Practice Pointer: Orders Drafted by Opposing Counsel

Grace Fletcher
gfletcher@mwlaw.com
(501) 688.8815

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Even the best litigator loses on a motion every now and then. When that happens in Arkansas state court, oftentimes the judge may file a verbatim order drafted by opposing counsel as the final order. Sometimes these orders have discrepancies between what the judge said at the conclusion of the hearing and what is actually written. Other states have expressed concern over the fairness of these orders because of their one-sided nature.[1] However, Arkansas courts have repeatedly upheld the long-standing tradition of permitting the prevailing party to prepare orders and judgments.[2]

Attorneys who routinely practice in Federal Court will know that the duty to draft judgments lies with the court itself or the clerk.[3] This has been so since a 2002 amendment to Federal Rule 58 departed from the old practice of directing the prevailing party to prepare a judgment.[4] This change to the Federal Rules demonstrates an awareness of issues of unfairness inherent in allowing the prevailing party to frame the judgment or order.

In contrast, the Arkansas Rules explicitly permit a party to draft orders or judgments. In the case of final judgments, the Arkansas' Rules of Civil Procedure allow the prevailing party to draft and submit a form of judgment to be entered by the court. This may be done with or without the consent of opposing counsel.[5] On appeal, the written order generally prevails over oral orders made after the hearing in Arkansas.[6] Courts have explained that the rationale for this rule rests in Arkansas Rule of Civil Procedure 58, which states that a judgment or decree is not effective "A judgment or decree is effective only when so set forth and ended as provided in Administrative Order No. 2."[7] Administrative Order 2(b)(2) provides that an order announced from the bench does not become effective until reduced to writing and filed. Courts seem to rationalize that if the written order differs from the oral order, the judge's mind has changed based on a further interpretation of the facts.

As a practical matter, busy Arkansas judges may rely on the prevailing party's ethical obligations of candor to the tribunal when entering the order verbatim.[8] In theory, once a party has won their case, all that party would need to do is draft the order or judgment exactly as delivered by the judge at the hearing. In practice, however, the prevailing party may take the opportunity to draft an order that is more favorable to his or her client. Ultimately, the judgment entered is the judgment that prevails, so it is important to ensure that the findings of fact and conclusions of law – as memorialized by opposing counsel – accurately reflect your case.

For attorneys practicing in Arkansas state courts, it is important to be aware of this practice and consider steps to prevent biased orders. For example, having a court reporter present at every hearing can establish a clear record of the hearing. As the drafting party, an attorney should refer to the hearing transcript to provide an accurate representation of the oral findings from the bench. If opposing counsel drafts a biased order that differs from the bench ruling, and the judge enters the order as written, counsel

is left with little recourse for reconsideration. Having a clear transcript can strengthen your position on a motion to reconsider or on appeal. However, the presence of a court reporter will not help if the judge does not state his or her findings of fact at the hearing. Therefore, clarifications should be made in court, as soon as practicable after the findings are spoken. Because Arkansas case law emphasizes that the judge's entered judgment is the final and most reliable instance of his or her decision on the case, the entered order prevails as written.[9] "If a trial court's ruling from the bench is not reduced to writing and filed of record, [the court] is free to alter its decision upon further consideration of the matter,"[10] thus. Finally, when opposing counsel submits an order to the court, objections should be made quickly to any substance.

Finally, when drafting a final judgment, counsel should keep their ethical obligations at the forefront of their mind. Drafting such a judgment is a pivotal role in the adversarial process, and it is critical to draft a document that aligns with the court's findings as stated from the bench.

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[1] Wilkinson v. Wilson, 203 So.3d 186, 187-88 (D.C. Fl. 2016).

[2] See National Home Centers, Inc. v. Coleman, 370 Ark. 119, 257 S.W.3d 862 (2007), McGhee v. Arkansas State Bd. of Collection Agencies, 368 Ark. 60, 243 S.W.3d 278 (2006).

[3] Fed. R. Civ. P. 58.

[4] Comm. Notes on Rules – 2002 Amendment, Fed. R. Civ. P. 58.

[5] *Id.*

[6] McGhee v. Arkansas Bd. of Collection Agencies, 368 Ark. 60, 66, 243 S.W.3d 278, 284 (2006).

[7] Ark. R. Civ. P. 58 (2006).

[8] Ark R. Prof. Conduct 3.3

[9] McGhee v. Arkansas Bd. of Collection Agencies, 368 Ark. 60, 66, 243 S.W.3d 278, 284 (2006).

[10] DFH/PJH Enterprises, LLC v. Caldwell, 373 Ark. 412, 414, 284 S.W.3d 66, 68 (2008).