APPELLATE UPDATE

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ANNOUNCEMENTS

REMINDER: **Administrative Plans are to be submitted by July 1, 2009.**

On May 28th, the Supreme Court amended **Supreme Court Rule 5-2** and a copy of the per curiam was included in the mailout. The Court announced that publication of the *Arkansas Reports* would be ending and opinions of the appellate courts, beginning July 1st, would be published electronically. New citation formats were announced. Effective July 1st, all opinions would be precedent (no more unpublished opinions). The Court also announced that this revised rule would supersede Act 162 of 2009.

CRIMINAL

Gholson v. State: **[judgment and commitment order]** A trial court has authority to set aside its own order dismissing charges in a criminal case if the original order was entered in error. **[due process]** Appellant, who had actual notice of the time and place of his probation revocation hearing, was present at the hearing, was provided the opportunity to hear and controvert the evidence against him, was provided the opportunity to offer evidence in his own defense, and was represented by counsel, failed to establish a due-process violation. (Burnett, D.; CACR 08-1100; 5-6-09; Baker).

Seamster v. State:**[suspended imposition of sentence]** The trial court had jurisdiction to revoke appellant's suspended sentence based upon his failure to complete the Reduction of Sexual

Victimization Program, which was a condition of his suspended sentence. (Fitzhugh, M.; CR 08-1331; 5-7-09; Wills).

Morgan v. State: **[sufficiency of the evidence; manufacturing methamphetamine; possession of drug paraphernalia with the intent to manufacture methamphetamine; and first-degree endangering the welfare of a minor]** There was substantial evidence to support appellant's convictions. **[search warrant]** The facts in the affidavit provided a substantial basis for determining that reasonable cause existed to believe that items related to the sale of controlled substances would be found in appellant's residence. Accordingly, the search warrant for appellant's residence was not defective and the circuit court's denial of appellant's motion to suppress items obtained during the search was not clearly against the preponderance of the evidence. (Arey, D.; CR 08-1330; 5-7-09; Danielson).

Lee v. State: **[Rule 37]** The trial court did not err in denying appellant's Rule 37 petition. (Langston, J.; CR 08-160; 5-7-09; Brown).

Sherman v. State: **[exclusionary rule; revocation proceedings]** The exclusionary rule does not apply to revocation hearings unless the defendant demonstrates that the officers who conducted the search acted in bad faith. **[suppression of evidence]** When a person's home is not merely a residence but has been converted into a commercial center where unlawful business is transacted, the heightened protection against unlawful intrusion into a citizen's home that is established by Arkansas case law does not apply. (Fogleman, J.; CR 08-523; 5-14-09; Hannah).

Hammock v. State: **[sex-offender registration]** Appellant, who was required to register as a sex offender in Washington, was also required to register as a sex offender in Arkansas pursuant to Ark. Code Ann. § 12-12-906(B)(i). **[*Batson* challenge]** Because appellant failed to meet his burden of persuasion, the trial court did not err in denying his *Batson* challenge. (Gibson, R.; CACR 08-1045; 5-20-09; Glover).

Ventry v. State: **[sufficiency of the evidence; capital murder; aggravated robbery]** In addition to appellant's confession, there was substantial evidence to support his convictions. **[suppression of confession]** Based upon the totality of the circumstances, the Supreme Court concluded that appellant's confession was voluntarily given. **[transfer to juvenile court]** Because appellant filed to pursue an interlocutory appeal of the trial court's denial of his request to transfer his case to the juvenile division, the Supreme Court refused to consider the issue during the direct appeal following his convictions in circuit court. (Arnold, G.; CR 08-1232; 5-21-09; Gunter).

Gilcrease v. State: **[sufficiency of the evidence; capital murder; kidnapping]** There was independent evidence that linked appellant to the crimes for which he was convicted and that corroborated the testimony of his accomplice. **[cross-examination]** Appellant's accomplice entered into a plea agreement with the State in exchange for his testimony against appellant. Prior to trial, the accomplice refused to testify against appellant and sought to withdraw his guilty plea. The trial court denied his request and imposed a sentence upon the accomplice. The

accomplice again changed his mind and offered to testify against appellant. Although the accomplice was permitted to testify, the State did not offer him a deal. During cross-examination, appellant was not permitted to ask the accomplice questions about the history surrounding the previous plea agreement. However, appellant was permitted to cross-examine the witness about his motive and desire to have his sentence reduced as a result of his testimony against appellant. The Supreme Court noted that this line of questioning allowed appellant to show the witness's possible bias or prejudice. Accordingly, the Court concluded that the circuit judge did not abuse his discretion in imposing a limit on appellant's cross-examination of the accomplice. **[status as an accomplice]** When the facts show conclusively that a witness is an accomplice, the issue may be decided as a matter of law. When the accomplice's status presents issues of fact, the question should be submitted to the jury. (Humphrey, M.; CR 08-01058; 5-21-09; Imber).

Hinojosa v. State:**[probable cause to stop a vehicle]** Because appellant's license plate was not clearly visible or clearly legible as required by Ark. Code Ann. § 27-14-716 (b), and because the frame around the license plate made the plate more difficult to read in violation of Ark. Code Ann. § 27-14-716 (c), the law enforcement officer had probable cause to stop appellant's vehicle. **[statutory interpretation]** Arkansas Code Annotated § 27-14-716 applies to all vehicles traveling on Arkansas roads. (Kennedy, J.; CR 08-1336; 5-21-09; Wills).

Heard v. State: **[sufficiency of the evidence; aggravated robbery]** Appellant brandished a toy gun and demanded that a victim return two dollars which he owed the appellant. The victim admitted that he owed appellant the two dollars. Appellant was charged with aggravated robbery. Appellant argued that although his actions could have been found to be in violation of the law, they did not constitute robbery because the property that he took was his own. The Court of Appeals agreed with appellant and concluded that there was not substantial evidence to support appellant's conviction. (Hanshaw, L.; CACR 09-36; 5-27-09; Pittman).

Dosia v. State:**[motion to suppress]** Because appellant's initial encounter with law enforcement and resulting detention were impermissible, the trial court's denial of appellant's motion to suppress the evidence obtained therefrom was clearly against the preponderance of the evidence. (Capeheart, T.; CACR 08-1057; 5-27-09; Robbins).

Spiro Cora v. State: **[sufficiency of the evidence; theft of property lost, mislaid, or mistakenly delivered]** There was substantial evidence to support appellant's conviction of theft of property lost, mislaid, or mistakenly delivered. (Arnold, G.; CACR 08-633; 5-27-09; Kinard).

Matthews v. State: **[lesser-included offense]** Aggravated assault is not a lesser-included offense of aggravated robbery. (Johnson, K.; CR 08-1270; 5-28-09; Hannah).

CIVIL

Nichols v. Culotches Bay Committee:**[summary judgment]** Court erred in granting summary judgment sua sponte. Party merely responded to opponent's motion for summary judgment but did not file a cross motion for summary judgment; thus, party was not on notice that it needed to meet proof with proof on all potential elements and court should not have granted summary judgment. (Mills, B.; CA 08-1448; 5-6-09; Gruber)

Morris v. LandPulaski, LLC: **[tax sale]** Notice of tax sale was proper and sale will not be set aside. Although pre-sale notices were returned undelivered, and sale took place. Before a deed was conveyed, Commissioner took the additional step of mailing a third notice, which was not returned, and court found that notice had been received. Thus, owner received actual notice before he was deprived of his property by issuance of a deed. (Pierce, M.; CA 08-1159; 5-6-09; Vaught)

Nelson v. Stubblefield: **[instructions/medical standard of care]** Court was correct in giving AMI 1501-A rather than a modified form. There was not evidence to support the modified instruction because the doctor was never qualified as an expert on nursing and he was not allowed to testify directly to the standard of care for nurses. **[deposition]** Under facts, use of video deposition at trial in lieu of live testimony was not error.
Regarding another video deposition, even though the witness testified in person, under the rules the defendant was entitled to play a portion of the witness's video deposition because the deposition of a party may be used for any purpose. **[insurance]** Court did not abuse its discretion by not allowing plaintiff to present evidence that hospital's insurance carrier was a named defendant. (Burnett, D.; SC 08-649; 5-7-09; Brown)

Union Pacific Railroad v. Vickers:**[class certification]** Trial court erred in certifying the class. There was not a common question of law or fact that predominated over individual issues in the cases. All of the members of the purported class had in common the fact that they alleged they were injured by Union Pacific and Union Pacific acted improperly in settling their claims. There is no "one set of operative facts" as alleged by the class that may or may not have constituted the unauthorized practice of law or violation of deceptive practices act. (Hudson, J.; SC 08-934; 5-7-09; Wills)

Nationwide Assurance v. Lobov:**[insurance]** "Wilful or malicious acts" exclusion did not apply under the facts of the case even though the driver was intentionally speeding. (Carson, G.; CA 08-982; 5-13-09; Gruber)

Skallerup v. City of Hot Springs:**[sewer charge --resident/non-resident]** City was not estopped or otherwise prohibited from charging nonresident sewer customers a higher sewer rate and debt service charge than that charged to residents. City did not agree in 1970's to provide services at the same rate in perpetuity no matter what new facilities might be needed to supply demand. The nonresidents received the benefit of the system at the same rate as the residents so long as that

system could provide the needed services.
(Wright, H.; SC 08-611; 5-14-09; Hannah)

Western Sizzlin Corp. v. Parks Land Co. **[non-testifying expert]** Trial judge erred in allowing party to refer to opponent's employment of an expert who was not called to testify by that party. Reference to the original employment of the non-testifying expert was prejudicial. (Proctor,W.; SC 08-1199; 5-14-09; Gunter)

Alliance Steel, Inc. v. TNT Construction, Inc. **[contractor's bond]** Burden is on the materialman to check public records to determine if contractor had a bond for school construction project filed of record as required by statute. Materialman cannot make out a claim of fraud because it did not determine that there was not a bond until after it had provided supplies. Likewise, since materialman had a duty to determine whether a bond was filed, it cannot make out a claim of negligence based on assertion that contractor had a duty to obtain a bond. (Putman, J.; CA08-986; 5-20-09; Hart)

Sealing Devices, Inc. v. McKinney: **[loss of profits]** Trial court properly denied plaintiff's motion for new trial alleging inadequate damages in its loss of profits claim. Court was justified in giving the model instruction on loss profits rather than proffered instruction.
(Switzer, D.; CA08-1264; 5-20-09; Gruber)

Bulsar v. Watkins: **[medical malpractice]** In medical malpractice case, trial court denied plaintiff's motion for new trial because defendant's counsel was not disqualified. Defense counsel was retained by two doctors and their clinic prior to the filing of ths suit. One of the doctors was not sued. When the doctor who was not sued consulted with the defense attorney, plaintiff claimed defense counsel violated Evidence Rule 503(d)(3)(b) when he spoke ex parte with plaintiff's primary physician. This contact did not constitute improper contact with the opposing party's treating physician under this fact pattern, especially in light of the facts that an attorney-client relationship existed between defense counsel and the treating physician and the doctor sought the attorney for legal advice. (Humphrey, M.; CA07741; 5-20-09; Kinard)

Ark. Dept. Environmental Quality v. Oil Producers of Ark. **[sovereign immunity]** ADEQ's sovereign immunity was not waived by the Administrative Procedures Act because that agency is subject to a different statutory procedure and the Administrative Procedure Act does not apply to it. An exception to sovereign immunity is that an agency is acting ultra vires in issuing permits or unauthorized rules and regulations. A trial will be necessary to develop this issue. (Guthrie, D.; CA 08-890; 5-21-09; Brown)

Travis Lumber Co. v. Deichman:**[damages/remittur]** Circuit court erred in failing to order a new trial due to excessive compensatory damages because the jury award was not supported by the evidence Remittur is in order.**[locality rule]** There is no locality rule for any profession,

including the timber industry, other than the medical profession.**[standing/personal representative]** Foreign administrator lacked standing to bring suit in Arkansas on behalf of his deceased mother because he did not post bond prior to filing suit as required by statute. **[prejudgment interest]** Prejudgment interest cannot be awarded when the evidence varies widely and the damages are not capable of exact determination.**[trust estate]** Upon creation of trust and the conveyance of property to the trust estate, conveyance did not include an accrued cause of action that was not mentioned in conveyance.(Danielson, E.; SC 08-916; 5-21-09; Imber)

Crown Custom Homes, Inc. v. Buchanan Services, Inc.: **[contract]** There was an agreement between the parties based on the evidence, including past course of dealings. Since the contract was capable of being performed within one year, the Statute of Frauds is not applicable. The award of attorney's fees was not unreasonable merely because the fee was nearly the sum of the judgment. (Scott, J.; CA 09-20; 5-27-09; Baker)

Roberts Contracting Co. v. Valentine-Wooden Road Public Facility Board: **[contract]** Contractor did not substantially perform its contract; however, it is entitled to compensation for work it did perform based on the value of the benefit received and retained by the owner. (Kilgore, C.; CA 08-751; 5-27-09; Gruber)

DOMESTIC RELATIONS

Chambers v. Ratcliff: **[property-settlement; contempt]** The parties' divorce-decree-settlement agreement was a contract between the husband and wife. Section 8 of the agreement provided that the parties would maintain life-insurance policies, naming the two children of the marriage as beneficiaries. As a party to the original contract, the appellee had standing to bring the contempt action against the appellant even though it was the children who stood to benefit from the decree. The children were third-party beneficiaries, not necessary parties in interest The appellee was the proper party to bring a contempt action to enforce a provision of the decree. The children had no standing to pursue the action. (Carson, G.; No. CA 08-1283; 5-13-09; Vaught)

Whitworth v. Whitworth: **[alimony]** The trial court's denial of alimony to the appellant wife was affirmed. The Court of Appeals recited the rules regarding alimony and said that, although the facts of the case arguably would support an alimony award if the trial court had ordered it, the Court would not substitute its judgment for the trial court's. The Court found no abuse of discretion. (Shirron, P.; No. CA 08-1025; 5-20-09; Kinard)

Matthews v. Matthews: **[alimony; Ark. R. Civ. P. 37(b)]** The appellant husband appealed the trial court's order increasing the amount of his former wife's alimony and striking, as a discovery sanction, his motion requesting reimbursement for a previous overpayment of alimony. The court did not abuse its discretion in balancing the appellant's ability to pay alimony with the appellee's need for alimony. In answer to appellant's argument that the increase in alimony is equivalent to a distribution of his non-marital property, the Court of Appeals said that payment of alimony after a divorce comes from a payor's separate property and is necessarily paid from his separate property. The second issue involved the trial court's striking appellant's motion for reimbursement of an overpayment of alimony in the amount of $12,520 that stemmed from a 2006 appeal to the Court of Appeals. The Court noted that Rule 37(b)(2) provides that when a party fails to obey a discovery order, the circuit court may make such orders as are just, including, in Rule 37(b)(2)(C) "striking out pleadings or parts thereof[.]" The Court said that his motion contained a request for relief, and that the Rule's general grant of sanction authority to the court is broad enough to cover an order striking a motion. The appellee had to request documents three times, and each time, the appellant would provide a few of the documents. The Court said, "His actions, indeed inaction, were a flagrant disregard of the trial court and its orders, his ex-wife, and the entire judicial system." The trial court's order was affirmed. (Pierce, M.; No. CA 08-583; 5-20-09; Vaught)

PROBATE

Hetman v. Schwade: **[guardianship–accounting]** Appellant and appellee are sisters who, in a Pennsylvania court, were appointed co-guardians of their mother's estate and person, with only appellant having authority to sign checks. Appellee, a resident of Arkansas, subsequently brought her mother from New Jersey to Eureka Springs. The appellee filed a petition for guardianship in Arkansas. The appellant filed a petition for review of the guardianship in Pennsylvania, seeking appointment as sole guardian. Appellee answered, asking the Pennsylvania court to appoint her sole guardian and to transfer jurisdiction of the guardianship case to the Circuit Court of Carroll County. The Pennsylvania court ordered the appellant's guardianship terminated, noted that appellee would be the sole guardian, and transferred the guardianship to the Carroll County Circuit Court. No accounting was ordered. The Carroll County Court accepted transfer of the jurisdiction of the guardianship of the estate and the person of the parties' mother. The appellee filed a petition for accounting in Carroll County, arguing that the appellant had depleted the ward's estate as the guardian in Pennsylvania. The circuit court found it had both subject-matter jurisdiction and personal jurisdiction over the appellant and ordered the appellant to provide a formal accounting for the Pennsylvania guardianship. The Arkansas Supreme Court found that the Arkansas court had both subject-matter jurisdiction and personal jurisdiction, but did not have *authority* to order a guardian from an out-of-state guardianship proceeding who was never appointed guardian in Arkansas to provide an accounting in that case. Guardianships are special proceedings governed by statute. Generally, statutes have no effect except within the state's own territorial limits. The Court concluded that

the statute providing for an accounting in a guardianship case does not apply to a former guardian who was appointed, served, and removed as guardian solely under the laws of another state. The Court said its conclusion is also supported by common law principles. The case was reversed and remanded. (Epley, A.; No. SC 08-1273; 5-21-09; Wills)

Butler v. Dike: **[decedents' estates; family settlement agreement]** The Court of Appeals affirmed the trial court's conclusion that the purported distribution of real property did not constitute a family settlement agreement that altered the terms of the decedent's will. There was no "meeting of the minds" or mutual assent necessary to form a family settlement agreement. Since there was no family settlement agreement to govern the real property in question, defeasible title passed to Rosebud Nicholson at the decedent's death, subject to being defeated if she did not survive Calvin Butler. When she survived him, her title became indefeasible, and she owned the property in fee simple absolute. The trial court's decision was affirmed. (Henry, D.; No. CA 08-1242; 5-27-09; Kinard)

DISTRICT

Lampkin v. State: **[District Court Appeal]** Ark. Code Ann. § 16-96-508 permits the circuit court to dismiss an appeal and remand the case back to the district court when a defendant fails to appear for trial. However, a dismissal is not proper when the defendant fails to appear for a pretrial hearing. In this case, appellant failed to appear at a pretrial hearing and both parties agree that circuit court lacked authority to dismiss the appeal. (Sims, J.; CACR08-1093; 5-13-09; Gladwin)

EIGHTH CIRCUIT

Martin v. Russell: **[immunity]** On the basis of the record, no reasonable juror could have found that the order of protection under which plaintiff was arrested had been vacated by the state court, and the defendant officers' actions in arresting him for violation of the order were warranted and reasonable; as a result, the officers were entitled to qualified immunity on the claim that they arrested plaintiff in violation of his constitutional rights. (W.D. Ark.; 08-2577; 5-6-09)

U.S. SUPREME COURT

Montejo v. Louisiana: **[Michigan v. Jackson]** At a preliminary hearing required under

Louisiana law, petitioner Montejo was charged with first-degree murder, and the court ordered the appointment of counsel. Later that day, the police read Montejo his Miranda rights, and he agreed to go along on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim's widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death. Affirming, the State Supreme Court rejected his claim that the letter should have been suppressed under the rule of *Michigan v. Jackson*, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding. The court reasoned that *Jackson's* prophylactic protection is not triggered unless the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel; and that, since Montejo stood mute at his hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

Held: *Michigan v. Jackson* should be and now is overruled. The Louisiana Court's interpretation of *Jackson* would lead to practical problems. Requiring an initial "invocation" of the right to counsel in order to trigger the *Jackson* presumption, as the court below did, might work in States that require an indigent defendant formally to request counsel before an appointment is made, but not in more than half the States, which appoint counsel without request from the defendant. The protection afforded by *Michigan v. Jackson Jackson* is not needed. (No. 07-1529; 5-26-09)