, law firm, judge, or in any other area of the law?
 YES NO
If yes, please explain:

9. Have you or anyone you know ever had a serious or legal dispute with an employee or employer?
 YES NO
If yes, what was the nature of the dispute?

10. Have you, any close friend, or family member ever felt discriminated against at your work because of your age, race, gender, religion or national origin?
 YES NO
If yes, please explain: *I know people at work who felt*

they were discriminated against

11. Have you ever filed a grievance or claim regarding any employment related issues?

YES NO
If yes, please explain:

12. Do you feel you have ever been denied a promotion or a job within a company based on gender, race, national origin, religion, age, etc?

YES NO
If yes, please explain:

13. Have you ever had any training (legal, human resources, etc.) as it pertains to non-discrimination in the workplace?

YES NO
If yes, please explain:

14. Aside from issues of discrimination, have you ever felt treated unfairly at work for any other reason?

YES NO
If yes, please explain:

15. Have you or anyone you know ever worked for ACME?

YES NO
If yes, please explain:

next door neighbor works for ACME. He's A RAMP Agent.

16. Have you heard, or read anything suggesting that ACME is either a good company to work for or a bad company to work for?

YES NO

If yes, please explain how that has impacted your opinion of ACME:

My neighbor loses his job and the company. He did say he had a job for a boss a while back.

17. Do you currently or anyone you know ever worked for a competitor of ACME (e.g., UPS, DHL, Airborne Express)?

YES NO

If yes, please explain:

Cousin in Miami worked for DFI

18. Have you or anyone you know ever had a personal or business experience with or financial interest in ACME that would affect your ability to render a fair and impartial verdict in this case? *No*

19. Have you ever had any negative experiences with ACME?

YES NO

If yes, please explain:

20. What are your personal feelings—good or bad—about large corporations?

No feeling.

21. What are your feelings about ACME?

Very positive Positive Indifferent Negative Very negative

22. The Judge will instruct you on the law that will guide your decisions. The Judge may instruct you that a corporation has a right to make decisions—be they right or wrong, good or bad, sound or unsound, fair or unfair—as long as those decisions are not discriminatory or otherwise unlawful. Would you have trouble following such an instruction, based on some life experience or feeling about employers/big business?

YES NO

If yes, please explain:

23. If, after hearing all the evidence, you determine that Plaintiff has not proven racial discrimination but you think the manner in which Plaintiff was not hired was unfair (in other words, there was something about the hiring process that you did not like), would you have any difficulty finding that there was no race discrimination? *No*

24. Do you think you might be tempted to substitute your own views of company policy for ACME's policy?

YES NO

If yes, please explain why or why not:

I don't know. I might compare with our policies.

25. Have you, any close friend, or family member ever been a member of a labor union or worked under a union collective bargaining agreement?

YES NO

If yes, please explain and identify any union position held: *Uncle Wawa*

Union Steward for the Cotton Belt R.R.

26. Individuals and corporations are to be treated equally and are entitled to a fair and impartial trial based on the same legal standards. Do you have any personal feelings that would prevent you from treating a large corporation equally to an individual?

YES NO

If yes, please explain:

27. Please use this space to inform the court of any further information you feel concerns your ability to serve as a trial juror.

JUROR QUESTIONNAIRE

Please fill out completely. Do not write on the back of any page as copies will be made. If you need more room to answer a question, continue at the bottom or side of the page, or on the last page.

Name: Norma Rhea

Age: 35 Gender: Male _____ Female

1. Occupation: Union Organizer For how long: 5 years
Who is your present employer: United Widget Workers
What is your title or position: Union Organizer
What do you do at work: Recruit Union Workers
Is your job considered a management position? YES _____ NO
Do you supervise anyone at your job? YES _____ NO

Have you, any member of your family, or someone close to you been involved with personnel matters on the job, including hiring/firing, employee evaluation, employee promotions or pay determination, etc.?

YES NO _____

If yes, please explain: My husband was wrongfully terminated from his job.

2. What is your marital status?

- Single and never married
 Currently married and have been for 15 years
____ Married in the past for ___ years
____ Single, but living with domestic partner for _____ years
____ Widowed/widower, married in the past for _____ years
____ Other

3. What is the last level of education you completed?

- ____ Grade school or less
____ Some high school
 High school graduate or GED
____ Some college.
____ College graduate
____ Post graduate work

4. Do you have any special or professional licenses?

YES NO

If yes, please describe:

5. If married or living with a domestic partner, is your spouse or domestic partner employed outside the home?

YES NO

a) If Yes, what does he/she do and where is he/she employed?

b) If No, what work outside the home has he/she ever done?

6. Have you, any relatives, or anyone close to you ever been self-employed or owned a business of any kind?

YES NO

If Yes, please explain:

7. Have you ever served as a juror in the past?

YES NO

If Yes, please explain: Murder trial 8 years ago.

8. Have you or anyone close to you ever worked for an attorney, law firm, judge, or in any other area of the law?

YES NO

If yes, please explain: My aunt works in a law office

9. Have you or anyone you know ever had a serious or legal dispute with an employee or employer?

YES NO

If yes, what was the nature of the dispute? My husband was wrongfully terminated..

10. Have you, any close friend, or family member ever felt discriminated against at your work because of your age, race, gender, religion or national origin?

YES NO

If yes, please explain: My husband was a victim of discrimination.

11. Have you ever filed a grievance or claim regarding any employment related issues?

YES NO

If yes, please explain:

12. Do you feel you have ever been denied a promotion or a job within a company based on gender, race, national origin, religion, age, etc.?

YES NO

If yes, please explain:

13. Have you ever had any training (legal, human resources, etc.) as it pertains to non-discrimination in the workplace?

YES NO

If yes, please explain:

14. Aside from issues of discrimination, have you ever felt treated unfairly at work for any other reason?

YES NO

If yes, please explain:

15. Have you or anyone you know ever worked for ACME?

YES NO

If yes, please explain: Cousin worked there for 10 years.

16. Have you heard, or read anything suggesting that ACME is either a good company to work for or a bad company to work for?

YES NO

If yes, please explain how that has impacted your opinion of ACME:

My cousin said they were not fair to the employees.

17. Do you currently or anyone you know ever worked for a competitor of ACME (e.g., UPS, DHL, Airborne Express)?

YES NO

If yes, please explain:

18. Have you or anyone you know ever had a personal or business experience with or financial interest in ACME that would affect your ability to render a fair and impartial verdict in this case? *I can be fair and impartial.*

19. Have you ever had any negative experiences with ACME?

YES NO

If yes, please explain:

20. What are your personal feelings—good or bad—about large corporations?
As a general rule large corporations exploit their workforce.

21. What are your feelings about ACME?

Very positive Positive Indifferent Negative Very negative

22. The Judge will instruct you on the law that will guide your decisions. The Judge may instruct you that a corporation has a right to make decisions—be they right or wrong, good or bad, sound or unsound, fair or unfair—as long as those decisions are not discriminatory or otherwise unlawful. Would you have trouble following such an instruction, based on some life experience or feeling about employers/big business?

YES NO

If yes, please explain:

23. If, after hearing all the evidence, you determine that Plaintiff has not proven racial discrimination but you think the manner in which Plaintiff was not hired was unfair (in other words, there was something about the hiring process that you did not like), would you have any difficulty finding that there was no race discrimination?

No - I can be fair.

24. Do you think you might be tempted to substitute your own views of company policy for ACME's policy?

YES NO

If yes, please explain why or why not:

25. Have you, any close friend, or family member ever been a member of a labor union or worked under a union collective bargaining agreement?

YES NO

If yes, please explain and identify any union position held: I am a member

of United Widget Workers. My daddy was a coal miner and belonged to a union.

26. Individuals and corporations are to be treated equally and are entitled to a fair and impartial trial based on the same legal standards. Do you have any personal feelings that would prevent you from treating a large corporation equally to an individual?

YES NO

If yes, please explain:

27. Please use this space to inform the court of any further information you feel concerns your ability to serve as a trial juror.

Know I can be fair
and impartial.

JUROR QUESTIONNAIRE

Please fill out completely. Do not write on the back of any page as copies will be made. If you need more room to answer a question, continue at the bottom or side of the page, or on the last page.

Name: Dr. John Walters

Age: 45 Gender: Male Female

1. Occupation: Minister For how long: 10 yrs.

Who is your present employer: Southern Afl. AME Church

What is your title or position: Senior Minister

What do you do at work: Responsible for all aspects of Church

Is your job considered a management position? YES NO

Do you supervise anyone at your job? YES NO

Have you, any member of your family, or someone close to you been involved with personnel matters on the job, including hiring/firing, employee evaluation, employee promotions or pay determination, etc.?

YES NO

If yes, please explain: Part of my duties

2. What is your marital status?

Single and never married

Currently married and have been for _____ years

Married in the past for 26 years

Single, but living with domestic partner for _____ years

Widowed/widower, married in the past for _____ years

Other

3. What is the last level of education you completed?

Grade school or less

Some high school

High school graduate or GED

Some college

College graduate

Post graduate work

4 Do you have any special or professional licenses?

YES NO *Minister*

If yes, please describe. *and Counseling license*

5. If married or living with a domestic partner, is your spouse or domestic partner employed outside the home?

YES NO

a) If Yes, what does he/she do and where is he/she employed?

Secretary at Southern Ave AME Church

b) If No, what work outside the home has he/she ever done?

6. Have you, any relatives, or anyone close to you ever been self-employed or owned a business of any kind?

YES NO

If Yes, please explain: *Father and Uncle owned a construction business*

7. Have you ever served as a juror in the past?

YES NO

If Yes, please explain: *Business dispute*

8. Have you or anyone close to you ever worked for an attorney, law firm, judge, or in any other area of the law?

YES NO

If yes, please explain:

9. Have you or anyone you know ever had a serious or legal dispute with an employee or employer?

YES NO

If yes, what was the nature of the dispute? *My son was fired from Armi
He had a pocket knife at work.*

10. Have you, any close friend, or family member ever felt discriminated against at your work because of your age, race, gender, religion or national origin?

YES NO

If yes, please explain: *My son because of his race. Several of my
church members have told me stories and of suffering from
discrimination at work.*

11. Have you ever filed a grievance or claim regarding any employment related issues?

YES NO

If yes, please explain:

12. Do you feel you have ever been denied a promotion or a job within a company based on gender, race, national origin, religion, age, etc?

YES NO

If yes, please explain:

13. Have you ever had any training (legal, human resources, etc.) as it pertains to non-discrimination in the workplace?

YES NO

If yes, please explain:

14. Aside from issues of discrimination, have you ever felt treated unfairly at work for any other reason?

YES NO

If yes, please explain:

15. Have you or anyone you know ever worked for ACME?

YES NO

If yes, please explain: *My son and two cousins*

16. Have you heard, or read anything suggesting that ACME is either a good company to work for or a bad company to work for?

YES NO

If yes, please explain how that has impacted your opinion of ACME:

I think less of ACME because the way my son was treated.

17. Do you currently or anyone you know ever worked for a competitor of ACME (e.g., UPS, DHL, Airborne Express)?

YES NO

If yes, please explain:

18. Have you or anyone you know ever had a personal or business experience with or financial interest in ACME that would affect your ability to render a fair and impartial verdict in this case? *No*

19. Have you ever had any negative experiences with ACME?

YES NO

If yes, please explain. *Not me personally*

20. What are your personal feelings—good or bad—about large corporations?

I think their reputations have declined.

21. What are your feelings about ACME?

Very positive Positive Indifferent Negative Very negative

22. The Judge will instruct you on the law that will guide your decisions. The Judge may instruct you that a corporation has a right to make decisions—be they right or wrong, good or bad, sound or unsound, fair or unfair—as long as those decisions are not discriminatory or otherwise unlawful. Would you have trouble following such an instruction, based on some life experience or feeling about employers/big business?

YES NO

If yes, please explain

23. If after hearing all the evidence, you determine that Plaintiff has not proven racial discrimination but you think the manner in which Plaintiff was not hired was unfair (in other words, there was something about the hiring process that you did not like), would you have any difficulty finding that there was no race discrimination? *No*

24. Do you think you might be tempted to substitute your own views of company policy for ACME's policy?

YES NO

If yes, please explain why or why not

25. Have you, any close friend, or family member ever been a member of a labor union or worked under a union collective bargaining agreement?

YES NO

If yes, please explain and identify any union position held:

Brother belonged to a union.

26. Individuals and corporations are to be treated equally and are entitled to a fair and impartial trial based on the same legal standards. Do you have any personal feelings that would prevent you from treating a large corporation equally to an individual?

YES NO

If yes, please explain:

27. Please use this space to inform the court of any further information you feel concerns your ability to serve as a trial juror.

13TH ANNUAL FREE WINTER CLE



2018 Free Winter CLE

*Ethical Considerations in Preparing and
Submitting Pleadings, Motions and Briefs
to Trial and Appellate Courts*

Howard Brill

Former Arkansas Supreme Court Chief Justice

Ethical Considerations in Preparing and Submitting Pleadings, Motions and Briefs to Trial and Appellate Courts

13th Annual Winter CLE
March 3, 2018

Howard W. Brill
School of Law
University of Arkansas
Fayetteville, Arkansas

1) Should the document be filed with the court?

Rule 3.1. Meritorious Claims and Contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT: [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good

faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Rule 11. Signing of Pleadings, Motions, And Other Papers; Sanctions (as amended in 2015 and 2017)

(a) *Signature.* Except as provided in Rule 87 of these rules, every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his or her individual name, whose address shall be stated. A self-represented person shall sign his or her pleading, motion, or other paper and state his or her address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.

(b) *Certificate.* The signature of an attorney or party constitutes a certificate by the signatory that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) the pleading, motion, or other paper is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support;
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information;
- (5) when a party's claim or affirmative defense may only be established in whole or in part by expert testimony, the party has consulted with at least one expert, or has learned in discovery of the opinion of at least one expert, who (i) is believed to be competent under Ark. R. Evid. 702 to express an

opinion in the action and (ii) concludes on the basis of the available information that there is a reasonable basis to assert the claim or affirmative defense; and

(6) the pleading, motion, or other paper complies with the requirements of Rule 5(c)(2) regarding redaction of confidential information from case records submitted to the court.

(c) *Sanctions.* (1) If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon any attorney or party who violated this rule an appropriate sanction.

(2) Sanctions that may be imposed for violations of this rule include, but are not limited to:

- (A) an order dismissing a claim or action;
- (B) an order striking a pleading or motion;
- (C) an order entering judgment by default;
- (D) an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee;
- (E) an order to pay a penalty to the court;
- (F) an order awarding damages attributable to the delay or misconduct;
- (G) an order referring an attorney to the Supreme Court Committee on Professional Conduct or the appropriate disciplinary body of another state.

(3) The court's order imposing a sanction shall describe the sanctioned conduct and explain the basis for the sanction. If a monetary sanction is imposed, the order shall explain how it was determined.

(4) The court shall not impose a monetary sanction against a represented party for violating subdivision (b)(2), on its own initiative, unless it issued the show-cause order under subdivision (c)(6) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(5) A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5 but shall not be filed with

or presented to the court unless, within 21 days after service of the motion, or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(6) On its own initiative, the court may order an attorney or party to show cause why conduct specifically described in the order has not violated subdivision (b). The order shall afford the attorney or party a reasonable time to respond, but not less than 14 days.

Arkansas Rules of Appellate Procedure – Civil, Rule 11. Certification By Parties And Attorneys; Frivolous Appeals; Sanctions.

(a) The filing of a brief, motion or other paper in the Supreme Court or the Court of Appeals constitutes a certification of the party or attorney that, to the best of his knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact; is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; is not filed for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and that the document complies with the requirements of Rule of Civil Procedure 5(c)(2) regarding redaction of confidential information. A party or an attorney who files a paper in violation of this rule, or party on whose behalf the paper is filed, is subject to a sanction in accordance with this rule.

(b) The Supreme Court or the Court of Appeals shall impose a sanction upon a party or attorney or both for (1) taking or continuing a frivolous appeal or initiating a frivolous proceeding, (2) filing a brief, motion, or other paper in violation of subdivision (a) of this rule, (3) prosecuting an appeal for purposes of delay in violation of Rule 6-2 of the Rules of the Supreme Court and Court of Appeals, and (4) any act of commission or omission that has an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. For purposes of this rule, a frivolous appeal or proceeding is one that has no reasonable legal or factual basis.

(c) Sanctions that may be imposed for violations of this rule include, but are not limited to, dismissal of the appeal; striking a brief, motion, or other paper; awarding actual costs and expenses, including reasonable attorneys' fees; imposing a penalty payable to the court; awarding damages attributable to the delay or

misconduct; and, where there has been delay, advancing the case on the docket and affirming.

(d) A party may by motion request that a sanction be imposed upon another party or attorney pursuant to this rule, or the court may impose a sanction on its own initiative. A motion shall be in the form required by Rule 2-1 of the Rules of the Supreme Court and Court of Appeals, with citations to the record where appropriate, and will be called for submission three weeks after filing. The opposing party may file a response within 21 days of the filing of the motion. If the court on its own initiative determines that a sanction may be appropriate, the court shall order the party or attorney to show cause in writing why a sanction should not be imposed on the party or attorney or both.

**American Bar Association Formal Opinion 94-387
DISCLOSURE TO OPPOSING PARTY AND COURT THAT STATUTE OF
LIMITATIONS HAS RUN**

A lawyer has no ethical duty to inform an opposing party in negotiations that the statute of limitations has run on her client's claim; to the contrary, it would violate Rules 1.3 and 1.6 to reveal such information without the client's consent. It follows that where the opposing party and his counsel appear to be unaware that the limitations period has expired, the lawyer may not discontinue negotiations over the claim simply on this ground, in the absence of agreement by her client that she do so. Nor is the lawyer constrained by the rules of ethics from filing suit to enforce a time-barred claim, unless the rules of the jurisdiction preclude it. There is no basis in the ethics rules for holding a lawyer representing a government agency to a different standard in these circumstances than that applicable to a lawyer representing a private client.

Cases of note:

Wizsche v. Jaeger & Haines, Inc., 707 F. Supp. 407 (W.D. Ark. 1989) (attorney sanctioned for filing a baseless lawsuit).

Chris & Todd, Inc. v. Ark. Dept. of Fin. & Admin. 125 F.R.D. 491 (E.D. Ark. 1991) (sanctions awarded against attorney for filing a counterclaim that “appears to be nothing more than a gratuitous, irrelevant assertion intended to embarrass or harass”).

Eads v. Hall, 340 Ark. 375, 10 S.W. 3d 441 (2000) (sanctions awarded; motion for a rule on the clerk was not well grounded in fact or law, and caused a needless increase in the cost of litigation).

Whaley v. Kroger Co., 352 Ark. 122, 98 S.W. 3d 824 (2003) (appeal had no factual or legal basis to support charges of ethical violations by opposing counsel; appellee's counsel awarded \$1500 in attorney fees).

Reeve v. Carroll County, 373 Ark. 548, 28 S.W. 3d 242 (2008) (sanctions against attorney for taxpayers; "motion filed was frivolous and has resulted in a needed increase in the cost of this litigation").

Courier v. Woodruff, 2011 Ark. App. 659 (plaintiff's attorney sanctioned; "does not appear that he made any effort, other than talking to his client," to determine whether the complaint was well-grounded in fact).

Swindle v. Southern Farm Bur. Cas. Ins. Co., 2014 Ark. App. 157 (plaintiff's attorney sanctioned; "appears to have filed suit out of anger rather than any need to do so").

Eads v. Hall, 340 Ark. 375, 10 S.W. 3d 441 (2000) (appellants' motion for a rule on the clerk was frivolous; award of attorney fees and costs under Ark. R. App. P. – Civ 11).

2) What are the guidelines on "ghost-writing" a complaint, motion, or brief for a self-represented person?

Arkansas Rule of Civil Procedure 87 (adopted December 2017) Limited Scope Representation

(a) *Permitted*. In accordance with Rule 1.2(c) of the Arkansas Rules of Professional Conduct, an attorney may provide limited scope representation to a person involved in a court proceeding.

(b) *Notice*. An attorney's role may be limited as set forth in a notice of limited scope representation filed and served prior to or simultaneously with the initiation of a proceeding or initiation of representation, as applicable. Such notice shall not be required in matters where an attorney's representation consists solely

of the drafting of pleadings, motions, or other papers for an otherwise self-represented person as provided in subdivision (c) of this rule.

(c) *Drafting of Pleadings, Motions, and Other Papers.*

(1) An attorney may draft or help to draft a pleading, motion, or other paper filed by an otherwise self-represented person. The attorney shall include a notation at the end of the prepared document stating: “This document was prepared with the assistance of [insert name of attorney], a licensed Arkansas lawyer, pursuant to Arkansas Rule of Professional Conduct 1.2(c).” The attorney need not sign that pleading, motion, or other paper.

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

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

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

American Bar Association Formal Opinion 07-446

UNDISCLOSED LEGAL ASSISTANCE TO PRO SE LITIGANTS

A lawyer may provide legal assistance to litigants appearing before tribunals “pro se” and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance.

3) Is the attorney competent to file the court document?

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT:

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more

extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

4) When it comes to submitting court documents, what is the relationship between the attorney and the client?

Rule 1.2. Scope Of Representation And Allocation Of Authority Between Client And Lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(1) The client's informed consent must be confirmed in writing unless:

(A) the representation of the client consists solely of a telephone consultation;

(B) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a program authorized by Rule 6.5 and the lawyer's representation consists solely of providing information and advice or the preparation of legal documents; or

(C) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent as required by this rule, there shall be a presumption that:

(A) the representation is limited to the attorney and the services as agreed upon; and

(B) the attorney does not represent the client generally or in matters other than those as agreed upon.

(C) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Case of note:

The Firestone Tire & Rubber Company v. Little, 269 Ark. 636, 599 S.W. 3d 756 (1980) (misnomer argument; summons directed to “Firestone Tire and Rubber Company.”)

5) What information can be used when opposing a former client?

Rule 1.9. Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

**American Bar Association Formal Opinion 479 (December 15, 2017)
The “Generally Known” Exception to Former-Client Confidentiality**

A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

6) Does the attorney have an issue conflict because of another case?

Rule 1.7. Conflict Of Interest: Current Clients.

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another clients; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

American Bar Association Formal Opinion 93-377
POSITIONAL CONFLICTS

When a lawyer is asked to advocate a position with respect to a substantive legal issue that is directly contrary to the position being urged by the lawyer (or the lawyer's firm) on behalf of another client in a different and unrelated pending matter which is being litigated in the same jurisdiction, the lawyer, in the absence of consent by both clients after full disclosure, should refuse to accept the second representation if there is a substantial risk that the lawyer's advocacy on behalf of one client will create a legal precedent which is likely to materially undercut the legal position being urged on behalf of the other client. If the two matters are not being litigated in the same jurisdiction and there is no substantial risk that either representation will be adversely affect by the other, the lawyer may proceed with both representations.

Comment [24] to Rule 1.7:

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

7) What is the lawyer's duty of candor to the court?

Rule of Professional Conduct 3.3: Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. . . .

COMMENT:

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

8) What is the advocate's duty when opposing counsel innocently blunders with confidential documents?

Rule 4.4. Respect for Rights of Third Persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

COMMENT:

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalog all such rights, but they include legal restrictions on methods of obtaining evidence from third persons

and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning or deleting the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

American Bar Association Formal Opinion 05-437

INADVERTENT DISCLOSURE OF CONFIDENTIAL MATERIALS

A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures.

Arkansas Rule of Civil Procedure 26: General Provisions Governing Discovery.

(b)(5) Inadvertent Disclosure.

(A) A party who discloses or produces material or information without intending to waive a claim of privilege or attorney work product shall be presumed not to have waived under these rules and the Arkansas Rules of Evidence if the party takes the following steps: (i) within fourteen calendar days of discovering the inadvertent disclosure, the producing party must notify the receiving party by specifically identifying the material or information and asserting the privilege or doctrine protecting it; and (ii) if responses to written discovery are involved, then the producing party must amend them as part of this notice.

(B) Within fourteen calendar days of receiving notice of an inadvertent disclosure, a receiving party must return, sequester, or destroy the specified materials and all copies. After receiving this notice, the receiving party may not use or disclose the materials in any way.

Arkansas Rule of Evidence 502. Lawyer-Client Privilege.

(e) Inadvertent disclosure. A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if the disclosing party follows the procedure specified in Rule 26(b)(5) of the Arkansas Rules of Civil Procedure and, in the event of a challenge by a receiving party, the circuit court finds in accordance with Rule 26(b)(5)(D) that there was no waiver.

9) What is the attorney's obligation when the client wants the file?

Travis v. Committee on Professional Conduct, 2009 Ark. 188, 306 S.W. 3d 3 (attorney disciplined for not surrendering file to client).

Arkansas Rule of Professional Conduct 1.16: Declining or terminating representation:

(c) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving

reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Arkansas Rule of Professional Conduct 1.19 (adopted December 2016)
Client Files: Definition, Retention & Destruction

(a) Client file - Definition and duty to provide copies of client-file documents to the client. The use of the term “client” refers to both current and former clients.

(1) For purposes of these rules, the client file shall consist of any writings or property provided by the client to the lawyer and any documents, in paper or electronic format, that are the product of the lawyer’s representation, including pleadings, correspondence, and other documents prepared or received by the lawyer in furtherance of the representation. Documents that have not been filed with a tribunal, delivered or served, or other documents drafted but unexecuted or undelivered that the client has explicitly paid for the drafting, creation, or obtaining thereof, including such items as transcripts, depositions, medical records, and reports of experts, shall be provided to the client as part of the file.

(2) The following records are not included in the client file, even if they are maintained by the lawyer in association with the representation and the client file, and such records are not ones to which the client is entitled to review or receive a copy:

(A) The lawyer’s work product, which includes the documents the lawyer used to reach an end product of the lawyer’s representation, the lawyer’s notes, and preliminary drafts of pleadings and legal instruments;

(B) Internal memoranda prepared by or for the lawyer;

(C) Legal research materials prepared by or for the lawyer and factual research materials, including investigative reports prepared by or for the lawyer for use in the representation, unless the material has been specifically paid for by the client or procured by the lawyer for the client’s use;

(D) Documents such as internal conflict checks, firm assignments, notes regarding any ethics consultation, or records that might reveal the confidences of other clients.

(E) Items not included in the list of excluded items shall be considered to be part of the client file to which the client is entitled.

(3) Upon the client's written request in any format, the lawyer shall surrender the client's original file or a copy of the file, in paper or electronic format, to the client. Upon written authorization of the client, the lawyer shall surrender such file to the client's new lawyer. The lawyer may deliver a statement for costs of production to the client but may not withhold delivery of the client file pending payment.

(4) The cost of copying the file shall be the responsibility of the client. If the lawyer has in his or her possession client funds to be reimbursed for such copying cost, the lawyer may be reimbursed for such cost from the client funds held by the lawyer. A lawyer who has previously provided the client a copy of any part of the client file may charge the client for additional copies of the same documents. The client shall be responsible for the reasonable costs incurred in delivery, by mail or commercial-delivery service, of the client-file materials outside the lawyer's office. After delivery of the client file to the client or the client's new lawyer, the lawyer may deliver a statement of costs of copying of the file to the client but may not withhold delivery of the client file pending payment.

(5) If the lawyer provides the original client file to the client, the lawyer may, at no cost to the client, retain copies of all documents within the lawyer's file for the lawyer's purposes.

(6) The terms and conditions of the allocation of copying and delivery costs involved in the client file may be fixed by a written agreement between the client and the lawyer at the inception of the representation.

(b) Client file retention and destruction.

(1) A lawyer shall take reasonable steps to maintain the client's file in paper or electronic format for five (5) years after the conclusion of the representation in a matter.

(2) At any time following the expiration of five (5) years following the conclusion of the representation in a matter, a lawyer may destroy the client's files related to the matter.

(3) The providing to the client of the lawyer's file-retention-and-destruction policy in any writing, including an engagement letter or agreement or termination of representation letter, shall satisfy the notice requirement of this rule.

(4) Notwithstanding subparagraphs (1), (2), and (3), a lawyer in a criminal matter shall maintain the client's file for the life of the client if the matter resulted in a conviction, by plea or trial, and sentence of death, natural life, or life without parole, unless the client's file is turned over to some appropriate, permanent central-file repository that maintains such criminal case files in compliance with this rule.

(5) This rule does not supersede or limit a lawyer's obligations to retain or destroy contents of a client's file as otherwise imposed by law, court order, or rules of a tribunal.

**American Bar Association Formal Opinion 471 (July 1, 2015)
Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled**

Upon the termination of a representation, a lawyer is required under Model Rules 1.15 and 1.16(d) to take steps to the extent reasonably practicable to protect a client's interest, and such steps include surrendering to the former client papers and property to which the former client is entitled. A client is not entitled to papers and property that the lawyer generated for the lawyer's own purpose in working on the client's matter. However, when the lawyer's representation of the client in a matter is terminated before the matter is completed, protection of the former client's interest may require that certain materials the lawyer generated for the lawyer's own purpose be provided to the client.

10) How does the appellate lawyer treat the trial court?

Rule of the Supreme Court and the Court of Appeals 1-5. Contempt.

No argument, brief, or motion filed or made in the Court shall contain language showing disrespect for the circuit court.

Arkansas Rule of Professional Conduct Rule 8.2. Judicial and Legal Officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

3/1/2018

13TH ANNUAL FREE WINTER CLE



UNIVERSITY OF
ARKANSAS

School of Law

Saturday, March 3, 2018

8:00 a.m.-12:00 p.m.

Registration 8:00 a.m.-8:30 a.m.

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April 12, 2018 Meet the Lawyers reception with law students

April 13-14, 2018 All Alumni Reunion Weekend

May 19, 2018 Law School Commencement

June 13-15, 2018 Arkansas Annual Bar Association Meeting

June 14, 2018 Alumni Luncheon at the Annual Arkansas

Bar Association Meeting in Hot Springs

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