Your Day In Court

The Federal Court Experience

YOUR DAY IN COURT
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1992
United States District Court
for the Eastern and Western Districts of Arkansas

Revised July 2000

This booklet is a result of the Civil Justice Expense and Delay Reduction Plan for the Eastern District of Arkansas, as prescribed by the Civil Justice Reform Act of 1990. The pamphlet was produced upon recommendation of the advisory group for the plan in this district and was drafted by the committee of attorneys named below. Copies are provided free of charge to litigants and attorneys of this court. If there is a perceived conflict between this pamphlet and our Local Rules or the *Federal Rules of Civil Procedure*, the rules govern.

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Introduction

INTRODUCTION

Welcome to your United States District Court. As a party to a civil action that has been filed here, you have just entered a process that lies at the heart of our American system of justice. The court, your lawyer, and the opposing side's lawyer have a common goal: the speedy, inexpensive, fair, and just resolution of your suit. To help all parties achieve this goal the court is providing you with this booklet. It will familiarize you with procedures that the parties to this suit must follow and standards and traditions they and their attorneys are expected to honor. Please read it with care (or have someone read it to you). If you have any questions you should discuss them with your attorney.

The statement which you must sign and return to the court says that you have read and understand Sections Two, Three, Four, Six, and Seven and Rule 11. This much is *required* of you as a litigant in this court. To benefit most from the booklet, of course, you should read it all. Your lawyer is required to certify that he or she has also read and understands the required sections and the Additional Information sections on a lawyer's duties to clients and the Code of Professional Courtesy at the back of this pamphlet.

It was often a nasty business. But the law, at least, sought to govern misfortune, the slights and injuries of our social existence that were otherwise wholly random. . . .In human affairs, reason would never fully triumph; but there was no better cause to champion.

SCOTT TUROW

1. OUR COURTS' HISTORY AND POWERS

Article III of our Constitution created only the United States Supreme Court, but it also authorized the creation of "such inferior Courts as the Congress may from time to time ordain and establish." The first of these lower courts were established by Congress in 1789 – one trial court for each of the thirteen original states. Today the nation is divided into ninety-four federal court districts, including the one in which your case will be tried. There are two districts in Arkansas.

United States District Judges are nominated by the President of the United States and must be confirmed by the United States Senate. If confirmed, they are appointed to the federal bench for life on good behavior. They are called federal judges. (State, county, and municipal governments also have judges, who are often elected rather than appointed. This booklet will discuss federal judges only.) The framers of our Constitution believed that federal judges should be insulated as much as possible from political and economic pressure so that they would interpret the law objectively and protect the rights of the unpopular as well as the popular, the poor as well as the rich, and those in the minority as well as those in the majority. To simplify the matter, federal courts, for the most part, enforce "federal law," that is, the United States Constitution and federal statutes enacted by Congress, while state courts enforce state laws. But there are overlaps. For instance, the federal courts also apply state law when a case falls within their "diversity" jurisdiction – when the case involves parties who reside in different states and the amount in controversy exceeds a certain dollar amount. Also, state courts sometimes are called upon to enforce certain federal statutes, and they must, of course, follow the United States Constitution. If you are not sure why your case is being tried in federal court, ask your attorney.

Your case will be conducted under the Federal Rules of Civil Procedure, which have been approved by the United States Supreme Court. These rules guide and govern the lawyers and the court as your case runs its course.

Good counselors lack no clients.

WILLIAM SHAKESPEARE

2. THE CLIENT – LAWYER RELATIONSHIP

As a litigant in this court, you have certain rights which were first set forth in the Bill of Rights and later extended by other laws and court rulings. These include the rights to a trial, to due process, and to equal protection under the law. You are also entitled to courteous and respectful treatment by everyone involved in the process - the judge, court personnel, your lawyer, and the opposing attorney.

But your own lawyer owes you much more, including competence, communication, confidentiality, and loyalty. These duties are defined in the Rules of Professional Conduct and are described in more detail at the end of this booklet. Please read that section carefully for a more detailed understanding of the client-lawyer relationship.

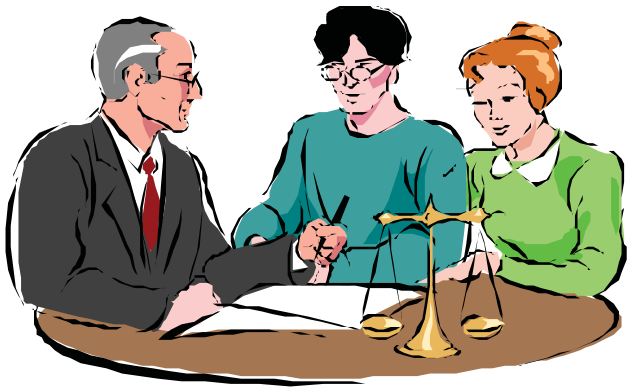
Although lawyers must abide by the Rules of Professional Conduct, they want to do better than just follow the rules. Some of the lawyers of this state have gone a step farther and adopted a Code of Professional Courtesy, which can also be found at the back of this booklet. The twenty-two declarations in the code boil down to common courtesy and respect for other people. All the lawyer's other obligations really come from these ideals. The court expects all lawyers practicing in federal courts in Arkansas to familiarize themselves with this code and to abide by it.

Q. If I am not happy with the way my lawyer is handling my case, what can I do?

A. If you have questions or if you are not pleased with the way your case is being handled, you should talk frankly with your attorney and ask for an explanation; and if that explanation does not satisfy you, it is time to get a new lawyer.

Q. Do I have to take my lawyer's advice?

A. No. The client makes the final call on all important decisions. You should, however, consider carefully your lawyer's advice – even if, perhaps especially if, the advice runs contrary to your own initial opinion.



Q. **Can my lawyer stop representing me even against my wishes?**

A. Yes, but only with the court's permission if a complaint has been filed and your case has formally begun.

Q. **Can I fire my lawyer if he is not diligently and competently representing me?**

A. Yes. Indeed, you may discharge your attorney even if he or she *is* diligently and competently representing you, but in doing so you may become liable to that attorney for any fees you have agreed to pay or any fees due to the lawyer for work already completed.

Your relationship with your lawyer is a two-way street: you have certain obligations to him or her as well. You should always tell your lawyer the truth. When your lawyer advises you about your obligations under the law, you should follow his or her directions. You should keep your promise to pay promptly for your lawyer's help. And even though you may have strong feelings about your suit or your adversaries, you are expected to return courtesy and civility to the others involved in your case, including court personnel, the judge, and the opposing side's lawyers. Just as a good working relationship between you and your lawyer is the key to efficient litigation, so too is a good and civil professional relationship between the opposing attorneys.

Every calling is great when greatly pursued.
OLIVER WENDALL HOLMES

3. YOUR ATTORNEY'S OBLIGATIONS TO OTHERS

Lawyers have obligations not only to you as their client, but also to themselves, their profession, other attorneys, and the court. Those practicing in federal court are bound to comply with Rule 11 of the Federal Rules of Civil Procedure, sometimes called the sanction rule, which is quoted in the Additional Information section at the end of this booklet. By this rule, all lawyers signing a pleading in federal court certify that they have made a reasonable inquiry into the facts of the matter at hand and the law, and have determined that the pleading has merit. This is one time when it is most important to communicate with your lawyer fully and truthfully. Documents are not to be filed for any improper purpose, "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If an attorney violates this rule, the court may impose penalties or **sanctions**, such as ordering that side to pay for expenses incurred by the other side as a result of an unnecessary or improper pleading. More drastic penalties may be imposed if warranted.

Q. **I'm so angry about this lawsuit that I told my lawyer to use every trick in the book to make life miserable for the other side – to drag this thing out till they have to cough up every penny they have, if she can. And I certainly don't want to see her cozying up to the other side's attorneys. She told me she can't "play hardball," though. What does she think I hired her for?**

A. Lawyers are required to follow the Rules of Professional Con duct, the Federal Rules of Civil Procedure, and the Code of Professional Courtesy. None of these rules allows them to throw their weight around, so to speak, in litigation. Be warned: if the judge thinks your lawyer is filing motions or refusing to cooperate simply "to make life miserable" for somebody, you and your lawyer can be severely penalized. If you had to represent yourself in this case, anger might keep you from thinking clearly, but one reason you have an attorney is for his or her emotional detachment. Remember, your lawyer wants to win, too – by asserting your position firmly and seeking your best interests aggressively, *without* being downright mean.

Another rule, Rule 37 of the Federal Rules of Civil Procedure, forbids attorneys and parties from blocking the discovery process by such actions as failing to respond to discovery requests, giving misleading or incomplete responses, refusing to comply with discovery orders of the court, or failing to appear at a properly noticed deposition. Again, offenders may be penalized in a variety of ways, from having to pay costs incurred by the other side as a result of their lack of cooperation, to having certain disputed facts resolved against them.

Lawyers may also be sanctioned for falling short of their basic obligations to their clients. Such a sanction may go so far as to remove an attorney from a case. Indeed, depending on its seriousness, such conduct can lead to the suspension of an attorney's license or even to outright disbarment.

With such penalties, the court ensures that you and your attorneys take very seriously your responsibilities to be honest, candid, and careful in conducting litigation. Litigation is a solemn truth-finding and justice-determining process, not to be undertaken lightly or for harassment, delay, or other improper motives.

> *The judges therefore should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness and attention; their minds should not be distracted with jarring interests, they should not be dependent upon any man or body of men.*
>
> THOMAS JEFFERSON

4. THE JUDGE'S OBLIGATIONS

The first responsibility of the judge is to move the case to a just and prompt conclusion. Early on he or she sends a scheduling order to the attorneys, setting deadlines for the conduct of the preliminary phases of your case and setting the case for trial. Like you, the judge and the court personnel want the docket to run smoothly and promptly, as planned. But please remember that the judge must supervise the overall docket of the court. Things that happen in other cases may affect the progress of your own case.

The judge has the duty to be impartial. He or she may very well know one or both of the attorneys in your case. Judges in a state like Arkansas know most of the attorneys who practice before them. If you think about it you will realize that it could not be otherwise. You need not worry that a judge's acquaintanceship with a certain lawyer will give anyone an unfair advantage. Judges have the duty to remove themselves from a case if they are related to, financially connected with, or very friendly with a party, or if they are for any reason biased for or against any of the parties to the lawsuit.

Q. **I don't care who decides my case, as long as it's not Judge X. We're not personally involved at all, but from what I read and hear I don't like him. Can I have some say-so in what judge I get?**

A. No. Parties to a lawsuit do not get to pick their judges, nor do judges pick their cases. Clerks of court assign judges to cases by random selection. However, if you believe that a judge is actually prejudiced against you for some reason, you can re

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Q. **Is it okay to talk to the judge while the case is active?**

A. No. Judges must handle and decide cases on the basis of two things only – written arguments filed in court called pleadings, and evidence that is presented in open court in the presence of all the parties and their attorneys. They do not talk to the parties or their attorneys about the case when the other side is not present, because this would create an appearance of partiality.

Q. Can a judge be removed from the bench?
A. Judges can be impeached by the United States Congress. Impeachment is extremely rare.

Judges should be courteous, patient, attentive, and fair, striving to decide correctly each issue presented. Remember that the issues in most trials are sometimes technical and highly contested, and you may disagree with the judge's decision. Courts of Appeals exist to correct errors that trial judges make in deciding the issues in your case.

Judges are also responsible for making attorneys and parties to the suit obey the rules of legal procedure and professional conduct, as explained in Section Three.

People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible.
WARREN BURGER

5. WHAT HAPPENS NOW THAT THE SUIT IS FILED?

There are criminal cases and civil cases. Your lawsuit is a **civil** case. Civil cases deal with such things as breach of contract, conflicts over the ownership of property, fault-based claims for damages for personal injury, and violations of federal statutes dealing with civil rights and age, race, or sex discrimination.

Your case started when a **complaint** was filed with the clerk of the United States District Court. A complaint is a statement about matters of fact and law. It is served on a defendant or on a third party to say that the plaintiff alleges that certain facts and laws entitle him or her to certain relief. The **plaintiff**, as you may know, is the party claiming to have been wronged; the **defendant** is the party sued; and a **third party to litigation** is someone who has or may have an interest in the lawsuit other than that of the principal litigants. After the complaint is served, the defendant responds by filing a formal **answer**.

At this point several other legal issues may be raised. **Jurisdiction**, for instance: Is this court the proper one to decide the case? A **motion to dismiss** is a legal "so-what," stating that even if everything the plaintiff states in his complaint is true, the plaintiff is still not, under the correct interpretation of the law, entitled to any relief. A **motion for summary judgment** is an allegation that there are no genuine factual issues to be determined by the court and that, therefore, the matter can be resolved without trial by simply applying the controlling law. So, you see, some cases are disposed of before trial.

Q. **All this red tape is driving me crazy. It seems as though both my attorney and the other side's attorney keep filing paper after paper with the court. Why can't we simply get on with the trial?**

A. Motions and counter-motions are just orderly ways of identifying and resolving disputes incident to the case. Often they help focus the court's attention on the real sticking points of the case. In fact, they might help bring about early settlement, which could save you time and money. However, motion practice can be, and too often is, overdone. The lawyer should file a motion with good reason and, generally, only after

trying to obtain relief voluntarily, through negotiations with opposing counsel. Judges can impose penalties to cut down on costly, unnecessary motions, but they would rather rely on the professionalism, reasonableness, and good judgment of the attorneys.

Once a complaint is filed, the clerk assigns it to a judge by random selection. Then a timetable relating to the various stages of your lawsuit is entered into the **docket**, or court calendar, and the court sends the scheduling order to the lawyers for both sides. That order informs them of the dates and deadlines relevant to your suit: the date of the trial itself; the time period during which the attorneys can engage in discovery; and the deadlines for the attorneys to turn in certain documents and papers to the court. The case will unfold according to the timetable set forth in the scheduling order, unless unusual circumstances cause a delay or **continuance** to be ordered by the court. Continuances are not favored by the courts and are given only for the most compelling reasons. Immediately upon receiving the scheduling order, your attorney should notify you of the trial date. Advise him or her *at once* if you have any problem with this date. In the meantime, mark the trial dates on your calendar and keep those dates open in accordance with your attorney's instructions. Because of the great volume of civil cases and because over ninety percent of all civil cases are settled or dismissed before trial, the court must "stack" cases on the docket so that court is always in session without gaps between trials. Thus, you may have to block out a week or two on your calendar even though your case may only take a day or two to try. This cannot be avoided, and it is not the lawyers' fault. There is simply no way for the court to manage the great number of cases on its docket without causing inconvenience. Nevertheless, the judge, the Clerk of Court, and all other court personnel work hard to minimize such inconveniences.

Litigation is the pursuit of practical ends, not a game of chess.

FELIX FRANKFURTER

6. DISCOVERY

Lawyers don't like surprises. Only on TV do attorneys, clients, witnesses, and court officers gasp because some startling revelation is made at trial. In the real, workaday world, the law recognizes that there is no way to resolve a case properly if either side withholds information that is basic to an understanding of the case. As a result both parties to a suit are required to cooperate in **discovery**, that is, in the disclosure of facts and documents that closely relate to the case. Discovery happens in several ways – by **interrogatories** (written questions from one side to the other), **requests for admissions** (written statements which the opposing side must admit or deny), or **depositions** (live, pre-trial testimony, before a court reporter and the lawyers, of people who have knowledge of the facts of the case). It is crucial that discovery be completed in a timely and orderly manner. If you and the other parties to the suit do not cooperate by agreeing on the principal issues of fact involved, the court will intervene to get this done. The scheduling order may direct all parties to meet together by a certain date in the hope that costs and delays will
be minimized by the agreement of the parties to disclose relevant information *voluntarily*.

Q. My lawyer, paid on an hourly rate, came to my deposition but just sat there and didn't say a word while I was questioned by the lawyers from the opposite side. Why should I have to pay him for that?

A. Your lawyer was there as a safeguard, to see that the questioning was done fairly and your interests properly protected. In your case, the opposing attorneys must not have asked any improper questions. You still owe your lawyer for this time, as you would for time spent in drafting pleadings, writing letters, or making telephone calls related to your case. Most lawyers keep precise and detailed records of minutes and hours spent on such tasks for your case.

The court will ask the parties to **stipulate**, or agree formally, to the truth of certain matters of fact when those facts are not really in dispute. This is a way of narrowing and pinpointing exactly what the conflicts between the litigants are. Such stipulations save money and time. Once certain facts are agreed upon, the attorneys can go about investigating those things that are genuinely disputed.

All necessary discovery must be started immediately and be concluded as soon as possible – no later than the discovery cut-off date set by the court. Sometimes parties cannot agree on what matters are appropriate for discovery. When a discovery problem comes up that cannot be resolved without court intervention, that problem must be brought to the court's attention promptly, by motion.

> ***Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time.***
>
> ABRAHAM LINCOLN

7. ALTERNATIVE DISPUTE RESOLUTION: SOME VOLUNTARY OPTIONS

Q. Is there any way that I can control the costs I am facing, or hurry things along somehow?

A.. Yes. Parties to a lawsuit can always consider the possibility of early settlement discussions in order to see if the dispute can be resolved promptly and as cheaply as possible.

If your case meets the jurisdictional requirements, states a legally valid claim, and has genuine issues of material fact, then you are constitutionally guaranteed the right to a civil trial, and you will not be forced to give up that right. However, it may be in your best interest to settle your lawsuit voluntarily, without going to trial. This might be cheaper and easier for everyone. Give close attention to your lawyer's recommendations in this matter. Ultimately, though, it is you who must decide whether or not to settle, and you need not apologize if you do insist on "your day in court." That is your right.

Your attorney and the opposing party's attorney may be able to work out terms for a settlement that are agreeable to both sides. In addition, you may request that a U.S. Magistrate Judge preside over a settlement conference in your case. This type of informal negotiated set-

tlement is the most common and familiar way your suit can be resolved without trial. However, if it looks as though that route might be unsatisfactory, you can use a more formal Alternative Dispute Resolution (ADR) technique or program to help you settle. Some means of ADR settlement are binding – that is, they result in a decision both sides must accept. Some are non-binding; they result in findings more like advice, and either party may take it or leave it. All involve a neutral third party who evaluates the case and helps guide it to resolution. However, the different ADR methods vary in the amount of control that the neutral third party has. ADR techniques are variable and flexible, letting the parties and their attorneys design an effective, efficient, and private resolution of their dispute. But usually they are not cost-free. Indeed, some may be very expensive. Discuss these pros and cons with your attorney.

For more detail on ADR, please see the Additional Information section at the end of this booklet. Note that this court has consciously rejected *mandatory* ADR because it believes it is important to uphold your right to have your case tried to a jury or a judge. Nevertheless, ADR remains a voluntary option which, if chosen, might save time, money, and anxiety.

> ***The fundamental premise of the Federal Rules is that a trial is an orderly search for the truth in the interest of justice, rather than a contest between two gladiators with surprise and technicalities as their chief weapons.***
>
> ARTHUR T. VANDERBILT

8. IF YOUR CASE GOES TO TRIAL

Q. Why aren't jury trials allowed in all cases?

A. Some lawsuits seek only equitable relief such as an **injunction**, a court order requiring someone to do (or stop doing) something. Within our legal system, judges have historically tried the factual issues in such cases. Some laws or statutes also provide that the judge alone must decide particular types of cases. Usually when the relief being sought is money damages, a jury can be demanded. But even where a jury is ordinarily required if requested, the parties can agree to try the factual issues to the court – that is, the judge – without a jury.

In a jury case, the jury is the judge of the *facts* and the judge is the judge of the *law* of the case; when the jury is waived, the judge listens to the testimony and decides the facts, then applies the law to the facts. Talk to your attorney about what kind of trial you should have.

Jury Trial. At the trial a fair amount of time will be spent on jury selection. This process is governed by strict rules that your attorney should explain ahead of time, and that will also be explained by the judge in his or her spoken instructions to the jury pool. An important part of the jury selection process is the *voir dire*, during which prospective jurors are questioned to help determine whether they could be fair and impartial if trying the factual issues in the case.

Once the jury is selected, sworn, and seated and the trial begins, the case proceeds in a specific, orderly way. First, each of the attorneys may make an opening statement – not an opening argument, you notice, but a statement identifying the issues in the case and sketching out the proof and evidence that the attorney expects to bring before the jury during the course of the trial.

In our system of law, the plaintiff has the burden of proof and must put on evidence first, after which the defendant may put on evidence. Occasionally the court may permit rebuttal evidence. Evidence is presented according to certain rules. The jurors may take into account only that evidence that the court has accepted. Lawyers may object to one another's evidence, just as they object to certain kinds of questioning. The judge decides whether to admit or to strike certain evidence or testimony, and all parties and jurors must abide by that ruling. Evidence does not usually include things the lawyers and the judge say, but only those things, such as documents or the testimony of witnesses, that are marked and received by the court as "evidence" under the rules of law.

Q. Why all the nitpicking? My trial took the better part of three days, mostly for a lot of legalistic haggling over things that didn't seem to matter very much. If I were in charge, I think I could have wrapped up the whole thing in a couple of hours.

A. Yes, lawyers do debate seemingly minor points of law and procedure, and often those debates are even carried on in the judge's chambers, while everybody else waits – as you probably noticed when you had a court recess for such a reason. But every subtle detail has a bearing on how the judge and jury will reflect on the facts of your lawsuit. If you are completely confused about some exchange between the lawyers during trial, ask your lawyer in private for a quick explanation, or simply put your trust in his or her training and experience. What may seem like nitpicking may in truth have a significant bearing on the outcome of your case.

After all the evidence and proof have been seen and heard, the attorneys are again allowed to address the jury directly, this time arguing their differing views of the evidence and its implications as persuasively as they can. The judge then instructs the jurors as to their duties and as to the law, and the jury retires to deliberate. (Some federal judges follow the state practice of giving jury instructions before the attorneys' arguments.) The jurors are supposed to follow the court's instructions as to the law of the case, but they may use their own knowledge, experience, and reasoning powers to sort out the facts of the case from the evidence they have heard.

Listen to the judge's instructions to the jury, for they will help you understand the rationale behind the different parts of a civil trial. Remember that these procedures exist for one reason only – so that the jury can most readily and accurately determine the facts and render its verdict in accordance with the law and the evidence.

Trial to the Court. When the judge alone is acting as both judge and jury, the basic trial format may be somewhat shortened. Attorneys may not always give opening statements, because the judge is already familiar with the issues in the case. Presentation of testimony and evidence proceeds as usual, but there may be no closing arguments. The judge might not rule on the case immediately, choosing rather to take the matter under advisement. In either instance, the judge makes findings of fact and also usually states his conclusions of law.

A *piece of paper blown by the wind into a law-court may in the end only be drawn out again by two oxen.*

CHINESE PROVERB

9. AFTER THE VERDICT

In consultation with your lawyer, you may wish to appeal your case if it is decided against you. Appeals from this federal court are to the Eighth Circuit Court of Appeals, which usually sits in St. Louis, Missouri, and St. Paul, Minnesota. The Eighth Circuit is composed of Arkansas, Nebraska, Iowa, Missouri, Minnesota, North Dakota, and South Dakota and is presently served by eleven active judges who are appointed from the Eighth Circuit states in which they live. They usually travel to St. Louis or St. Paul to hear appeals. However, the Circuit Court may sit anywhere within the circuit.

Appellate judges do not usually try cases. And, although district (trial) judges may sit on Courts of Appeals by assignment, certainly the judge who presided over your case at trial will not hear your appeal, if you decide to appeal. Everything said during the initial trial is taken down verbatim by a court reporter or a recording device. If you appeal your case, a transcript can be prepared for review by the appellate court. You and your lawyer will not go through the discovery process again. The appellate court will decide the case based entirely upon the record made in the trial court and the legal arguments made by the lawyers.

ADDITIONAL INFORMATION

On a Lawyer's Duties to the Client

- **Competence.** The Rules of Professional Conduct require that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." However, different lawyers have different areas of expertise. A lawyer may be highly competent in one area of law and unpracticed in another.

- **Communication.** The rule on communication says:
  - A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
  - A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Many times your lawyer may be working hard on your case without your knowing it. You have a right to make reasonable requests for information from your lawyer, whose duty it is to respond promptly. Some cases may develop more slowly than you would like. Other attorneys and parties are involved, as well as the court, and your own lawyer may not be able to control the speed with which things happen, no matter how much you press him or her.

Note that your communications should be limited to *your* attorneys. It is improper for any party to try to make personal contact with the judge or opposing counsel.

As a general rule, the lawyer makes the tactical decisions as to how the case will be handled along the way. You have the final decision on major questions, such as whether to accept an offer to settle the case. Listen carefully to your lawyer's advice, though, and think twice before you act against it.

• **Diligence**. In addition to competence, "a lawyer shall act with reasonable diligence and promptness in representing a client." In other words, your attorney must give proper attention and energy to the details of your case, handling each step of the case promptly, and notifying you of any unusual delay.

• **Fees**. Lawyers' fees, or the manner in which such fees are to be calculated, should be established by an agreement between the lawyer and the client. The law requires that the lawyer's fee shall be reasonable. "Reasonable" is hard to define, but some of the factors to be considered are the time and labor required, the skill required, the fee customarily charged in the locality for similar legal services, the ability, character, and reputation of the lawyer involved, and whether the fee is fixed or contingent. If the fee is to be contingent – that is, based on a percentage of a recovery won by settlement or judgment – then the fee agreement must be in writing. But it would be a good idea to put all fee agreements in writing at the beginning of your case.

Fees and expenses may sometimes be reduced if a settlement can be reached early in the case. Having clear cost estimates in hand may help you decide about settlement.

During the course of litigation, as well as at the end of it, you are entitled to an accounting by the lawyer. If more than one lawyer or law firm is involved in the case, you are entitled to know of any fee-splitting agreement that may exist between them.

• **Confidentiality**. As a strong general rule, the information a client gives a lawyer is confidential. There are, however, exceptions. For instance, if you tell your lawyer you are about to commit a crime, the lawyer may reveal what would normally be confidential information in order to prevent the crime. Or, confidential information may have to be revealed in order to present your case in the lawsuit. Litigation seeks to uncover the truth, and undisclosed facts on either side which are relevant to the issues might distort the truth. If your case involves information that might be sensitive or private, please discuss this point thoroughly with your lawyer.

• **Loyalty**. Lastly, a lawyer usually cannot represent you as a client if doing so would conflict with the interests of another client. If this is a problem in your lawsuit, your lawyer will discuss it with you. In some cases the conflict is not serious enough to disqualify the lawyer from representing more than one client. Even in those cases, however, each client must consent to the representation of the other clients, after being fully advised of the facts.

As important as the lawyer's duties to the client are, a lawyer may never counsel or assist a client in committing a crime, a fraud, or other wrong.

The following Code of Professional Courtesy for attorneys was adapted from the Pulaski County Bar Association's Code of Professional Courtesy.

As a member of the Bar of the United States District Courts for the Eastern and Western Districts of Arkansas, I will strive for the following professional ideal:

1. The rule of law will govern my entire conduct. I will not attempt to violate the law or place myself above the law.
2. Representing my client in a professional manner is my first obligation.
3. I will familiarize myself with the Rules of Professional Conduct and strive to observe those rules in my daily practice.
4. I will conduct myself as a lady or gentleman and live my personal and professional life by doing unto others as I would have them do unto me.
5. I will be honest with myself.
6. My word will be my bond.
7. When each adversary proceeding ends, I will shake hands with my

fellow lawyer who is my adversary. If I lose, I will refrain from unnecessary condemnation of the Court, my adversary, or my adversary's client.

8. I recognize that procedural rules are necessary only as a last resort to preserve order and decorum. Therefore, if my adversary is entitled to something, I will provide it without motions, briefs, hearings, orders, or other formalities. If something is a fact, I will stipulate to it in writing without a request for admissions, interrogatories, witnesses, or documents.
9. I believe vigorous advocacy is consistent with professional courtesy. Even though antagonism may be expected by my client, it is not a part of my duty to my client. A lawyer is not called to be obnoxious.
10. I will not notice a deposition until I have made an effort to set it by agreement.
11. I will communicate with my adversary promptly and courteously to avoid and resolve litigation.
12. I believe that advocacy does not include harassment.
13. I believe that advocacy does not include needless delay.
14. I will be ever mindful that every motion, trial, court appearance, deposition, pleading, or legal technicality costs someone time and money.
15. I believe that only attorneys– not secretaries, paralegals, or other non-lawyers – should communicate with a judge or appear before the judge on substantive matters.
16. I will stand to address the court.
17. I will advise my clients of the proper behavior expected of them in the courtroom.
18. When in the courthouse, I will dress appropriately out of respect for the court and the law.
19. I will always be punctual, and if possible early, so that preliminary matters may be disposed of and the main business of the meeting or hearing begun on time.
20. I will not compromise my effectiveness as an advocate and counselor by becoming too closely associated with my client's activities or emotionally involved with his case.
21. I am thankful for my opportunity to be a lawyer.
22. I appreciate the respect, trust, and friendship which other lawyers have given me. I will act at all times to preserve those values and the camaraderie at the Bar, because without it my client and I suffer.

On Alternative Dispute Resolution

Even though your case has already been filed in federal court, you may consider using Alternative Dispute Resolution (ADR) programs. You and your attorneys are responsible for looking into this option. Starting points for your investigation include the American Bar Association's Standing Committee on Dispute Resolution and the Arkansas Bar Association's ADR Committee, as well as similar committees of other state bar associations; directories of ADR providers; and public, university, and law school libraries. Telephone classified directories list nationwide and local ADR providers under "Mediation" and "Arbitration."

Different ADR procedures are listed below. Some may be altered or combined with others to suit your needs.

- **Mediation**. This is the least formal ADR process and is purely non-binding in nature. It differs from settlement negotiations in that a neutral mediator is brought in to help both sides consider all angles of settlement. As with other non-binding processes, if a case does not settle in mediation, you are free to proceed with other ADR methods or with litigation.
- **Early Neutral Evaluation**. Each party makes a brief presentation of its case to a neutral evaluator who is experienced in the subject matter of the dispute. In a settlement conference attended by the parties and their attorneys, the evaluator may suggest ways to control discovery and motions practice and encourages ongoing settlement discussions.
- **Summary Jury Trial**. An important factor in settlement negotiations is both attorneys' opinions of what a jury would be likely to do if the case actually were tried. When a jury's reaction is hard to predict, settlement becomes more difficult. Then a summary jury trial might be set up. It is not, of course, a real trial. This court does not permit real jurors to be used for this purpose, but the parties may by agreement engage people to serve in this advisory role. The attorneys present a summary of their cases to an advisory "jury," which deliberates and renders a non-binding verdict. The lawyers may then question the "jurors" to get the benefit of their thinking and responses to the issues and facts. Settlement negotiations based on what is learned can follow.
- **Mini-trial.** In large, complex commercial or corporate cases, a mini-trial involving those executives with full settlement authority might be helpful. After the corporate executives hear presentations

from the attorneys on both sides, intense negotiations occur, usually without the lawyers participating. A neutral expert advisor presides over the process and might be consulted for a non-binding advisory opinion if negotiations bog down. Again, this is a settlement device, not a real trial

- **Arbitration**. This ADR technique most closely resembles a court trial, but it may be quicker, cheaper, and less formal than real litigation. Its outcome can be binding or purely advisory, depending upon the parties' agreement. The parties can also agree to tailor the rules of procedure. Usually, one to three arbitrators render a decision after reviewing a part or all of the evidence and listening to the arguments of their attorneys. Many contracts and other business agreements contain the requirement that arbitration, rather than litigation, be used when a dispute arises. The opportunity to appeal from an arbitrator's decision – that is, the amount awarded and to whom – is usually very limited, but many litigants prefer that restriction.
- **Settlement Conferences**. A United States Magistrate Judge is available to conduct a settlement conference(s) in any civil case which is not exempted.[1] A settlement conference may be held if all parties consent to the same, or if all parties so request and the district judge assigned to the case believes that it would be useful. All conferences should be conducted at such times and under the procedures as established by the respective United States Magistrate Judge. A magistrate judge may use the settlement conference to give an assessment of the merits of the case, improve communications among parties, help formulate resolutions, and facilitate the trading of settlement offers. If you are interested in this ADR process, you should have your attorney contact the Judge assigned to your case. Discuss these and other settlement alternatives with your attorney if you wish. As a general rule, the earlier you settle, the more you – and the taxpayers – save. It is the policy of this court to encourage voluntary, early settlements.

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[1] Unless otherwise ordered by the Court, the following cases are excluded from the program: Appeals from ruling of administrative agencies, social security cases, bankruptcy appeals, habeas corpus and extraordinary writs, and prisoner civil rights cases.

On the Sanction Rule

The following passage is quoted from the *Federal Rules of Civil Procedure*:

> Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions
>
> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. * * * The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. 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 the person who signed it, a represented party, or both, an appropriate sanction, which may include 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.

On the Importance of Juries

The Seventh Amendment to our Constitution provides, in part, that "in suits at common law. . . the right of trial by jury shall be preserved." The jury system is respected as a cornerstone not only of our individual freedoms, but also of our national political character. One who observed its importance early in our country's history was the French traveler and writer Alexis de Tocqueville. The following selection from his *Democracy in America* (1835) explains that the use of juries in civil trials gives the American people a distinguishing role and responsibility:

> Juries invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government. By making men pay attention to things other than their own affairs, they combat that individual selfishness which is like rust in society.
>
> . . . Juries are wonderfully effective in shaping a nation's judgement and increasing its natural lights. That, in my view, is [the jury's] greatest advantage. It should be regarded as a free school which is always open and in which each juror learns his rights, comes into daily contact with the best-educated . . . and is given practical lessons in the law, lessons which the advocate's efforts, the judge's advice, and also the very passions of the litigants bring within his mental grasp. I think that the main reason for the practical intelligence and the political good sense of the Americans is their long experience with juries in civil cases.