

# The Arkansas Register



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**Secretary of State**  
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# THE ARKANSAS REGISTER

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.: 2003-238

Nichols, Wayne  
*State Representative*

**RE:**Pursuant to provisions of Act 1188 of 2003, (A.C.A. 16-17-129), Poinsett County passed an ordinance imposing the additional five dollar fine in district court on all arrests in the county. Does this include the city fines imposed in the city limits or just those arrests made outside the city limits? Q2) If the five dollar fine increase may be collected on all fines in the county, can each city pass an ordinance imposing an additional five dollar fine on all tickets that go through their court system, or only the city fines imposed in the city limits? **ANSWER:** Q1) I cannot conclusively opine on this matter, because I am uncertain whether the court would view the statute as plain and unambiguous under the so-called plain meaning rule, or whether it would engage in statutory construction to determine intent. If the court looked to the fine distribution statute (16-17-707), it might decide that the additional fine imposed under the county ordinance only applies to county cases, and not to cases on the city docket. Q2) A city has separate authority to levy and collect this fine, but the same issue applies regarding the applicability of the city ordinance to county cases.

## Opinion No.: 2003-243

Goss, Kevin D.  
*State Representative*

**RE:**Will provisions of ACA 16-17-129 require defendants on the city docket in Osceola District Court to pay a \$5 fine to Mississippi County as well as a \$5 fine to the City of Osceola? **ANSWER:** See Opinion 2003-238. This question can only be definitively decided by a court.

## Opinion No.: 2003-262

Verkamp, John Paul  
*State Representative*

**RE:**If the City of Greenwood switches to four-year staggered terms for certain municipal officers pursuant to ACA 14-43-312, can the City revert back to two-year terms if the four-year terms are later deemed to be undesirable? Q2) If the answer to Q1 is "yes," what procedure would the City utilize to revert back to the two-year terms? Q3) Would an election be required? **RESPONSE:** There does not appear to be any current statutory procedure to accomplish this. Legislative clarification is indicated.

## Opinion No.: 2003-263

Thyer, Chris  
*State Representative*

**RE:**In light of ACA 21-1-207, or any other pertinent Arkansas law, must an employee of a first-class city, specifically a police officer, take a leave of absence from his employment with the city in order to run for a citywide elective office such as mayor? **ANSWER:** Generally, no. This statute protects the employee's right to be a candidate for public office. But see A.C.A. 14-51-303 regarding possible restrictions under a local civil service commission policy. See also Op. 99-155.

## Opinion No.: 2003-264

Laverty, Randy  
*State Senator*

**RE:**May the City of Harrison, by ordinance, also levy and collect an additional \$5.00 from Boone County District Court defendants who reside within the City?

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# ATTORNEY GENERAL OPINIONS

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ANSWER: The city has separate authority to levy and collect this additional fine, but a question may remain to be resolved by a court regarding the ordinance's applicability to cases on the county docket. See Opinion 2003-238.

## Opinion No.: 2003-266

Laverty, Randy  
*State Senator*

**RE:** Does the Carroll and Madison Library System Administrative office have tort immunity? **RESPONSE:** ACA 21-9-301 grants tort immunity under state law in certain instances to political subdivisions, boards and officers and employees of political subdivisions. In my opinion this immunity in all likelihood covers the Board and its officers and employees, as it appears the actions of the Library System are the actions of two counties acting jointly through an interlocal cooperation agreement. A different "qualified" immunity applies in federal causes of action.

## Opinion No.: 2003-268

Roebuck, Tommy G.  
*State Representative*

**RE:** What does the State require of AEDC projects? For instance, is it legal for a state agency or private citizen to be given special consideration, if requested, if such consideration is contrary to enacted law? Q2) Is it legal for inspection fees to be paid directly to a full-time employee of either Saline County or Paron Water Works in this situation? Q3) Is it legal for the local water board to approve full-time employees of these same entities to directly collect inspection fees. **RESPONSE:** Decline to answer because a private party to imminent litigation is seeking my advice.

## Opinion No.: 2003-271

Broadway, Shane  
*State Senator*

**RE:** Does the law in the State of Arkansas require a construction contractor to maintain Worker's Compensation Insurance to do business in the State? Q2) If the answer to Q1 is "yes," then what are the penalties for not maintaining the insurance? Q3) How is the requirement to maintain insurance enforced? **ANSWER:** Q1) This depends upon the particular surrounding facts, viewed in light of the requirements of the Ark. Worker's Comp. Law relating to an employer's obligation to secure the payment of compensation to its employees for injuries or death. See A.C.A. 11-9-401; 11-9-404; 11-9-402. Q(2) & (3) See 11-9-406.

## Opinion No.: 2003-273

Faris, Steve  
*State Senator*

**RE:** Would an employee of the Arkansas Employment Security Division in Hot Springs be prohibited by the Hatch Act from merely publicly announcing her candidacy for U.S. Representative? **RESPONSE:** In all likelihood "yes," assuming her particular employment is one covered by the "Hatch Act." See Opinion 89-198. Federal officials should be consulted, however, as to the applicability of the law to any particular factual circumstances.

## Opinion No.: 2003-274

Jones, Terry  
*Pros. Attorney, 4th Judicial District*

**RE:** Does the State Fire Marshal and his duly appointed deputies have the power to arrest and/or issue

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# ATTORNEY GENERAL OPINIONS

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citations? Q2) Could the Director of the State Police grant arrest and citation authority to the Fire Marshal and his deputies? Q3) Would the answer to either of the questions above be different if the Fire Marshal or any of his deputies has completed the 100 hour training course set out in ACA 12-9-304? RESPONSE: If the marshal and his deputies are certified law enforcement officers, they have the power to arrest and issue citations. If they are not certified, they do not have this authority.

## Opinion No.: 2003-276

Judy, Jan A.  
*State Representative*

RE:Q1) Does Act 674 of 2003 change the existing law to give new authority to police and fire pension boards to raise surviving spouses' benefits in the future to exceed fifty percent (50%) of the ending salary of the pensioners? Q2) If the current pensioners are receiving more than 50% of the ending salary, are the current surviving spouses limited to what they had been receiving prior to Act 674 until the pension board acts under ACA 24-11-102 to specifically raise the surviving spouses' benefits? RESPONSE: Q1) Yes. The Act should not be applied retroactively. Q2) Regardless of the amount current spouses are receiving at present, the amount they receive can only be increased by specific action of the board pursuant to ACA 24-11-102.

## Opinion No.: 2003-278

Jackson, Phillip  
*State Representative*

RE:Pursuant to provisions of ACA 26-75-701 and -703, can the city appoint individuals to the City Advertising and Promotion Commission who live outside the city but either own businesses or work inside the city? RESPONSE: The provisions of Article 19, 3 of the Ark. Const. require that these individuals live inside the city.

## Opinion No.: 2003-279

Magness, Benny  
*Chair, AR Bd of Correction*

RE:Does the Board of Correction have authority to reorganize the Department of Correction School District to: 1) require the superintendent of the school district to report directly to the Board of Correction; and 2) add a full school program, including teachers, at the Department of Community Punishment? RESPONSE: 1) In all likelihood "no." 2) It depends upon how this is accomplished.

## Opinion No.: 2003-280

House, Don R.  
*State Representative*

RE:Since the Arkansas Water Well Construction Commission (AWWCC) located in District 73 is housed within the Arkansas Soil and Water Conservation Commission (ASWCC), does the ASWCC have the authority to provide all operating funds and employees/staff, as well as use ASWCC funds and employees/staff to enforce the rules and regulations of the AWWCC? RESPONSE: The answer is unclear under Ark. law. State law does provide for some use of the resources of Soil and Water for the Water Well Comm'n, but does not make clear the extent of such use.

## Opinion No.: 2003-281

Adams, Bob  
*State Representative*

RE:Are the Arkansas State Police required by Act 1032 of 2003 (A.C.A. 16-88-116) to lodge all citations within the corporate boundaries of a City in the District Court of that City or, in cases where there is more than one District Court in a municipality, may the citations be lodged in the court closest to the point of issuance?

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# ATTORNEY GENERAL OPINIONS

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ANSWER: This is a venue statute. See Op. 2003-286) Subsection (b) of A.C.A. 16-88-116) operates as an exception to subsection (a) where there is more than one district court located in the municipality, with jurisdiction over traffic citations issued within the municipality. Little Rock is currently the only city to which subsection (b) applies. (See 16-17-913 regarding the City of Pine Bluff, after Jan. 1, 2005). The Pulaski County District Court is situated in Little Rock. Accordingly, all traffic citations issued within the boundaries of Little Rock must be placed on the docket of either the Little Rock District Court or the Pulaski County District Court, depending upon which court is closest to where the offense occurred.

## Opinion No.: 2003-282

Agee, Sarah S.  
*State Representative*

**RE:**Q1) Is the City of Lincoln required to grant sick and/or vacation leave for maternity use by all employees, as stated in their published Personnel Policy Manual, or can this provision be interpreted differently with every new mayor? Does each new mayor need to change the Personnel Policy to reflect their desires? Q2) Do federal laws bind the City of Lincoln? Is the answer to this question affected by the number of employees the city has? **RESPONSE:** Q1) State law does not mandate a particular interpretation of the city's policy. It must however, be interpreted in a manner that is consistent with all applicable law. The city is free to change the language of its policy. Q2) All cities are subject to federal law. Under the applicable federal law, the FMLA, some employees are eligible for protection and others are not. Also, the FMLA does not apply to employers that have fewer than 50 employees.

## Opinion No.: 2003-283

Bell, Stewart  
*Exec Dir, Bd of Hearing Instrument Dispensers*

**RE:**Would it be a violation of ACA 17-84-101(10)(E)

for a hearing instrument dispenser to use the term "audiology" in his/her practice or business name without the presence of an audiologist on staff? **ANSWER:** Yes, if no services are being provided by a licensed audiologist.

## Opinion No.: 2003-284

Rosenbaum, Sid  
*State Representative*

**RE:**Can a school display firearms on school property for a fundraising event sponsored by a 501C (3) nonprofit corporation? Q2) Is there an exemption that allows the firearms to be displayed at the event itself if held on school property? Q3) If a certified law enforcement officer were present and if gun safety information were present, could firearms be displayed? **RESPONSE:** Q1) No. ACA 5-73-109. Q2) No. Same statute. Q3) No, unless the display is integral to one of the educational or training purposes set forth at 5-73-109(c)(8) or (9).

## Opinion No.: 2003-286

Harris, Eric  
*State Representative*

**RE:**Is Act 1032 of 2003 constitutional when applied to municipalities situated in two different counties? Q2) Can the City of Springdale (a portion of which is situated in Benton County) comply with Act 1032 of 2003 and not run afoul of the Ark. Supreme Court's decision in *Sexson v. Municipal Court of Springdale*, 312 Ark. 261, 849 S.W.2d 486 (1993)? Q3) If the answer to Q2 is "yes," then how can this be accomplished? **ANSWER:** The Arkansas Constitution is not implicated by Act 1032 (A.S.A. 16-88-116) because this is a venue statute. It does not affect the District Court's territorial jurisdiction, and does not address municipalities that are situated in two different counties. Territorial jurisdiction is governed by A.C.A. 16-17-206 (b) (see also A.C.A. 16-88-104 (a) (4)), until Jan. 1, 2005, when the district courts will exercise jurisdiction in the area from which

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# ATTORNEY GENERAL OPINIONS

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the judges are elected (see 16-17-901 et. seq. (Supp. 2003)).

## **Opinion No.: 2003-287**

Boyce, Henry H.

*Pros Att'y, Third Judicial District*

**RE:**Do the provisions of A.C.A. 5-5-101(d), as amended by Act 135 of 2003, require the City of Pocahontas to deposit proceeds from the sale of unclaimed seized property into the general fund, or is the City still bound to follow ACA 24-11-415 as set out in Op. 97-218? **RESPONSE:** The answer to this question will depend upon what law enforcement agency seized the firearms and under what provision of law they were seized. Regardless of what law enforcement agency seized the firearms, if they were confiscated pursuant to the Controlled Substances Act, A.C.A. § 5-64-101 et seq., the proceeds of their sale should be distributed pursuant to the scheme set forth at A.C.A. § 5-64-505. If the weapons were seized by a city our county agency under some other provision of law, I believe A.C.A. § 5-5-101 would control, either as amended by Act 135 of 2003 or in its unamended form, depending upon the date of the seizure. By contrast, if the weapons were seized by the Arkansas State Police, I believe A.C.A. § 24-11-415 would control. Having offered this opinion, I should note that the law on this question is highly confusing and needs clarification.

## **Opinion No.: 2003-288**

Laverty, Randy

*State Senator*

**RE:**To what extent, if any, does a quorum court have jurisdiction or authority to dictate any of the terms of a judicial sentence to be issued by a district court, in advance of any judicial ruling and before the district court has heard any evidence? Q2) Does a quorum court have jurisdiction or authority to require a district court to collect an "additional fine" in certain traffic

and criminal cases? Q3) Inasmuch as Act 1188 and Newton County Ord. No. 03-13 appear to authorize the quorum court to levy and collect such "additional fines," and do not specifically impose any additional duties upon the district court, can the quorum court transfer its collection powers, or delegate its collection duties to the district court? Q4) Does said Ordinance impose additional duties upon the district court? If so, what are they? Can the quorum court require the district court to perform such additional duties? If so, how would such requirement be enforced? Q5) If the district court is required to collect the quorum court's "additional fines," and if such requirement is lawful, how is such collection to be accomplished? Q6) Does said Ordinance effectively increase the range of allowable penalties set forth in the Arkansas Criminal Code? **ANSWER:** These questions are asked within the specific context of a county ordinance enacted under A.C.A. 16-17-129 (authorizing counties and cities to levy and collect an additional fine in district court and city court). The questions are thus answered within that context. Q1 and 2) The General Assembly, rather than the Quorum Court, has dictated that this fine will be collected if levied by county ordinance. This is pursuant to the legislature's general authority over sentencing. Q3) there is no transfer of collection powers or delegation of collection duties to the district court. Q4) The statute mandates the court to impose the fine, similar to other mandatory statutory fines. The county ordinance imposes no duties on the court. Q5) The judge must impose the fine in the stated instances, according to the statute. Regarding collection, see A.C.A. 16-13-709 and 16-17-132. Q6) The fine is imposed pursuant to the statute, once levied by county or city ordinance. This is separate and apart from penalties set forth in the Criminal Code.

## **Opinion No.: 2003-289**

Bright, Stephen D.

*State Representative*

**RE:**Is the mayor of a first class city, operating under the city council form of government, included in the governing body for purposes of the Arkansas Freedom of Information Act (FOIA)? **ANSWER:** Yes. See

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A.C.A. 14-42-102, 14-43-501, and Op. 97-057.

## Opinion No.: 2003-291

Salmon, Mary Anne  
*State Senator*

**RE:**Would a condominium owner's association that enlists the services of a lawn care company to provide lawn care services to the condominium property owners have to pay additional sales taxes for such services or would the single family residence" exemption set forth in Act 1252 of 1997 cover the association? **RESPONSE:** Decline to answer because questions regarding the application of a sales tax should properly be directed to the Department of Finance and Administration.

## Opinion No.: 2003-293

Judy, Jan A.  
*State Representative*

**RE:**Is Fayetteville's supplemental alcohol tax applicable to sales or cooling charges for beer and wine sold to members and nonmembers of a private nonprofit corporation (club) that holds an on-premises retail permit from ABC? **RESPONSE:** The supplemental tax is applicable to sales to members, but not nonmembers. The fact that the club holds a retail permit does not exempt it from the supplemental tax.

## Opinion No.: 2003-294

Walters, Shirley  
*State Representative*

**RE:**If a constitutional amendment was passed by the voters of the State of Arkansas which removed the word "adequate" from the Constitution and simply provided that the state would provide an equal education, would the state still be obligated to provide

an adequate education based on federal law or the United States Constitution? **RESPONSE:** I am unable to answer this question because the education article of the Arkansas Constitution, Ark. Const. art. 14, § 1, contains neither the term "adequate" nor the term "equal." Moreover, given the virtual inevitability of litigation in the near future on the question of whether the state has complied with the Lake View requirements — litigation in which this office will have to defend the state's position — I am not situated to offer my own opinion regarding how the state's educational duties might be defined or redefined. However, I can and will note that the federal constitution does not address the issue of education. Although federal court regularly acknowledge the importance of education in civic life, they largely leave states to set educational policy in the hope that experimentation among the states will demonstrate the most productive formulas.

## Opinion No.: 2003-296

Wyatt, Leslie  
*President, Arkansas State University*

**RE:**Does Arkansas State University have legal authority to purchase land at fair market value from the Arkansas State College Foundation, a private nonprofit organization, in light of the fact that the deed would contain a restrictive use covenant requiring the land to revert back to the Foundation if the University ceases to exist or to use the land for educational purposes? **RESPONSE:** Arkansas State University ("ASU") is statutorily authorized to purchase land pursuant to A.C.A. § 6-62-302. I am unaware of any provision of law that would necessarily preclude ASU from purchasing property subject to a reversionary clause of the sort referenced in your request. A reviewing court would presume that the purchase was made for a proper public purpose and that the consideration paid was reasonable. Your question is essentially whether ASU may purchase a fee simple determinable interest in property with a possibility of reverter for the fair market price of a fee simple absolute. Although answering this question will ultimately entail conducting a factual inquiry into the

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# ATTORNEY GENERAL OPINIONS

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adequacy of the consideration exchanged, I believe the board has considerable discretion in determining what constitutes reasonable consideration in any given transaction. In my opinion, so long as the consideration paid were not so grossly disproportionate as to amount to fraud, the transaction would pass constitutional muster.

## **Opinion No.: 2003-299**

Laverty, Randy  
*State Senator*

**RE:**In light of the provisions of Act 1754 of 2003, which allow school districts to enter into public/private partnerships for the acquisition of facilities, does the Green Forest School District have authority to negotiate with a single contractor in a lease-purchase agreement without reopening bids for a new facility since all of the earlier bids were over budget?  
**RESPONSE:** Not under the circumstances as you have described them. Act 1745 authorizes entering into a public-private partnership only if the facilities bonds issued to finance the project were exempt from federal taxation pursuant to the provisions of 26 U.S.C. § 142(a)(13) in effect on January 1, 2003. The referenced federal statute deals only with state-issued facilities bonds, not with district bonds of the sort referenced in your request. Accordingly, I believe the District will be bound by the bidding procedure for awarding contracts set forth at A.C.A. § 22-9-203.

## **Opinion No.: 2003-301**

Knickrehm, Kurt  
*Director, Dept of Human Services*

**RE:**Can a juvenile defendant raise the insanity defense? **RESPONSE:** In my opinion, the answer to this question is "no," although the state must overcome a presumption that a juvenile under thirteen charged with capital murder or murder in the first degree is both unfit to proceed and "lacked the capacity" to "[p]ossess the mental capacity required

for the offense charged." A.C.A. § 9-27-502(b)(1)(A). Also, if a juvenile is tried as an adult, he or she would be able to raise the insanity defense pursuant to A.C.A. § 5-2-312 — a provision of the criminal code that, unlike any provision of the juvenile code, allows any defendant to plead insanity.

## **Opinion No.: 2003-302**

Sumpter, Denny  
*State Representative*

**RE:**What is the legal definition of the phrase "prepared food," as it is used regarding collections by the Advertising and Promotion Commission?  
**RESPONSE:** The term is not statutorily defined, and I am not authorized to supply a definition. However, the common meaning rule provides guidance.

## **Opinion No.: 2003-303**

Womack, Shawn  
*State Senator*

**RE:**Are counties obligated to pay mileage for travel incurred by the Public Defender's office?  
**RESPONSE:** No. Travel expenses are not included among the costs for which a county is accountable under ACA 16-87-302(b). Under ACA 16-87-212, the Arkansas Public Defender Commission is charged with defraying travel expenses.

## **Opinion No.: 2003-304**

Smith, Terry  
*State Senator*

**RE:**Pursuant to ACA 16-81-106(g), are U.S. Forest Service law enforcement officers and investigators empowered to act as officers for the arrest of offenders against the laws of this state to the same extent and under the same circumstances as certified

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state law enforcement officers? RESPONSE: "No" with respect to Forest Service "law enforcement officers" and "yes" with respect to Forest Service "special agents." Section 559c of title 16 of the United States Code authorizes the designation of up to 1,000 weapons-bearing "special agents and law enforcement officers" to serve in the Forest Service of the United States Department of Agriculture. These special agents and officers are charged with enforcing the drug laws and making arrests for federal misdemeanor and felony violations "committed within the National Forest System or which affect the administration of the National Forest System." Id. Subsection 16-81-106(g) of the Arkansas Code invests "United States Department of Agriculture special agents" — a category that includes Forest Service special agents — with the authority "to act as officers for the arrest of offenders against the laws of this state." Subsection 559g of the United States Code authorizes the Forest Service by memorandum of understanding or cooperative agreement to accept such a designation by a state government so long as the enforcement power granted "is mutually beneficial to the National Forest System and the cooperating agency or jurisdiction." My inquiries reveal that the Forest Service has entered into such memoranda of understanding with various local jurisdictions. However, because A.C.A. § 16-81-106(g) authorizes only Forest System special agents to enforce state law, I do not believe this enforcement authority can extend under current Arkansas law to the distinct category of uniformed Forest Service law enforcement officers.

## Opinion No.: 2003-306

Bienvenu, Hal, M.D.,  
*Cosmetic Surgeon*

RE:Is the decision of the custodian of records to withhold release of a Little Rock Police Department Internal Affairs investigative file, which did not result in the suspension or termination of an employee, consistent with provisions of the Freedom of Information Act (FOIA)? RESPONSE: Yes, assuming, as reported, that none of the investigated

officers was suspended or terminated as a result of the investigation.

## Opinion No.: 2003-307

Emigh, Barry L.

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

## Opinion No.: 2003-308

Laverty, Randy  
*State Senator*

RE:Following an approved vote to restructure a school's millage which eliminates mills for dedicated maintenance and operation millage (Capitol Outlay/ Current Expenditures), may a school district transfer "carryover" funds from the eliminated category to the operation fund category? RESPONSE: No. Regardless of how a district elects to structure its future millages, the fact remains that taxes collected in the past for dedicated maintenance and operation of the schools must be used for the dedicated purpose(s) approved by the voters. See Ark. Const. art. 16, § 11 ("[N]o moneys arising from a tax levied for one purpose shall be used for any other purpose.")

## Opinion No.: 2003-309

Fite, Dwight  
*State Representative*

RE:Does the witness fee provided for in ACA 16-43-208 apply only to subpoenas being served on witnesses served by the sheriff of the county? Q2) Pursuant to provisions of 16-43-208, how is service

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# ATTORNEY GENERAL OPINIONS

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provided for witnesses who live in one county but are called to testify in another? Q3) Are police officers who are called to testify allowed to receive a witness fee plus mileage at the expense of the county? Q3b) Are other witnesses called by the prosecution allowed to receive this same fee? Q3c) If the answer to Q3b is "no," isn't that discrimination? Q4) Are police officer who are called to testify for the defendant allowed to receive a witness fee plus mileage? Q4b) Are other witnesses called by the defense allowed to receive this same fee? Q4c) If the answer to Q4b is "no," isn't that discrimination? Q5) If several different charges against a defendant are consolidated into one trial, is that defendant allowed six witnesses for each misdemeanor charge and/or twelve witnesses for each felony charge? Q6) Is a misdemeanor defendant limited to four or six witnesses if he is being tried on four separate charges in one trial? Q7) Why don't private citizens receive the same witness fee for attendance at trial as law enforcement officers? Q8) Is the practice of requiring defendants to pay for subpoena service and witness fees contrary to provisions of ACA 16-43-208? Q9) What statute, rule or regulation gives the Saline County Sheriff or Saline County Judge authority to retain any portion of bond money paid by a private citizen to release an individual from custody? Q10) Since Act 1778 of 2003 makes no mention of bond money from private citizens, what authority are Arkansas counties relying on to retain a portion of privately paid bond fees? RESPONSE: Decline to answer because the questions seek private legal advice on behalf of a litigant disgruntled over particular actions taken by the court and various governmental officials.

## Opinion No.: 2003-310

Broadway, Shane  
*State Senator*

**RE:** Does the witness fee provided for in ACA 16-43-208 apply only to subpoenas being served on witnesses served by the sheriff of the county? Q2) Pursuant to provisions of 16-43-208, how is service provided for witnesses who live in one county but are called to testify in another? Q3) Are police officers

who are called to testify allowed to receive a witness fee plus mileage at the expense of the county? Q3b) Are other witnesses called by the prosecution allowed to receive this same fee? Q3c) If the answer to Q3b is "no," isn't that discrimination? Q4) Are police officer who are called to testify for the defendant allowed to receive a witness fee plus mileage? Q4b) Are other witnesses called by the defense allowed to receive this same fee? Q4c) If the answer to Q4b is "no," isn't that discrimination? Q5) If several different charges against a defendant are consolidated into one trial, is that defendant allowed six witnesses for each misdemeanor charge and/or twelve witnesses for each felony charge? Q6) Is a misdemeanor defendant limited to four or six witnesses if he is being tried on four separate charges in one trial? Q7) Why don't private citizens receive the same witness fee for attendance at trial as law enforcement officers? Q8) Is the practice of requiring defendants to pay for subpoena service and witness fees contrary to provisions of ACA 16-43-208? Q9) What statute, rule or regulation gives the Saline County Sheriff or Saline County Judge authority to retain any portion of bond money paid by a private citizen to release an individual from custody? RESPONSE: This request virtually mirrors the one addressed in Opinion 2003-309. Decline to answer for the reasons set forth in my previous opinion.

## Opinion No.: 2003-311

Smith, Roger  
*State Representative*

**RE:** How should the quorum court proceed in light of the fact that the Fountain Lake School District has not changed their millage to the required 25 mills? RESPONSE: Decline to answer because the question raises issues that bear directly on the enforceability of a pending consent decree in the case of *Barker et al. v. Frank et al.*, Saline County Circuit Court No. CIV-94-719-2. Also, the state may be a necessary party in any proceeding relating to the consent decree in order to seek enforcement of the constitutionally mandated state uniform rate of tax. See Amendment 74. Attached Opinions 2003-031,

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2003-035 and 2003-065, which generally address the quorum courts' obligation to levy the uniform rate of tax.

## Opinion No.: 2003-315

Niswanger, Stephen B.  
*Attorney, Williams & Anderson*

**RE:**Request for certification of the popular name and ballot title of a proposed initiated act to allow the medical use of marijuana as described therein. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

## Opinion No.: 2003-316

Bowman, James & Ballard,

**RE:**Is the decision of the custodian of records to withhold release of requested Continuous Improvement (CIR) Forms and all correspondence and emails sent within the Office of Fiscal Management and/or the Office of Finance and Administration pertaining to the requested CIR Forms consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** The opinion sets forth the various applicable tests and discusses the various possible classifications of the requested records.

## Opinion No.: 2003-317

Salmon, Mary Anne  
*State Senator*

**RE:**If a person was participating in a municipal health plan as an employee on or before August 1, 1997, and subsequently retired at age 50 with 20 years of service, can the person be dropped from the plan or is the Municipal Health Benefit Fund required to

continue to provide coverage? **RESPONSE:** The municipality is not required to continue to provide health care coverage for this person, but it may choose to do so.

## Opinion No.: 2003-319

King, Barbara  
*State Senator*

**RE:**Q1) Does Ark. Const. art. 19, sec. 5 apply to school board position? Q2) Does the failure of an incumbent to run for re-election cause a vacancy in the position held by the incumbent? Q3) Does the reporting in a local newspaper of a school board member's decision not to run for re-election amount to a resignation for purposes of ACA 6-13-611? Q4) What steps must the Helena-West Helena School Board take to accept a resignation? Q5) Does an incumbent school board member have a right to hold over or is his or her position considered vacant at the end of that member's term, although no one else has been elected or qualified to hold the position? **RESPONSE:** Q1) Yes. Q2) No. Q3) No. Q4) It must act by motion or resolution (but a resignation must first be tendered). Q5) Yes.

## Opinion No.: 2003-320

Ross, Erika  
*Attorney, Arkansas Municipal League*

**RE:**Is the decision by the City of Cabot records custodian to release all non-exempt records that are responsive to a request for all records "regarding, reflecting or pertaining to any claim of discrimination on the basis of sex" in connection with a city employee consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** The opinion sets forth the standards the custodian must apply in deciding what documents to produce.

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.: 2003-325

Rosa, Marcella Delia, Ed.D.  
*Interim Superintendent*

**RE:**Is the decision of the custodian of records (based on speculation as to the requester's motive for the request) to withhold release of employee resumes requested under the Freedom of Information Act (FOIA) citing the request as an "unwarranted invasion of personal privacy," consistent with provisions of the act? **RESPONSE:** No. Resumes are generally open, and these contain no information that would lend itself to use for harassment purposes. Moreover, consideration of the requester's motive is inappropriate.

## Opinion No.: 2003-328

Emigh, Barry

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

## Opinion No.: 2003-336

Suskie, Paul  
*City Attorney*

**RE:**Q1) Is the custodian of records authorized under the Freedom of Information Act (FOIA) to release a copy of a closed police investigative file to the attorney of the individual whose accusations prompted the investigation? Q2) Is the investigator for a city department entitled to receive a copy of a closed police investigative file pursuant to the FOIA? **RESPONSE:** The opinion outlines the various applicable tests for the release of these types of records.

## Opinion No.: 2003-337

Hickam, D. Scott, P.A.  
*Attorney at Law*

**RE:**Is the custodian's decision to withhold release of all documents pertaining to all school employees, certified or uncertified, for the last three years consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** The custodian's assessment that the request is not sufficiently specific is an appropriate first response. If the request is later narrowed, some of the records will be releasable. The opinion reviews the various applicable tests for the release of such records.

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# ADOPTED RULES AND REGULATIONS

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## ARKANSAS DEVELOPMENT FINANCE AUTHORITY

*Executive Division*

Docket No.: 109.00.03--001  
Effective Date: 11/2/03  
Contact Person: Patrick Patton  
Telephone: (501) 682-5902

### Development Finance Loan Policy

## BOARD OF ELECTION COMMISSIONERS

Docket No.: 108.00.03--002  
Effective Date: 11/8/03  
Contact Person: Jeanette Heinbockel  
Telephone: (501) 682-1856

### Rules for Election Officials Training

## BOARD OF PUBLIC ACCOUNTANCY

Docket No.: 019.00.03--003  
Effective Date: 10/31/03  
Contact Person: Leveta Ray  
Telephone: (501) 682-5533

### Board of Accountancy Rules

Docket No.: 019.00.03--004  
Effective Date: 10/31/03  
Contact Person: Leveta Ray  
Telephone: (501) 682-5533

### Rule 12 - Fees

## BOARD OF DENTAL EXAMINERS

Docket No.: 038.00.03--003  
Effective Date: 10/27/03  
Contact Person: William Trice  
Telephone: (501) 372-4144

### Credentials Required for Issuing a Dental or Dental Hygiene License

## EDUCATION DEPARTMENT

*Administration Services*

Docket No.: 005.01.03--001  
Effective Date: 11/24/03  
Contact Person: Kristi Pugh  
Telephone: (501) 682-9850

### ADE 161 - Rules Governing Initial and Standard Administrator Licensure

*Attorney's Office*

Docket No.: 005.23.03--001  
Effective Date: 10/31/03  
Contact Person: Scott Smith  
Telephone: (501) 682-4227

### ADE 157 - Rules Governing the Guidelines, Procedures and Enforcement of the Arkansas Public School Choice Act

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# ADOPTED RULES AND REGULATIONS

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## *Office of Accountability*

Docket No.: 005.19.03--003  
Effective Date: 11/24/03  
Contact Person: Charity Smith  
Telephone: (501) 682-4207

### **ADE 156 - Rules Governing Standards of Accreditation of Arkansas Public Schools**

Docket No.: 005.19.03--004  
Effective Date: 11/14/03  
Contact Person: Charles Watson  
Telephone: (501) 682-4247

### **ADE 162 - Rules Governing the Arkansas Comprehensive Testing, Assessment & Accountability Program & the Academic Distress Program**

Docket No.: 005.19.03--006  
Effective Date: 11/20/03  
Contact Person: Marcia Harding  
Telephone: (501) 682-4221

### **ADE 154 - Rules Governing Special Education & Related Services Child Fund**

Docket No.: 005.19.03--007  
Effective Date: 11/20/03  
Contact Person: Marcia Harding  
Telephone: (501) 682-4221

### **ADE 155 - Mediation and Hearings Sec. 10.01.38 & Your Rights Under the IDEA, Special Education & Related Services**

Docket No.: 005.19.03--010  
Effective Date: 11/24/03  
Contact Person: Ron Tolson  
Telephone: (501) 682-4342

### **ADE 160 - Rules Governing Initial, Standard and Provisional Teacher Licensure**

## *Technical Assistance*

Docket No.: 005.25.03--001  
Effective Date: 11/24/03  
Contact Person: Patricia Martin  
Telephone: (501) 682-5124

### **ADE 158 - Rules Identifying & Governing the Arkansas Fiscal Assessment and Accountability Program**

Docket No.: 005.25.03--002  
Effective Date: 11/24/03  
Contact Person: Jim Boardman  
Telephone: (501) 682-5005

### **ADE 159 - Rules Governing Distance Learning**

## **FINANCE & ADMINISTRATION**

### *Revenue Division*

Docket No.: 006.05.03--003  
Effective Date: 11/17/03  
Contact Person: David Foster  
Telephone: (501) 682-1130

### **2003-4: Employee Contributions to Employment-Related Retirement Plans**

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# ADOPTED RULES AND REGULATIONS

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Docket No.: 006.05.03--004  
Effective Date: 11/7/03  
Contact Person: David Foster  
Telephone: (501) 682-1130

## **2003-3: Tax Credit Registration and Claim Verification System**

### **GAME & FISH COMMISSION**

Docket No.: 002.00.03--008  
Effective Date: 11/9/03  
Contact Person: James Goodhart  
Telephone: (501) 223-6327

## **2004 Spring Turkey Hunting Season; 2003-04 Waterfowl Hunting Season**

### **HOME INSPECTOR REGISTRATION BOARD**

Docket No.: 198.00.03--003  
Effective Date: 11/16/03  
Contact Person: Jay Walker  
Telephone: (501) 268-3794

## **Rules and Procedures**

### **HUMAN SERVICES**

#### *Medical Services*

Docket No.: 016.06.03--024  
Effective Date: 12/1/03  
Contact Person: Nikki Wade  
Telephone: (501) 682-8859

## **Section I - All Medicaid Providers**

Docket No.: 016.06.03--025  
Effective Date: 12/1/03  
Contact Person: Carolyn Patrick  
Telephone: (501) 682-8359

## **Official Notice DMS-2003-YY-5**

Docket No.: 016.06.03--036  
Effective Date: 11/14/03  
Contact Person: Will Taylor  
Telephone: (501) 682-8363

## **Rehabilitative Hospital Update Transmittal #44 & Hospital/Critical Access Hospital/End-Stage Renal Disease Update Transmittal #66**

### *Services for the Blind*

Docket No.: 016.10.03--001  
Effective Date: 11/13/03  
Contact Person: Lyndel Lybarger  
Telephone: (501) 682-5463

## **DSB Living Independence for Elders (LIFE) Policy**

Docket No.: 016.10.03--002  
Effective Date: 11/13/03  
Contact Person: Lyndel Lybarger  
Telephone: (501) 682-5463

## **DSB Vocational Rehabilitation (VR) Policy**

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# ADOPTED RULES AND REGULATIONS

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## INSURANCE DEPARTMENT

Docket No.: 054.00.03--002  
Effective Date: 11/16/03  
Contact Person: Booth Rand  
Telephone: (501) 371-2820

### **Rule 80: Notices of Non-Renewal of Employer Group Health Insurance Due to Non-Payment of Premium**

Docket No.: 054.00.03--003  
Effective Date: 11/16/03  
Contact Person: Booth Rand  
Telephone: (501) 371-2820

### **Rule 78: Small Employer Health Insurance Purchasing Groups**

Docket No.: 054.00.03--004  
Effective Date: 11/16/03  
Contact Person: Booth Rand  
Telephone: (501) 371-2820

### **Rule 79: Health Insurance Consumer Choice**

Docket No.: 054.00.03--006  
Effective Date: 10/16/03  
Contact Person: Booth Rand  
Telephone: (501) 371-2820

### **Emergency Rule 81: Employer Service Assurance Organizations**

## PHARMACY BOARD

Docket No.: 070.00.03--007  
Effective Date: 10/27/03  
Contact Person: Charles Campbell  
Telephone: (501) 682-0190

### **Regulation 07-02: Compounding**

Docket No.: 070.00.03--008  
Effective Date: 11/16/03  
Contact Person: Charles Campbell  
Telephone: (501) 682-0190

### **Regulation 2: Pharmacists**

Docket No.: 070.00.03--009  
Effective Date: 11/16/03  
Contact Person: Charles Campbell  
Telephone: (501) 682-0190

### **Regulation 03: Pharmacy Technicians**

Docket No.: 070.00.03--010  
Effective Date: 11/16/03  
Contact Person: Charles Campbell  
Telephone: (501) 682-0190

### **Regulation 04: Pharmacy & Regulation 04-02-0001: Central Fill Pharmacy**

Docket No.: 070.00.03--011  
Effective Date: 11/16/03  
Contact Person: Charles Campbell  
Telephone: (501) 682-0190

### **Regulation 08-02: Wholesale Distributor of List I Chemicals**

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# ADOPTED RULES AND REGULATIONS

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Docket No.: 070.00.03--012  
Effective Date: 11/16/03  
Contact Person: Charles Campbell  
Telephone: (501) 682-0190

**Regulation 11: Criminal Background Checks**

**PUBLIC SERVICE**  
*Utilities Section*

Docket No.: 126.03.03--001  
Effective Date: 11/7/03  
Contact Person: Diana Wilson  
Telephone: (501) 682-5782

**Transition Cost Guidelines**



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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 placement in this edition.**

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# ORDERS AND NOTICES

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## LEGISLATIVE AUDIT November 3, 2003

<b>Agency</b>	<b>Period Covered</b>
Fund Reconciliation Report	6/30/02
Arkansas Teacher Retirement System	6/30/02
Arkansas Department of Economic Development	6/30/02
Arkansas State Building Services	6/30/02
Assessment Coordination Department	6/30/02
Arkansas Department of Community Correction	6/30/02
Arkansas State Board of Nursing	6/30/02
Arkansas Crime Information Center	6/30/02
Office of the Governor	6/30/02
Office of the Lieutenant Governor	6/30/02
County and Municipal Aid	6/30/02
Department of Education - Arkansas Educational Television Commission	6/30/03
Arkansas War Memorial Stadium Commission (Private)	6/30/03
Delta Counseling Associates, Inc. (Private)	6/30/03
Professional Counseling Associates, Inc. (Private)	6/30/03
Department of Aeronautics	6/30/02
Arkansas Department of Emergency Management	6/30/02
Arkansas Science and Technology Authority	6/30/02
Arkansas Supreme Court	6/30/02
Arkansas Court of Appeals	6/30/02

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# ARKANSAS REGISTER

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