

# The Arkansas Register



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# TABLE OF CONTENTS

## **ATTORNEY GENERAL**

Opinions . . . . . 4

**RULES AND REGULATIONS** . . . . . 8

## **INSURANCE DEPARTMENT**

Orders . . . . . 11

## **LEGISLATIVE AUDIT**

Orders . . . . . 12

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**Secretary of State**  
**State Capitol, Room 026**  
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# THE ARKANSAS REGISTER

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.:2003-353

King, Barbara  
*State Representative*

**RE:**If Community Health Centers are privately owned facilities, Federally Qualified Health Centers and provide preferential pricing only to patients of the health center, would A.C.A. 17-92-607 prohibit the establishment of 340B pharmacies within Community Health Centers in Arkansas? **RESPONSE:** In Arkansas, the general state-law requirements for licensure as a pharmacy are set forth at A.C.A. §§ 17-92-403 through 405 (Repl. 2002). In my opinion, it is unclear under Arkansas law precisely what facilities are “hospitals” and thus are restricted by A.C.A. § 17-92-607 (Repl. 2002), which prohibits nonprofit hospitals from holding pharmacy permits for the retail sale of pharmaceuticals. If the statute applies, I believe a center could not engage in “retail” sales of pharmaceuticals. Even if community health centers do not qualify as “hospitals” and thus are not restricted by A.C.A. § 17-92-607, federal law — i.e., § 340B itself — would restrict drugs purchased at discount and would allow their sale only to a “patient of the entity.”

## Opinion No.:2003-373

Hutchinson, Jeremy  
*State Representative*

**RE:**Does a public school teacher have authority to bar a student, who has disrupted the class on more than one occasion during a nine-week period, from returning to the class until a parent conference is held? Q2) Would this type of discipline be upheld under A.C.A. 6-18-511 (removal by teacher)? **ANSWER:** Generally yes, assuming that the removal was in accordance with 6-18-511 (b). Section 6-18-511 (d) imposes a conference as a condition to returning the student to the classroom. If a conference is held, then the student would be returned as a possible solution to the problem.

## Opinion No.:2003-384

Holt, John Stephen, Ph.D.  
*Chair, AR Psychology Board*

**RE:**Q1) What is the status of an individual who is licensed by the Arkansas Psychology Board and who is also licensed by a Board that is less restrictive with regard to supervision, such as the Arkansas Board of Examiners in Counseling or the Arkansas Social Work Board? Q2) Does a psychological examiner continue to have required psychologist supervision in areas specified by Chapt. 97 (ACA 17-97-101 et seq.) to remain a psychological examiner, even if the individual can perform the same service independently under another Board? Q3) Can a Licensure Board require an individual to discontinue his or her licensure with another Board as a requirement for licensure or offering a specific service when he or she has met the requirements of that specific Board? **RESPONSE:** Q1) A person who is licensed by two different boards can perform all the functions that each license authorizes him to perform. However, doing so may constitute grounds for suspension by one of the boards. Q2) Yes. Q3) The answer will depend upon the statutes governing the board in question. The Board cannot do so if such action would conflict with its statutes.

## Opinion No.:2004-001

Clark, David B  
*Exec Dir, AR Fire & Police Pen Rev*

**RE:**Does Act 1736 of 2003 authorize the board of trustees of a local fire and police pension fund, subject to the conditions stated in the Act, to resume payment of survivor benefits to a surviving spouse of a deceased member whose benefits had been terminated because of remarriage prior to the effective date of Act 1736? **RESPONSE:** No. You are asking whether Act 1736 applies retroactively to reinstate the benefits of a spouse whose benefits were terminated under previous law because he or she remarried. Act 1736 does not support reinstating the benefits of the remarried spouse of a deceased

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# ATTORNEY GENERAL OPINIONS

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police officer or firefighter. It is well established that substantive legislative enactments will ordinarily be deemed to apply prospectively only, unless the intent for retroactive application is clearly expressed. See Ark. Op. Att'y Gen. No. 97-326.

## Opinion No.:2004-004

Martin, Harold G.

**RE:**Request for certification of the popular name and ballot title for a proposed constitutional amendment authorizing bingo and raffles conducted by nonprofit Arkansas corporations, empowering the General Assembly to operate lotteries, authorizing for-profit gambling as specified, and other purposes. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

## Opinion No.:2004-005

Baker, Gilbert  
*State Senator*

**RE:**Under the provisions of the proposed Senate Bill 59, is the 1/8 cent constitutional conservation tax held harmless? **RESPONSE:** This question raises complex issues of statutory and constitutional construction. Plausible arguments can be made both for and against the proposition that SB 59 affects the 1/8 cent tax levied by Amendment 75. It is unclear how a court would resolve the issue. For that reason, the opinion does not answer the question definitively, but points out the various problematic issues that are implicated by SB 59.

## Opinion No.:2004-006

Jeffress, Jimmy  
*State Senator*

**RE:**Does a prosecuting attorney have authority to close down a municipal police department for alleged

violations of the Arkansas Speed Trap Law (A.C.A. 12-8-401, et seq.) absent an investigation by the Arkansas State Police? **RESPONSE:** Decline to answer because of pending litigation.

## Opinion No.:2004-008

Stilley, Oscar  
*Attorney at Law*

**RE:**Request for certification of the popular name and ballot title for a proposed constitutional amendment to revise the Arkansas prison system, and for other purposes. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

## Opinion No.:2004-009

Capps, John Paul  
*State Senator*

**RE:**Can a municipality require a county to follow its zoning ordinances; specifically, in light of White County's superior sovereignty, as well as provisions of A.C.A. 14-19-108, can the City of Searcy require White County to apply for a conditional use permit to rezone the land that the County has purchased for the purpose of building a new jail? **ANSWER:** The general question cannot be answered because it will depend upon the particular exercise of zoning power. See Op. Nos. 92-024 & 91-120. Regarding a city's regulation of site location for a county jail, the answer is generally "yes," that is, the county must attempt to comply with local zoning, giving the city the initial land use decision. See generally A.C.A. 14-56-301 & 14-56-305, and 114-56-416 (city's authority to establish zones limiting types of buildings and a zoning ordinance). The reasonableness of the zoning decision may, however, be subject to a balancing of interests test, which weighs the competing interests of the county and city using based on various factors. This will require court review, if the matter is not resolved through local zoning.

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# ATTORNEY GENERAL OPINIONS

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## Opinion No.:2004-010

Campbell, Denele  
*Ex Dir, ARDPark, Inc.*

**RE:**Request for certification of the popular name and ballot title for an initiated measure to permit the medical use of marijuana in Arkansas. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

## Opinion No.:2004-012

Gill, Brooks  
*City Attorney*

**RE:**Is the decision of the city attorney to release documentation in his possession relating to certain sexual harassment claims in response to a Freedom of Information Act (FOIA) request consistent with provisions of the Act? **RESPONSE:** The records constitute the personnel records of both the mayor and the employee. As such, they are subject to a balancing test weighing the interest of the public in obtaining the records against the interests of the employees in avoiding disclosure. If the documents are reviewed solely under this test, I believe they should be disclosed subject to the condition that you redact the employee's name and other identifying information. There is some possibility that the records might also qualify as the employee's evaluation/job performance records, although the facts as you have recited them suggest that this classification does not apply. In the unlikely event that it does, I believe the records should not be disclosed even though they might otherwise have been subject to disclosure as personnel records.

## Opinion No.:2004-014

Bush, JoAnne H.  
*Chair, LOPFI Board*

**RE:**Does the fact that a terminated fireman who has appealed the decision upholding his termination by

the Civil Service Commission preserve his membership in LOPFI, thereby qualifying him to be a firefighter representative on the LOPFI board? **RESPONSE:** In light of the Commission's decision to uphold the firefighter/member's termination, he should be considered no longer "regularly employed" by the city and thereby cannot be an active member of LOPFI. Pursuant to A.C.A. 24-10-202(a), he is considered as having resigned from the Board. Until the Board passes a resolution declaring the vacancy, however, the former trustee may continue to serve under the so-called "de facto" officers doctrine. See opinion for discussion.

## Opinion No.:2004-017

Daniels, Charlie  
*Secretary of State*

**RE:**Request to fix and declare the popular names for two resolutions of the General Assembly passed during the 2003 regular session: 1) HJR 1006 (Proposed Constitutional Amendment 1) and HJR 1028 (Proposed Constitutional Amendment 2). **RESPONSE:** Popular names fixed and declared pursuant to A.C.A. 7-9-110. See Opinion.

## Opinion No.:2004-021

Hill, Jim  
*State Senator*

**RE:**Does the Quorum Court need to take any action since the Murfreesboro School District levied 23.9 mills for maintenance and operation and 3.0 mills for dedicated maintenance and operation? Q2) Could the county be held accountable for the school district's not levying the tax? Q3) If the answer to q2 is "yes," how can we remedy this problem? **RESPONSE:** Q1) It is unclear based upon the limited facts whether the millage apportionment you have recited fails to meet the uniform rate of tax requirement set forth in Amendment 74. It is in all likelihood consistent with Amendment 74 to credit against the 25-mill uniform rate of tax any maintenance and operation millages

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# ATTORNEY GENERAL OPINIONS

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expressly dedicated to the purposes set forth at A.C.A. § 26-80-110(b)(1) through (4). However, it is unclear whether a district could permissibly credit the expenses set forth in subsection (5) — viz., “[r]epaying revolving loans for any of the purposes previously listed.” Moreover, assuming a millage to repay a revolving loan might not be credited against the uniform rate of tax, I believe a millage generally passed for “dedicated maintenance and operation” and not otherwise restricted to specified uses likewise might not be credited, regardless of whether the district uses the proceeds to retire revolving debt. Assuming at least 1.1 mill of tax is dedicated to one or more of the purposes set forth at A.C.A. § 26-80-110(b)(1) through (4), I believe a court would conclude that the levy accords with the requirements of Amendment 74. If the millage is not so dedicated, given the confusing state of the law on this issue, I cannot opine how a court would rule. If county officials conclude they have failed to levy the full uniform rate of tax, I believe the county court, not the quorum court, might remedy the situation by directing the county clerk to correct the inadequate levy. A.C.A. § 14-14-904(b)(4). Q2) No. The Code anticipates that any lawsuit to enforce compliance with Amendment 74 take the form of a mandamus action directly against noncomplying officials. See A.C.A. § 26-80-207. Q3) The simplest remedy for any deficiency would be for the county court to direct the county clerk to correct the levy pursuant to A.C.A. § 14-14-904(b)(4).

## Opinion No.:2004-025

Verkamp, John Paul  
*State Representative*

**RE:**Q1) Is it the city’s responsibility to substantiate costs charged to the requesting individual for copying relating to Freedom of Information Act requests (FOIA)? Q2) Is a city required to justify the “per page”

copy charges they impose on citizens for copies related to FOIA requests? Q3) Is it legal for a city to charge more than the actual cost of copy expense for copies made as a result of an FOIA request? Q4) Is a city allowed to make a profit from copies related to an FOIA request? Q5) Are there legal consequences a city can face for the over charging of FOIA copies? Q6) Is there anything in current state law that allows a city to charge individuals \$0.25 per page for copies related to FOIA requests without verifying that \$0.25 per page is the actual cost of copies for that city? **RESPONSE:** Q1) Yes. See ACA 25-19-105(d)(3). Q2) Yes. See ACA 25-19-105(d)(3)(B). Q3) No. Q4) No. Q5) The FOIA provides for both criminal and civil remedies for violations of its provisions. See ACA 25-19-104 and -107. Q6) A city can charge \$0.25 per page only if that amount reflects the actual cost of copying. The city must verify this cost.

## Opinion No.:2004-027

Emigh, Barry

**RE:**Request for certification of the popular name and ballot title for a proposed constitutional amendment to impose a statewide millage on property to fund Arkansas schools, and for other purposes. **RESPONSE:** Popular name and ballot title rejected due to ambiguities in the text of the proposed measure.

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# ADOPTED RULES AND REGULATIONS

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## ALTERNATIVE DISPUTE RESOLUTION COMMISSION

Docket No.: 187.00.03--002  
Effective Date: 2/5/04  
Contact Person: Jennifer Jones Taylor  
Telephone: (501) 682-9400

**Requirements for the Certification of  
Mediators for Circuit Courts and  
Procedures for the Discipline of  
Mediators**

## ARKANSAS DEVELOPMENT FINANCE AUTHORITY

*Executive Division*

Docket No.: 109.00.03--002  
Effective Date: 1/31/04  
Contact Person: Patrick Patton  
Telephone: (501) 682-5902

**Policies Regarding Suspension from  
Participation in ADFA Housing  
Programs**

## BOARD OF ELECTION COMMISSIONERS

Docket No.: 108.00.03--003  
Effective Date: 2/7/04  
Contact Person: Ruth Raines  
Telephone: (501) 682-1783

**Rules for Citizen Complaints of Non-  
Hava Violations of Election and Voter  
Registration Laws**

Docket No.: 108.00.03--004  
Effective Date: 2/7/04  
Contact Person: Ruth Raines  
Telephone: (501) 682-1783

**Rules for Reimbursement of Expenses  
for State-Funded Elections**

## GAME & FISH COMMISSION

Docket No.: 002.00.04--001  
Effective Date: 2/9/04  
Contact Person: James Goodhart  
Telephone: (501) 223-6327

**Approved 2004 Spring Turkey Season  
and Code**

## HEALTH DEPARTMENT

*Protective Health Codes*

Docket No.: 007.24.04--001  
Effective Date: 2/13/04  
Contact Person: Terry Granderson  
Telephone: (501) 661-2642

**Rules Pertaining to the Licensing of  
Heating, Ventilation, Air Conditioning  
and Refrigeration Contractors**

## HUMAN SERVICES

*County Operations*

Docket No.: 016.20.04--001  
Effective Date: 3/12/04  
Contact Person: Troy Branscum  
Telephone: (501) 682-8275

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# ADOPTED RULES AND REGULATIONS

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## **Weatherization Assistance Program's 2004 State Plan**

### *Medical Services*

Docket No.: 016.06.03--029  
Effective Date: 2/1/04  
Contact Person: Joie Wallis  
Telephone: (501) 682-5424

**Official Notices (20) to add and/or correct procedure codes and modifiers to comply with HIPAA requirements - DMS-2003 #: DD-2, YC-2, YY-8, SB-2, J-3, U-1, C-3, F-2, FF-3, O-9, SS-3, KK-11, R-13, V-1, II-8, CM-1, G-3, AR-4, S-1, NN-3, T-2, H-1, L-9, Z-1, Y-4, A-3, P-1, I-2, LC-1, GG-1, AL-1, E-8, NN-4**

Docket No.: 016.06.03--030  
Effective Date: 2/1/04  
Contact Person: Carolyn Patrick  
Telephone: (501) 682-8359

**Official Notice DMS-2003-DD-3, DMS-2003-YY-9, DMS-2003-YC-3, DMS-2003-SB-3**

Docket No.: 016.06.03--031  
Effective Date: 2/1/04  
Contact Person: Nikki Wade  
Telephone: (501) 682-8859

**Official Notice DMS-2003-E-9**

Docket No.: 016.06.03--032  
Effective Date: 2/1/04  
Contact Person: Nikki Wade  
Telephone: (501) 682-8859

**Official Notice DMS-2003-G-4**

Docket No.: 016.06.03--035  
Effective Date: 2/1/04  
Contact Person: Nikki Wade  
Telephone: (501) 682-8859

**Official Notice DMS-2003-J-4**

Docket No.: 016.06.03--036  
Effective Date: 3/1/04  
Contact Person: Will Taylor  
Telephone: (501) 682-8362

**Rehabilitative Hospital Update #44 and Hospital / Critical Access Hospital (CAH) / End-Stage Renal Disease (ESRD) Update Transmittal #66**

Docket No.: 016.06.03--039  
Effective Date: 2/1/04  
Contact Person: Betty Reed  
Telephone: (501) 682-8363

**Official Notice DMS-2003-O-11, DMS-2003-G-6, DMS-2003-II-10, DMS-2003-L-11, DMS-2003-KK-14, DMS-2003-Q-9, DMS-2003-R-16, DMS-2003-OO-10**

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# ADOPTED RULES AND REGULATIONS

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Docket No.: 016.06.04--003  
Effective Date: 1/30/04  
Contact Person: Betty Reed  
Telephone: (501) 682-8363

**Emergency Rule: Official Notice DMS-2004-C-1; DMS-2004-F-1; DMS-2004-NN-1; DMS-2004-L-3; DMS-2004-FF-1; DMS-2004-Y-1; DMS-2004-YY-2**

Docket No.: 016.06.04--004  
Effective Date: 1/30/04  
Contact Person: Renita Honorable  
Telephone: (501) 682-8577

**Emergency Rule: Pharmacy Provider Manual Update #66**

## INSURANCE DEPARTMENT

Docket No.: 054.00.03--006  
Effective Date: 2/1/04  
Contact Person: Booth Rand  
Telephone: (501) 371-2820

**Rule 81 - Employer Service Assurance Organizations**

## STATE MEDICAL BOARD

Docket No.: 060.00.04--001  
Effective Date: 2/22/04  
Contact Person: William Trice, III  
Telephone: (501) 372-4144

**Rule 27 - Informed Consent for Gastric Bypass Surgery**

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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

Agency

Period Covered

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# ARKANSAS REGISTER

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