

# The Arkansas Register



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**State Capitol, Room 026**  
**Little Rock, AR 72201-1094**

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# THE ARKANSAS REGISTER

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.:2004-274

Lendall, Jim  
*State Representative*

**RE:**Would the exclusion of contraceptives from an employer- or higher education-sponsored benefits program that otherwise provides prescription drug coverage violate Arkansas or federal law or the Arkansas or U.S. Constitutions? Q2) If the exclusion of contraceptives in this manner would violate Arkansas law and not violate federal law or the U.S. Constitution, is it likely that federal courts would follow Arkansas law on this question? **ANSWER:** "No" as to state statutory law, as well as state and federal constitutional law. But the answer is less clear regarding federal statutory law. One federal court has held that Title VII was violated by an employer's self-insured health plan that excluded contraceptive coverage but was otherwise comprehensive. (Erickson v. Bartell, W.D.Wash.) This case was not appealed. Similar federal cases are pending, including one that, if appealed to the 8th Circuit, could provide binding precedent on the issue. Currently, however, the issue is unclear.

## Opinion No.:2004-285

Johnson, Bob  
*State Senator*

**RE:**Can a county judge have his or her office located in a non-adjacent courthouse annex and still be in compliance with ACA 14-14-1001(c)? **RESPONSE:** No, not under the recited facts.

## Opinion No.:2004-288

Reed, Tommy  
*Exec Dir, AR Prof Bail Bondsman*

**RE:**Pursuant to provisions of ACA 17-19-202(d)(4), is the transfer of an agent's license from one professional bail bond company to another an administrative/clerkical function of the licensing board which occurs by

payment of the transfer fee, or is it a valid exercise of the regulatory power of the board to impose a reasonable waiting period (two weeks), during which the agent cannot transact business, to allow the company from which the agent is transferring to verify that all monies have been collected and all documentation has been satisfactorily completed? **RESPONSE:** In my opinion, the Arkansas Code does not authorize the Arkansas Professional Bail Bondsman Licensing Board to enact any rule or regulation effectively suspending an agent's license during the time it takes the Board to confirm that the agent has observed his legal obligations in transferring from one professional bail bond company to another.

## Opinion No.:2004-289

Bennett, Russell  
*State Representative*

**RE:**Can a county treasurer, pursuant to ACA 21-6-302, collect a commission fee from the Real Property Reappraisal Fund (ACA 19-5-1096 and 26-26-1907)? Q2) Does the language of ACA 19-5-1207, which provides: "[t]here shall be no deduction from the proceeds of the fund to pay any fees or expenses except as provided in the act creating the fund," preclude imposition of such a fee? **ANSWER:** Q1) No. This would be contrary to ACA 19-5-1207. See 26-26-1904 and 26-26-1905 (reflecting State's intent to pay entire cost of reappraisals, with no deductions for other fees or expenses).

## Opinion No.:2004-291

Hutchinson, Jeremy  
*State Representative*

**RE:**Under the common law incompatibility doctrine, is there a likely prohibition of dual office holding by members of the planning commission of a city and local school board directors? **RESPONSE:** No, although a planning commission member should recuse from voting on matters that involve the school district he serves.

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.:2004-292

King, Barbara  
*State Representative*

**RE:**When a city council is presented with a petition requesting an election on consolidating two municipalities after the petitions have been deemed to contain a sufficient number of signatures and the council is required to pass an ordinance in favor of the annexation and calling an election on the question pursuant to ACA 14-40-1201, what is the effective date of the ordinance? Q2) Assuming that the normal effective date of the ordinance is a date after the election dated called for on the petition, can the ordinance be passed with an emergency clause so that its effective date would be immediate? Q3) If the normal effective date of the ordinance is a date after the election called for on the petition, is it necessary to recirculate the petition or can the election be called at a time compatible with the effective date of the ordinance with all other portions of the petition remaining valid? **ANSWER:** These questions are implicated in a current circuit court case (*Valley v. Coad, Phillips Co. Cir. Ct.*). Consequently, an opinion cannot be issued, consistent with the office's long-standing policy against issuing opinions on matters in litigation.

## Opinion No.:2004-295

Walters, Shirley  
*State Representative*

**RE:**Is it legal for the South Sebastian County Water Users Association to provide the White Hall-Rye Hill Volunteer Fire Department with address information of all residences and businesses within its coverage area or would that be a violation of the Privacy Act? **RESPONSE:** Because there is no general privacy protection under Arkansas law (the Federal Privacy Act is inapplicable), the Association must provide records containing the address information (with the possible exception of unlisted addresses) IF it is subject to the Arkansas Freedom of Information Act (FOIA). This will involve a question of fact. See Opinions 2002-285 and 2001-314.

## Opinion No.:2004-297

Luker, Jim  
*State Senator*

**RE:**By whom and by what method is a decision to be made under ACA 6-13-634 fixing the number of members of the Cross County School District Board of Directors? Q2) By whom and what method should the boundaries of the zones be established? Q3) After the number of board members and the boundaries of the zones are established, by what method and time frame are the positions on the new board to be filled? **RESPONSE:** Q1) I do not believe the voters' approval of single-member zones pursuant to A.C.A. 6-13-615 necessarily requires a reconsideration of the number of members serving on the Cross County School District Board of Directors, as your question seems to imply. However, if the Board wishes to change the number of its members, I believe it should petition to do so to the State Board of Education pursuant to A.C.A. 6-13-604 (increase) or A.C.A. 6-13-606 (decrease). Q2) The county election commission should establish zone boundaries. A.C.A. 6-13-615(c). Q3) A.C.A. 6-13-615 and Act 872 of 1989 provide that the members of the current board, regardless of residence, will be assigned zones by lot and that elections by zone should be scheduled on a staggered basis, with the length of the current term to be served in each zone again to be determined by lot.

## Opinion No.:2004-300

Wooldridge, Tim  
*State Senator*

**RE:**Do the 10% cap and the 5% cap provided for in Ark. Const. amend. 79, Secs. 1(b) and (c) apply until the reappraised value of the parcel is reached, regardless of the number of times the parcel is sold? Q2) If the answer to q1 is "no," may the General Assembly enact legislation allowing the taxable value of the parcel to increase to full assessed value on January 1 following the transfer or sale of the property? **RESPONSE:** Q1) I cannot answer with a "yes" or "no." The provisions of Amendment 79 are ambiguous with respect to the question of whether the

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# ATTORNEY GENERAL OPINIONS

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conveyance of property subject to either of the referenced caps would warrant lifting the cap on the purchaser's assessments until, possibly, the next reappraisal warrants reimposing a cap. Q2) Assuming a court would agree that Amendment 79 is ambiguous on this issue, the court would attach some weight to a legislative conclusion that the constitution supports, even if it may not necessarily mandate, lifting the cap when property changes hands pending the next reappraisal. However, given the ambiguity in Amendment 79, I cannot opine unequivocally that a reviewing court would uphold the constitutionality of the proposed legislation.

## Opinion No.:2004-308

Haak, David M.  
*State Representative*

**RE:**In light of the fact that an unopposed Miller County Quorum Court member passed away after he won the primary but before the general election, would the person that the Governor appoints only serve out this current term with a special election for the upcoming term? Q2) Would the person appointed be able to serve out the remainder of the current term and the upcoming term? Q3) If there is a special election, can the person appointed by the Governor run for that term? Q4) If there is no special election, can the same person be re-appointed by the Governor to fill the upcoming term as well as the current unexpired term? **RESPONSE:** 1) No, assuming the "vacancy in nomination" was not filled; 2) yes; 3) to the extent this question inquires about a special election to fill the vacancy in office, as opposed to a vacancy in nomination, an answer is unnecessary because a special election is not authorized, but the appointee will be ineligible in the next general election; and 4) assuming the "vacancy in nomination" was not filled, there is no need to reappoint the same appointee. He will serve until his successor is elected and qualified.

## Opinion No.:2004-310

McSpadden, Don  
*Pros Attorney, 16th Judicial District*

**RE:**Can a legislator serve as a public defender, whether he is paid by the state, a county, or a city? **RESPONSE:** See Opinion 2001-127. It depends upon the exact position at issue and the position the individual held first.

## Opinion No.:2004-311

Schulte, Susan  
*State Representative*

**RE:**In light of the fact that the Cabot City Council voted to commemorate the passing of a young Cabot resident killed while serving on active duty in Iraq, can the city use public funds to pay the costs of this commemoration, including the cost of flowers and the cost of framing a proclamation? **RESPONSE:** The expenditure of municipal funds in support of a public commemoration of the military service and sacrifice of a soldier killed while on active duty may well be permissible under the pertinent constitutional and statutory analysis (the public purpose doctrine, art. 12 sec. 5, and 14-58-303); distinguishing Opinion 91-410 on this ground.

## Opinion No.:2004-318

Emigh, Barry

**RE:**Request for certification of the popular name and ballot title for a proposed constitutional amendment permitting state-operated lotteries, bingo, raffles and gambling. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.:2004-320

Edwards, Arthur

**RE:**Is the decision of the custodian of records to release documents reflecting an employee's date of hire, salary history and, if any, grievances and complaints made by the employee against coworkers, after redacting any exempt information, consistent with the provisions of the Freedom of Information Act?  
**RESPONSE:** In my opinion, documents reflecting the date of hire and salary history should be produced. With respect to grievance reports and claims of prejudice, discrimination or harassment against coworkers, the custodian must identify each such document as either a personnel record or an employee evaluation/job performance record and then apply the applicable standard.



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# ADOPTED RULES AND REGULATIONS

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## ALCOHOL & DRUG ABUSE COORDINATING COUNCIL

Docket No.: 180.00.04--001  
Effective Date: 12/18/04  
Contact Person: Brad Farmer  
Telephone: (501) 228-3828

### Rule 1 - Code of Ethics

## BOARD OF NURSING

Docket No.: 067.00.04--001  
Effective Date: 12/17/04  
Contact Person: LouAnn Walker  
Telephone: (501) 686-2704

### Chapter 4 - Advanced Practice Nursing

## FINANCE & ADMINISTRATION

*Revenue Division*

Docket No.: 006.05.04--006  
Effective Date: 12/16/04  
Contact Person: Mike Munns  
Telephone: (501) 682-4630

### Rule 2004-7: Regulation Implementing Act 1118 of 2001 - Regarding Ark. Code Ann. Sec. 27-14-1603

## GAME & FISH COMMISSION

Docket No.: 002.00.04--011  
Effective Date: 1/1/05  
Contact Person: James Goodhart  
Telephone: (501) 225-6327

## Big Spring Trout Management Plan and Regulations

## HIGHER EDUCATION

### *Colleges & University Plans & Operations*

Docket No.: 008.02.04--003  
Effective Date: 12/25/04  
Contact Person: David McKinney  
Telephone: (870) 972-2945

## 2004-2005 Parking Regulations for Arkansas State University

## HUMAN SERVICES

*Administration Services*

Docket No.: 016.14.04--003  
Effective Date: 1/1/05  
Contact Person: Joe Franklin  
Telephone: (501) 682-9631

## Revised Social Services Block Grant Comprehensive Services Program Plan

Docket No.: 016.14.04--004  
Effective Date: 1/1/05  
Contact Person: Joe Franklin  
Telephone: (501) 682-9631

## Social Services Block Grant Comprehensive Services Program Manual

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# ADOPTED RULES AND REGULATIONS

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## *Medical Services*

Docket No.: 016.06.04--027  
Effective Date: 12/17/04  
Contact Person: Tom Show  
Telephone: (501) 682-2483

### **State Plan Transmittal #2004-005(A) - Physicians**

Docket No.: 016.06.04--066  
Effective Date: 12/1/04  
Contact Person: Tommy Wingard  
Telephone: (501) 682-6117

### **Nursing Assistant Training Program - Petition to Remove Neglect Findings**

Docket No.: 016.06.04--068  
Effective Date: 12/1/05  
Contact Person: Betty Reed  
Telephone: (501) 682-8363

### **Official Notice DMS-2004-R-16 - Home Dialysis - Physician's Professional Services**

Docket No.: 016.06.04--069  
Effective Date: 12/1/05  
Contact Person: Dorothy Vance  
Telephone: (501) 682-2916

### **Podiatry Services Update Transmittal #46**

Docket No.: 016.06.04--072  
Effective Date: 12/1/05  
Contact Person: Renita Honorable  
Telephone: (501) 682-8577

### **Private Duty Nursing Update Transmittal #50**

Docket No.: 016.06.04--073  
Effective Date: 12/1/05  
Contact Person: Will Taylor  
Telephone: (501) 682-8362

### **Living Choices Assisted Living Provider Manual Update #5**

Docket No.: 016.06.04--074  
Effective Date: 12/1/05  
Contact Person: Renita Honorable  
Telephone: (501) 682-8577

### **Section I - All Arkansas Medicaid Provider Manuals - Provider Enrollment Change**

Docket No.: 016.06.04--078  
Effective Date: 1/1/05  
Contact Person: Tommy Wingard  
Telephone: (501) 682-6117

### **Rules for Level I and II Assisted Living Facilities**

Docket No.: 016.06.04--079  
Effective Date: 1/1/05  
Contact Person: Betty Reed  
Telephone: (501) 682-8363

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# ADOPTED RULES AND REGULATIONS

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**Official Notice DMS-2004-A-8; DMS-2004-AR-7; DMS-2004-G-4; DMS-2004-CA-7; DMS-2004-II-5; DMS-2004-L-16; DMS-2004-KK-12; DMS-2004-R-17; DMS-2004-OO-5 -- Influenza Virus Vaccine, for Intranasal Use**

Docket No.: 016.06.04--080  
Effective Date: 12/3/04  
Contact Person: Tom Show  
Telephone: (501) 682-2483

**Emergency Rule: State Plan Transmittal #2004-015; Hospital Update #70 and Physician Update #91**

Docket No.: 016.06.04--081  
Effective Date: 12/18/04  
Contact Person: Renita Honorable  
Telephone: (501) 682-8577

**Official Notice DMS-2004-O-3, DMS-2004-E-2, DMS-2004-II-3, DMS-2004-KK-10, DMS-2004-Q-2, DMS-2004-R-13, DMS-2004-OO-3, and Arkansas State Plan Transmittal #2004-004 - Evidence-Based Prescription Drug Provisions**

## **MOTOR VEHICLE COMMISSION**

Docket No.: 063.00.04--002  
Effective Date: 12/16/04  
Contact Person: John Chappelle  
Telephone: (501) 682-1428

**Rule 3 - Advertising**

Docket No.: 063.00.04--003  
Effective Date: 12/16/04  
Contact Person: John Chappelle  
Telephone: (501) 682-1428

**Rule 5 - Limitation of Sales of New Motor Vehicles**

## **PARKS & TOURISM**

*Parks Division*

Docket No.: 013.05.04--001  
Effective Date: 1/1/05  
Contact Person: Sandy Burch  
Telephone: (501) 682-6918

**Park Directive 2000 - Calendar Year 2005 Fees and Rates**

## **POLLUTION CONTROL & ECOLOGY**

*Air Pollution Control*

Docket No.: 014.01.04--001  
Effective Date: 12/19/04  
Contact Person: Deborah Pitts  
Telephone: (501) 682-0883

**Regulation 19 - Plan of Implementation for Air Pollution Control**

*Solid Waste*

Docket No.: 014.03.04--002  
Effective Date: 12/23/04  
Contact Person: Deborah Pitts  
Telephone: (501) 682-0883

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# ADOPTED RULES AND REGULATIONS

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## Regulation 28 - County Recycling Programs

### **PUBLIC SERVICE COMMISSION**

*Utilities Section*

Docket No.: 126.03.04--003  
Effective Date: 12/16/04  
Contact Person: Diana Wilson  
Telephone: (501) 682-5782

### **Extended Area Service Rules - Added to Public Service Commission's Telecommunications Providers Rules**

### **REAL ESTATE COMMISSION**

Docket No.: 076.00.04--001  
Effective Date: 1/1/05  
Contact Person: Bill Williamson  
Telephone: (501) 683-8014

**Amendments: Regulations 4.1 - Applications; Education; Experience; Regulation 10.4 - Broker Responsibilities; Executive Brokers; Part-Time Brokers; Regulation 10.8 - Trust Funds; Trust Accounts; Regulations 10.10 - Agreements to be Written**

### **WORKFORCE EDUCATION**

Docket No.: 172.00.04--004  
Effective Date: 12/17/04  
Contact Person: Peggy Wakefield  
Telephone: (501) 682-1500

### **Special Policies and Procedures for Secondary Area Technical Centers**

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# INSURANCE DEPARTMENT

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**\*\*\* No Insurance Orders were filed with the *Arkansas Register* during the past filing period for publication in this edition.**

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# ORDERS AND NOTICES

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## LEGISLATIVE AUDIT December 1, 2004

<b>Agency</b>	<b>Period Covered</b>
Department of Finance and Administration - Disbursing Officer	6/30/03
Arkansas Department of Community Correction	6/30/03
Arkansas Treasurer of State	6/30/03
Arkansas Treasurer of State - Disbursing Officer	6/30/03
Treasurer of State, Arkansas Auditor of State, Department of Finance and Administration - Reconciliation Report	6/30/03
Arkansas Court of Appeals	6/30/03
Arkansas State Military Department	6/30/03
War Memorial Stadium Commission	6/30/04
Workers' Compensation Commission	6/30/03
Workers' Compensation Commission	6/30/04
Arkansas Children's Hospital (Private)	6/30/04
Counseling Clinic, Inc. (Private)	6/30/04
Delta Counseling Associates (Private)	6/30/04
Ozark Counseling Services, Inc. (Private)	6/30/04

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# ORDERS AND NOTICES

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Ozark Guidance Center, Inc. (Private)	6/30/04
Southwest Arkansas Counseling and Mental Health Center, Inc.	6/30/04
Western Arkansas Counseling and Guidance Center, Inc.	6/30/04
Southwest Arkansas Planning and Development District, Inc.	6/30/04
Arkansas State Athletic Commission	6/30/04
State Plant Board	6/30/03
Arkansas Science and Technology Authority - Two-Year Period Ended	6/30/04



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