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ABSTRACTING THE RECORD

*Honorable Terry Crabtree**

I. INTRODUCTION

In 1977, Justice George Rose Smith wrote an article for the Arkansas Law Review about abstracting a trial record when filing a brief on appeal.¹ His article gave the reasons for what was then Rule 9² and discussed problems faced by the appellant and the appellee in complying with its requirements. The current abstracting rule, Rule 4-2 (a)(6) of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas, still requires an appellant to prepare an abstract of the trial record when submitting an appeal. The purpose of requiring an abstract also remains the same. It is, quite simply, to give the reviewing court an understanding of the issues on appeal. A cursory reading of the rule reveals that a proper abstract should consist of “an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for decision.”³

Although some form of the rule has been in existence for 100 years,⁴ Arkansas’s appellate courts continue to summarily affirm appeals due to flagrantly deficient abstracts. While the mandates of Rule 4-2(a)(6) may not at first seem overly complex, there have been 94 reported⁵ cases that involved flagrantly deficient abstracts since the early 1970s. For any member of the bar considering even a limited appellate practice, proper abstracting is crucial. This note will thus address the more common problems that arise in abstracting a trial record, the minimum requirements of an abstract, and the possible liability that may result from an abstract that has been deemed deficient by the supreme court or court of appeals. My first suggestion for those who have

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1. See George Rose Smith, *Arkansas Appellate Practice: Abstracting the Record*, 31 ARK. L. REV. 359 (1977).

2. ARK. SUP. CT. R. 9 is now Rule 4-2.

3. ARK. SUP. CT. R. 4-2 (a)(6) (1998).

4. See *Get Rid of It, Inc. v. City of Smackover*, 59 Ark. App. 93, 96, 952 S.W.2d 192, 194 (1997).

5. See ARK. SUP. CT. R. 5-2 (c) & (d). The Court of Appeals does not traditionally publish cases that are affirmed due to flagrantly deficient abstracts, so the actual number is substantially higher than the 94 cases referenced above.

never read the article by Justice Smith is to do so.⁶ It will provide a clear understanding of the rules on abstracting and the philosophy of the court as it existed when the article was written.

The most important concept to keep in mind while abstracting the record is that it is the appellant's burden to produce a record sufficient for the appellate court to make a decision, and that the record on appeal is limited to that which is abstracted.⁷ An abstract is defined by the supreme court rules as "an impartial condensation, without comment or emphasis, of [] material parts of the pleadings, proceedings, facts, documents, and other matters in the record"⁸ The appellate court justices and judges will not search the

6. See *Smith, supra* note 1 and accompanying text.

7. See *McAdams v. Automotive Rentals, Inc.*, 324 Ark. 332, 924 S.W.2d 464 (1996).

8. ARK. SUP. CT. R. 4-2. Rule 4-2 provides:

RULE 4-2. CONTENTS OF BRIEFS [Effective for briefs filed after July 1, 1998.]

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

(1) TABLE OF CONTENTS. Each brief must include a table of contents. It should reference the page number for the beginning of each of the major sections identified in Rule 4-2(a) (2)-(8). Within the abstract section of the brief, it should reference the page number for the beginning of each witness' testimony and should note the page at which each pleading and document is abstracted.

(2) INFORMATIONAL STATEMENT AND JURISDICTIONAL STATEMENT. The Informational Statement and Jurisdictional Statement required by Supreme Court Rule 1-2 (c).

(3) STATEMENT OF THE CASE. The appellant's brief shall contain a concise statement of the case, without argument. This statement, ordinarily not exceeding two pages in length, shall not exceed five pages without leave of the Court. The statement of the case should be sufficient to enable the court to read the abstract with an understanding of the nature of the case, the general fact situation, and the action taken by the trial court. The appellee's brief need not contain a statement of the case unless the appellant's statement is deemed to be controverted or insufficient.

(4) POINTS ON APPEAL. Following the appellant's statement of the case, the appellant shall list and separately number, concisely and without argument, the points relied upon for a reversal of the judgment or decree. The appellee will follow the same sequence and arrangement of points as contained in the appellant's brief and may then state additional points. Either party may insert under any point not more than two citations which either considers to be the principal authorities on that point.

(5) TABLE OF AUTHORITIES. The table of authorities shall be an alphabetical listing of authorities with a designation of the page number of the brief on which the authority appears. The authorities shall be grouped as follows:

(A) Cases

(B) Statutes/rules

(C) Books and treatises

(D) Miscellaneous

(6) ABSTRACT. The appellant's abstract or abridgment of the record should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the Court for

decision. A document included in the Addendum pursuant to Rule 4-2(a)(8) should not be abstracted. A document, such as a will or contract, may be photocopied and attached as an exhibit to the abstract. However, the document or the necessary portions of the document must be abstracted. Mere notation such as "plaintiff's exhibit no. 4" is not sufficient. On a second or subsequent appeal, the abstract shall include a condensation of all pertinent portions of the record filed on any prior appeal. Not more than two pages of the record shall in any instance be abstracted without a page reference to the record. In the abstracting of testimony, the first person (i.e., "I") rather than the third person (i.e., "He, She") shall be used. The Clerk will refuse to accept a brief if the testimony is not abstracted in the first person or if the abstract does not contain the required references to the record. In the abstracting of depositions taken on interrogatories, requests for admissions, and the responses thereto, and interrogatories to parties and the responses thereto, the abstract of each answer must immediately follow the abstract of the question. Whenever a map, plat, photograph, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by photography or other process and attach it to the copies of the abstract filed in the Court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the Court upon motion.

(7) ARGUMENT. Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. Citations of decisions of the Court which are officially reported must be from the official reports. All citations of decisions of any court must state the style of the case and the book and page in which the case is found. If the case is also reported by one or more unofficial publishers, these should also be cited, if possible. The number of pages for argument shall comply with Rule 4-1(b).

(8) ADDENDUM. Following the signature and certificate of service, the brief shall contain an Addendum which shall include photocopies of the order, judgment, decree, ruling or letter opinion from which the appeal is taken. It should be clear where any item appearing in the Addendum can be found in the record. Any item appearing in the Addendum should not also be abstracted. Pursuant to subsection (c) below, the clerk will refuse to accept an appellant's brief if it does not contain the required addendum. The appellee's brief shall only contain an Addendum to include an item which the Appellant's addendum fails to include.

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

(B) INSUFFICIENCY OF APPELLANT'S ABSTRACT. Motions to dismiss the appeal for insufficiency of the appellant's abstract will not be recognized. Deficiencies in the appellant's abstract will ordinarily come to the Court's attention and be handled in either of two ways as follows: (1) If the appellee considers the appellant's abstract to be defective, the appellee's brief may call the deficiencies to the Court's attention and may, at the appellee's option, contain a supplemental abstract. When the case is considered on its merits, the Court may impose or withhold costs to compensate either party for the other party's noncompliance with this Rule. In seeking an award of costs under this paragraph, counsel must submit a statement showing the cost of the supplemental abstract and a certificate of counsel showing the amount of time that was devoted to the preparation of the supplemental abstract. (2) If the case has

record for reversible error.⁹ By affirming the trial court's decision due to a deficient abstract, the appellate court is saying that the appellant has not met its burden to show that error or prejudice occurred at the trial level.

Our supreme court has indicated that compliance with the rule is necessary to the efficient decision of cases on appeal.¹⁰ Even though most cases are affirmed because the appellant's abstract does not contain sufficient information for the court to make a decision,¹¹ the supreme court has noted that an abstract that is too lengthy is just as violative of the rule as one that does not contain sufficient information.¹² In at least one case, the abstract was longer than the entire trial transcript.¹³ An attorney on appeal needs to make a decision as to what is required to present to the appellate court. An abstract should contain only those material parts of the record necessary to demonstrate error on appeal. Attorneys make judgments every day about how to proceed with a case, and a judgment as to what is material to their argument should not be outside the realm of their professional experience.

not yet been submitted to the court for decision, an appellant may file a motion to supplement the abstract and file a substituted brief. Subject to the court's discretion, the court will routinely grant such a motion and give the appellant fifteen days within which to file the substituted abstract and brief. If the appellee has already filed its brief, upon the filing of appellant's substituted abstract and brief, the appellee will be affected an opportunity to revise or supplement its brief, at the expense of the appellant's counsel, as the court may direct. (3) Whether or not the appellee has called attention to deficiencies in the appellant's abstract, the Court may treat the question when the case is submitted on its merits. If the Court finds the abstract to be flagrantly deficient, or to cause an unreasonable or unjust delay in the disposition of the appeal, the judgment or decree may be affirmed for noncompliance with the Rule. If the Court considers that action to be unduly harsh, the appellant's attorney may be allowed time to revise the brief, at his or her own expense, to conform to Rule 4-2 (a)(6). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the Court may direct.

(c) NON-COMPLIANCE. Briefs not in compliance with the format required by this Rule shall not be accepted for filing by the Clerk.

[Amended by Per Curiam July 15, 1996, effective for all cases in which the record is lodged on or after Sept. 1, 1996; amended Per Curiam June 30, 1997, effective for cases in which the record is lodged on or after Sept. 1, 1997; amended Per Curiam January 29, 1998, effective for briefs filed after July 1, 1998.]

9. See *Mayo v. State*, 324 Ark. 328, 920 S.W.2d 843 (1996).

10. See *Trout v. Mathis*, 289 Ark. 24, 708 S.W.2d 629 (1986).

11. See *Carmical v. City of Beebe*, 316 Ark. 208, 871 S.W.2d 386 (1994).

12. See *Forrest City Mach. Works v. Mosbacher*, 312 Ark. 578, 851 S.W.2d 443 (1993).

13. See *Muldrow v. Douglas*, 316 Ark. 86, 870 S.W.2d 736 (1994).

II. MINIMUM REQUIREMENTS

A. Notice of Appeal

The notice of appeal should be abstracted. The abstracted notice will inform the reviewing court who is appealing the decision of the trial court, whether the notice of appeal was timely, and what order or judgment is being appealed.¹⁴ The notice of appeal limits the appeal to those issues contained in the order or judgment appealed. In addition, a notice of appeal that clearly designates the particular judgment appealed from allows an efficient indication of whether or not the judgment is a final judgment for appellate purposes. If the order appealed from is not final, the court will dismiss the appeal on its own motion.¹⁵

B. Judgments, Orders, and Pleadings

The supreme court has made it very clear that the pleadings, notice of appeal, and judgment are the bare essentials of an abstract.¹⁶ Without the pleadings, the court is unable to determine exactly what issues were raised when the lawsuit was initiated, and what relief was requested and denied. The complaint and answer should always be abstracted to put the case in proper perspective for the appellate court, and any exhibits attached to either the complaint or the answer should be abstracted.¹⁷ The exhibits are usually central to the issues in the case, and without them, the appellate court does not have the same opportunity as the trial court to assess the materiality of the exhibits. Motions that are at issue on appeal should also be abstracted, along with the trial court's ruling.¹⁸ It is the burden of the party making the motion to seek a ruling from the court. Failure to do so waives the motion or objection.¹⁹

The judgment or order appealed from should always be abstracted.²⁰ The order may contain findings of fact or address the credibility of the witnesses, and all such relevant findings should be included in the abstract. Any amended orders or letter opinions that explain the ruling of the trial court in detail should also be abstracted. In appeals from administrative hearings, the opinion of the

14. See ARK. R. APP. P. - CIV. 3 (e), which states: "A notice of appeal or cross-appeal shall specify the party or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal."

15. See *Hodges v. Huckabee*, 333 Ark. 247, 968 S.W.2d 619 (1998).

16. See *McPeck v. White River Lodge Enters.*, 325 Ark. 68, 924 S.W.2d 456 (1996).

17. See *Chrysler Credit Corp. v. Scanlon*, 319 Ark. 758, 894 S.W.2d 885 (1995).

18. See *Burgess v. Burgess*, 286 Ark. 497, 696 S.W.2d 312 (1985).

19. See *Watson v. State*, 313 Ark. 304, 854 S.W.2d 332 (1993).

20. See *Winters v. Elders*, 324 Ark. 246, 920 S.W.2d 833 (1996).

administrative tribunal must be abstracted. For example, if the Workers' Compensation Commission issues an order adopting the findings of the Administrative Law Judge, both the order from the full Commission and the ALJ should be abstracted.²¹

The supreme court has recognized that many abstracts do not contain a proper abridgement of the order appealed from, and has taken a step to alleviate the problem. A recent per curiam opinion requires that the order appealed from be attached to the abstract.²² The clerk has been directed to refuse to accept the abstract if it does not comply with the new rule. The change to the rule should significantly reduce the number of cases affirmed because of a flagrantly deficient abstract.

C. Documents

In many cases, the central issue on appeal will relate to a contract, deed, or other document. Effective July 1, 1998, such documents may be included in the Addendum to the abstract, and will not need to be abstracted in and of themselves. However, if the will, contract, or other document is merely attached as an exhibit, it must be still abstracted.²³ Mere reference to the exhibit number is insufficient. If a plat, map, picture or other document cannot be abstracted, "the appellant shall reproduce the exhibit by photography or other process and attach it to the copies of the abstract filed in the court and served on opposing counsel, unless this requirement is shown to be impractical and is waived by the Court upon motion"²⁴

21. See *Kearney v. Committee on Professional Conduct*, 320 Ark. 581, 897 S.W.2d 573 (1995); *Bonner v. McKee Baking Co.*, 29 Ark. App. 1, 776 S.W.2d 364 (1989).

22. *In Re: Supreme Court Rule 4-2*, 331 Ark. Appx. (1998) (The "COURT'S NOTES re Addendum" state that "[t]he Court is cognizant that the requirement of the Addendum is a significant addition to the brief, and there will be a period of adjustment. Thus, for a reasonable period, the Clerk of the Court should be liberal in granting extensions pursuant to rules 4-3(k) and 4-4(c) to enable a party to remedy a problem with an Addendum.").

23. See *Sherwood v. Glover*, 331 Ark. 124, 958 S.W.2d 526 (1998) (affirming the trial court because, among other things, "the appellant merely listed the names of the pleadings and orders without summarizing their contents."); *Fulkerson v. Calhoun*, 58 Ark. App. 63, 946 S.W.2d 714 (1997) (affirming the trial court because "[i]n this deed dispute, the chancellor's decision and the arguments of both appellant and appellees are fraught with references to plats, sections, deeds, leases, accretions, metes and bounds, surveys, and maps. It is readily apparent that these supporting documents are the basis for the appellant's claims, appellee's counterclaim, and the chancellor's ruling. However, appellant failed to abstract or photocopy and attach in exhibit form the necessary documents.").

24. ARK. SUP. CT. R. 4-2 (a)(6).

D. Photographs and Videotapes

In the event that one of the issues on appeal involves a photograph or videotape, the photo or tape must be abstracted.²⁵ If it is impractical to abstract the photograph or videotape, a motion must be filed seeking the appellate court's permission to submit the actual videotape or photograph.²⁶ Obviously, if the appellant is arguing that a photograph was prejudicial, the appellate court must view the photograph to make a decision.

E. Page References

Rule 4-2(a)(6) requires the abstract to reference every two pages of the transcript. The logic behind this portion of the rule is self-evident. In multi-volume transcripts, the court can more easily find the necessary testimony or document by quickly reviewing the abstract. The supreme court has held that failure to properly make reference to the page numbers in the abstract to the record is a violation of the rule. In at least one case, the trial court's decision was affirmed because, among other things, the appellant's brief did not cite the page numbers of the transcript as required. If certain pages of the transcript are omitted from the abstract, it should be noted in the abstract and an explanation given why the transcript pages were omitted, such as that they were not relevant to the issues on appeal.

F. Use of the First Person

Rule 4-2(a)(6) also requires that the testimony of a witness be abstracted in the first person. For example:

Q: What is your name?

A: My name is June Cleaver.

Q: Where do you live?

A: 625 Marshall Street, Little Rock.

The abstract of this brief testimony would be "My name is June Cleaver and I live at 625 Marshall Street in Little Rock." Essentially, the abstracted testimony should tell a story that flows smoothly in the first person. Legal jargon should be avoided and plain words used.²⁷ As noted by the supreme court, abstracting the testimony in the first person is often easier for the abstracter and the reader. A reprint of the transcript is not acceptable, nor is a

25. See *id.* See also, *Coney v. State*, 319 Ark. 709, 894 S.W.2d 583 (1995).

26. See ARK. SUP. CT. R. 4-21(a)(6).

27. See *Crystal Oil Co. v. Warmack*, 313 Ark. 381, 855 S.W.2d 299 (1993).

recitation of the responses of the witness such as, "yes, yes, no, maybe." Occasional references to the unabstracted testimony in the argument portion of the brief violates the rule, and will result in affirmance.

G. Objections, Rulings and Motions for a Directed Verdict

Arkansas has no "plain error" rule. Thus, an argument for reversal will generally not be considered in the absence of an appropriate objection at the trial court level. In order to be timely, the objection must be contemporaneous, or nearly so, with the alleged error.²⁸ The purpose of the contemporaneous objection rule is to give the trial court the opportunity to know the reasons for disagreement with its proposed action before or at the time that the court makes its ruling.²⁹ However, to successfully present the argument on appeal, it is not enough that the objection be sufficiently specific and timely. Failure to abstract an objection, and the ruling on the objection, can result in a finding that the abstract is flagrantly deficient.³⁰

One of the more common abstracting problems arises in the context of motions for a directed verdict in criminal cases. Rule 33.1 of the Arkansas Rules of Criminal Procedure provides that, when there has been a trial by jury and the motion is based on the sufficiency of the evidence, a defendant must move for a directed verdict at the conclusion of the State's evidence and again at the close of the case. Failure to renew the motion will constitute a waiver of the argument on appeal.³¹ In addition, a motion for a directed verdict based on insufficiency of the evidence must specify the respect in which the evidence is deficient.³² It is essential that the reviewing court be able to determine from the abstract that these two requirements, renewal and specificity, have been met. If the appeal challenges the sufficiency of the evidence, the abstract should contain a verbatim reproduction of the original motion and the renewed motion, as well as the court's rulings.

28. See *Smith v. State*, 330 Ark. 50, 953 S.W.2d 870 (1997); but see *Wick v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980) (providing for limited exceptions to the contemporaneous objection rule).

29. See *Mackey v. State*, 329 Ark. 229, 947 S.W.2d 359 (1997).

30. See *Hood v. State*, 329 Ark. 21, 947 S.W.2d 328 (1997).

31. See ARK. R. CRIM. P. 33.1 (1998); *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995) (renewed directed-verdict motion, "I would renew all previous motions I have made," at close of evidence sufficient for appellate review).

32. See ARK. R. CRIM. P. 33.1 (1998).

III. CORRECTING A DEFICIENT ABSTRACT

The appellate courts have noted that they will not strike an argument on appeal for minor violations of the rule on abstracting, and that they have the freedom to review and consider the entire record.³³ When the appellate court can determine from the abstract the information needed to make a decision, minor deviations from the rule do not necessarily require dismissal for non-compliance.³⁴

When an abstract is deficient, the appellee may supply the needed information in its response to the appellant's brief.³⁵ It is a well-settled rule that the appellant may not supplement or cure a deficient abstract in its reply brief.³⁶ However, the appellant may ask the court's permission to file a substituted abstract and brief at any time prior to the case being submitted to the court for decision.³⁷ The supreme court grants requests to substitute the brief before submission, even after the appellee's response, on a routine basis.³⁸

IV. CONSEQUENCES OF A FLAGRANTLY DEFICIENT ABSTRACT

The first and most obvious consequence of a flagrantly deficient abstract is that the trial court's decision will be affirmed even though the appeal may have merit. In such a case, a disservice has been done to the client and the attorney is probably subject to at least some minimal, and possibly more severe, liability. In several cases where the appellee has supplemented the abstract so the appellate court could decide the case on its merits, costs and attorney's fees have been awarded to the appellee, and in some cases there has been a referral to the Committee on Professional Conduct.

In *Deere v. State*,³⁹ Judge Griffen of the Arkansas Court of Appeals wrote:

I agree that we should affirm the revocation of appellant's suspended sentence, and write this concurring opinion to elaborate on the harm posed by appellant's counsel, Heather Patrice Hogrobrooks, in her persistent refusal to comply with the abstracting rule. By my count, this is the fifth reported decision in two years where an appellate court has found

33. See *Maples v. State*, 16 Ark. App. 175, 698 S.W.2d 807 (1985).

34. See *Integon Indem. Corp. v. Bull*, 311 Ark. 61, 842 S.W.2d 1 (1992).

35. See *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

36. See *Bryant v. State*, 16 Ark. App. 45, 696 S.W.2d 773 (1985). See also ARK. R. SUP. CT. R. 4-1(b), which states: "[t]he appellant's reply brief . . . shall not include any supplemental abstract unless permitted by the Court upon motion."

37. See *Daffron v. State*, 325 Ark. 411, 926 S.W.2d 662 (1996).

38. See *id.*

39. 59 Ark. App. 174, 954 S.W.2d 943 (1997) (Griffen, J., concurring).

Hogrobrooks to have filed a flagrantly deficient abstract. Four of the cases (including this one) involved criminal appeals; one appeal arose from a civil judgment. *See Allen v. Routon*, 57 Ark. App. 137, 943 S.W.2d 605 (1997). A lawyer who knowingly violates court rules so as to expose her clients to summary adverse consequences does a disservice to her clients and is harmful to the administration of justice. That Hogrobrooks did so in this case, given her history, while brazenly accusing the investigating officer, prosecutor, the magistrate who issued a search warrant, and the trial judge of misconduct, conspiracy to obstruct justice, and bias, is sheer hypocrisy. I fully support the decision to again refer Hogrobrooks to the Supreme Court Committee on Professional Conduct because she knowingly refused to abstract properly, despite the adverse consequences to her clients and the judicial process. One wonders how many trusting litigants must be victimized by her combative incompetence, and how long our disciplinary system will leave them at her whim.⁴⁰

The Supreme Court Committee on Professional Conduct suspended Ms. Hogrobrooks's license for six months after the referral by the court of appeals.⁴¹

V. HELPFUL HINTS

1. Always abstract the pleadings, critical documents, objections, rulings, and final judgment of the court.
2. If you have never done an appeal, review a good abstract or brief, or seek out an attorney who has done a substantial amount of appellate work.
3. If you argue it, abstract it.
4. When in doubt, read the rule and the cases decided under the rule.

It is true that the Supreme Court has looked past deficient abstracts and decided cases that have technically violated the rule on abstracting. However, in my opinion, the court is more inclined to hold appellants strictly responsible for complying with the rules regarding abstracting. Any attorney who is considering filing an appeal should pay close attention to Rule 4-2 (a)(6). There is arguably no greater failure than to lose a meritorious appeal for such

40. *Id.*

41. Letter to Leslie Steen (May 11, 1998) (filed of record May 11, 1998).

simple, technical reasons. Properly abstracting a trial record does not require a Herculean effort, and is much simpler than explaining to a client why her arguments were not even considered by the appellate court.

