



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-038

April 20, 2016

Mr. Daniel Greenberg
Attorney at Law
55 Fontenay Circle
Little Rock, AR 72223

Dear Mr. Greenberg:

I am writing in response to your request for certification, pursuant to Ark. Code Ann. § 7-9-107 (Supp. 2015), of the popular name and ballot title for a proposed initiated measure.

At the outset, I wish to make clear to you that the decision to certify or reject a popular name and ballot title is in no way a reflection of my view of the merits of a particular proposal. I am not authorized to, and do not consider the merits of the measure when making my determination to certify or reject a popular name and ballot title.

The Attorney General is required, pursuant to Ark. Code Ann. § 7-9-107, to certify the popular name and ballot title of all proposed initiative and referendum acts or amendments before the petitions are circulated for signature. The law provides that the Attorney General *may, if practicable*, substitute and certify a more suitable and correct popular name and ballot title. Or, if the proposed popular name and ballot title are sufficiently misleading, the Attorney General may reject the entire petition.

Section 7-9-107 neither requires nor authorizes this office to make legal determinations concerning the merits of the act or amendment, or concerning the likelihood that it will accomplish its stated objective. In addition, consistent with Arkansas Supreme Court precedent, unless the measure is “clearly contrary to

law,”¹ this office will not require that a measure’s proponents acknowledge in the ballot title any possible constitutional infirmities.² Consequently, this review has been limited primarily to a determination, pursuant to the guidelines that have been set forth by the Arkansas Supreme Court, discussed below, of whether the popular name and ballot title you have submitted accurately and impartially summarize the provisions of your proposal.

The purpose of my review and certification is to ensure that the popular name and ballot title honestly, intelligibly, and fairly set forth the purpose of the proposed amendment or act.³

REQUEST

You have requested certification, pursuant to Ark. Code Ann. § 7-9-107, of the following popular name and ballot title for a proposed constitutional amendment:

Popular Name

The Lawsuit Reform Amendment of 2016: An Amendment to Limit Attorney Contingency Fees and Non-Economic Damages in Medical Lawsuits

Ballot Title

An amendment to the Arkansas constitution providing that the practice of contracting for or charging excessive contingency fees in the course of legal representation of any person seeking damages in an action for medical injury against a health-care provider is hereby prohibited; providing that an excessive medical-injury contingency fee is greater than thirty-three and one-third percent (33 1/3%) of the

¹ See *Kurrus v. Priest*, 342 Ark. 434, 445, 29 S.W.3d 669, 675 (2000); *Donovan v. Priest*, 326 Ark. 353, 359, 931 S.W.2d 119, 121 (1996); *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992).

² As part of my review, however, I may address constitutional concerns for consideration by the measure’s proponents.

³ See *Arkansas Women’s Political Caucus v. Riviere*, 283 Ark. 463, 466, 677 S.W.2d 846 (1984).

amount recovered; providing that, for the purposes of calculating the amount recovered, the figure that shall be used is the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the medical-injury claim; providing that this limitation shall apply whether the recovery is by settlement, arbitration, or judgment; providing that this limitation shall apply regardless of the age or mental capacity of the plaintiff; providing that the prohibition of excessive medical-injury fees does not apply to workers' compensation cases; providing that the General Assembly may enact legislation which enforces this prohibition, and that it may also enact legislation that determines the relative values of time payments or periodic payments and governs the consequences and penalties for attorneys who contract for or charge excessive medical-injury contingency fees; providing that the General Assembly shall enact a measure which specifies a maximum dollar amount for a non-economic damage award in any action for medical injury against a health-care provider, but that such a measure may never be smaller than two hundred and fifty thousand dollars (\$250,000); providing that the General Assembly may, after such enactment, amend it by a vote of two-thirds of each house, but that no such amendment may reduce the maximum dollar amount for a non-economic damage award in any action for medical injury against any health-care provider to less than two hundred and fifty thousand dollars (\$250,000); providing that the Supreme Court shall adjust this figure for inflation or deflation on a biennial basis; and providing that this amendment does not supersede or amend the right to trial by jury.

RESPONSE

The popular name is primarily a useful legislative device.⁴ It need not contain detailed information or include exceptions that might be required of a ballot title, but it must not be misleading or give partisan coloring to the merit of the

⁴ *Pafford v. Hall*, 217 Ark. 734, 739, 233 S.W.2d 72, 75 (1950).

proposal.⁵ The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency.⁶

The ballot title must include an impartial summary of the proposed amendment or act that will give the voter a fair understanding of the issues presented.⁷ According to the Court, if information omitted from the ballot title is an "essential fact which would give the voter serious ground for reflection, it must be disclosed."⁸ At the same time, however, a ballot title must be brief and concise;⁹ otherwise voters could run afoul of Ark. Code Ann. § 7-5-309's five-minute limit in voting booths when other voters are waiting in line.¹⁰ The ballot title is not required to be perfect, nor is it reasonable to expect the title to cover or anticipate every possible legal argument the proposed measure might evoke.¹¹ The title, however, must be "free of any misleading tendency whether by amplification, omission, or fallacy, and it must not be tinged with partisan coloring."¹² The ballot title must be honest and impartial,¹³ and it must convey an intelligible idea of the scope and significance of a proposed change in the law.¹⁴

⁵ E.g., *Chaney v. Bryant*, 259 Ark. 294, 297, 532 S.W.2d 741, 743 (1976); *Moore v. Hall*, 229 Ark. 411, 316 S.W.2d 207 (1958). For a better understanding of the term "partisan coloring," see *infra* at note 12.

⁶ *May v. Daniels*, 359 Ark. 100, 105, 194 S.W.3d 771, 776 (2004).

⁷ *Becker v. Riviere*, 270 Ark. 219, 226, 604 S.W.2d 555, 558 (1980) (internal citations omitted).

⁸ *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938, 942 (1994).

⁹ See Ark. Code Ann. § 7-9-107(b).

¹⁰ *Bailey* at 284, 884 S.W.2d at 944.

¹¹ *Id.* at 293, 844 S.W.2d at 946-47.

¹² *Id.* at 284, 884 S.W.2d at 942. Language "tinged with partisan coloring" has been identified by the Arkansas Supreme Court as language that "creates a fatally misleading tendency" (*Crochet v. Priest*, 326 Ark. 338, 347, 931 S.W.2d 128, 133 (1996)) or that "gives the voter only the impression that the proponents of the proposed amendment wish to convey of the activity represented by the words." (*Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 249, 884 S.W.2d 605, 610 (1994)).

¹³ *Becker v. McCuen*, 303 Ark. 482, 489, 798 S.W.2d 71, 74 (1990).

¹⁴ *Christian Civic Action Committee*, 318 Ark. at 245, 884 S.W.2d at 607 (internal quotations omitted).

Furthermore, the Court has confirmed that a proposed measure cannot be approved if the text of the proposal itself contributes to confusion and disconnect between the language in the popular name and the ballot title and the language in the proposed measure.¹⁵ The Court concluded that “internal inconsistencies would inevitably lead to confusion in drafting a popular name and ballot title and to confusion in the ballot title itself.”¹⁶ Where the effects of a proposed measure on current law are unclear or ambiguous, it is impossible for me to perform my statutory duty to the satisfaction of the Arkansas Supreme Court without (1) clarification or removal of the ambiguities in the proposal itself, and (2) conformance of the popular name and ballot title to the newly worded proposal.

Applying the above precepts, it is my conclusion that the ballot title is adequate as proposed but that the popular name proposed is partisan and that a more suitable, complete, and correct popular name should be substituted for that proposed. The following is hereby certified in order to ensure that, when construed together, the popular name and ballot title accurately set forth the purpose of the proposed measure:

Popular Name

An Amendment to Limit Attorney Contingency Fees and
Non-Economic Damages in Medical Lawsuits

Ballot Title

An amendment to the Arkansas constitution providing that the practice of contracting for or charging excessive contingency fees in the course of legal representation of any person seeking damages in an action for medical injury against a health-care provider is hereby prohibited; providing that an excessive medical-injury contingency fee is greater than thirty-three and one-third percent (33 1/3%) of the amount recovered; providing that, for the purposes of calculating the amount recovered, the figure that shall be used is the net sum

¹⁵ *Cf. Roberts v. Priest*, 341 Ark. 813, 825, 20 S.W.3d 376, 382 (2000).

¹⁶ *Id.*

recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the medical-injury claim; providing that this limitation shall apply whether the recovery is by settlement, arbitration, or judgment; providing that this limitation shall apply regardless of the age or mental capacity of the plaintiff; providing that the prohibition of excessive medical-injury fees does not apply to workers' compensation cases; providing that the General Assembly may enact legislation which enforces this prohibition, and that it may also enact legislation that determines the relative values of time payments or periodic payments and governs the consequences and penalties for attorneys who contract for or charge excessive medical-injury contingency fees; providing that the General Assembly shall enact a measure which specifies a maximum dollar amount for a non-economic damage award in any action for medical injury against a health-care provider, but that such a measure may never be smaller than two hundred and fifty thousand dollars (\$250,000); providing that the General Assembly may, after such enactment, amend it by a vote of two-thirds of each house, but that no such amendment may reduce the maximum dollar amount for a non-economic damage award in any action for medical injury against any health-care provider to less than two hundred and fifty thousand dollars (\$250,000); providing that the Supreme Court shall adjust this figure for inflation or deflation on a biennial basis; and providing that this amendment does not supersede or amend the right to trial by jury.

Pursuant to Ark. Code Ann. § 7-9-108, instructions to canvassers and signers must precede every petition, informing them of the privileges granted by the Arkansas Constitution and of the associated penalties for violations. Enclosed herewith are instructions that should be incorporated in your petition prior to circulation.

Sincerely,



LESLIE RUTLEDGE
Attorney General

Enclosures

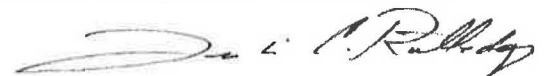
Instructions to Canvassers and Signers

1. The Arkansas Constitution gives Arkansas citizens the power to (a) initiate legislation by petition of 8% of the legal voters or constitutional amendments by petition of 10% of legal voters, or (b) order the referendum against any general act or any item of an appropriation bill or measure passed by the General Assembly by petition of 6% of legal voters. A proposed measure must be submitted at a regular election; referendum petitions may be referred at special elections on petition of 15% of the registered voters. Any measure submitted to the people becomes law when approved by a majority of the votes cast on the measure.
2. Only registered voters may sign. All signatures must be in the signer's own handwriting and in the presence of the person circulating the petition. The petition should contain only the signatures of voters residing in a single county.
3. Printed name, date of birth, residence, city or town of residence, and date of signing must be given as an aid to verification. If a petition signer needs assistance with this information due to disability, another person may print the signer's information and that person shall sign and print their name in the margin of the petition.
4. Do not attach additional sheets to this petition unless they contain the full language of the petition. The signature section of the petition must be formatted as prescribed by the Secretary of State.
5. Pursuant to section 5-55-601(b) of the Arkansas Code, each of the following activities constitutes "petition fraud," which is a Class A misdemeanor and is punishable by a fine of up to \$1,000 and imprisonment for up to one year:

A person commits the offense of petition fraud:

- (1) If the person knowingly:
 - (A) Signs a name other than his or her name to a petition;
 - (B) Signs his or her name more than one (1) time to a petition; or
 - (C) Signs a petition when he or she is not legally entitled to sign the petition;
- (2) If the person acting as a canvasser, notary, sponsor as defined under § 7-9-101, or agent of a sponsor:
 - (A) Signs a name other than his or her own to a petition;
 - (B) Prints a name, address, or birth date other than his or her own to a petition unless the signor requires assistance due to disability and the person complies with § 7-9-103;
 - (C) Solicits or obtains a signature to a petition knowing that the person signing is not qualified to sign the petition;
 - (D) Knowingly pays a person any form of compensation in exchange for signing a petition as a petitioner;
 - (E) Accepts or pays money or anything of value for obtaining signatures on a petition when the person acting as a canvasser, sponsor, or agent of a sponsor knows that the person acting as a canvasser's name or address is not included on the sponsor's list filed with the Secretary of State under § 7-9-601; or
 - (F) Knowingly misrepresents the purpose and effect of the petition or the measure affected for the purpose of causing a person to sign a petition;
- (3) If the person acting as a canvasser knowingly makes a false statement on a petition verification form; [or]
* * *
- (5) If the person acting as a sponsor files a petition or a part of a petition with the official charged with verifying the signatures knowing that the petition or part of the petition contains one (1) or more false or fraudulent signatures unless each false or fraudulent signature is clearly stricken by the sponsor before filing.

The Attorney General is by law required to certify the sufficiency of the popular name and ballot title of all initiative or referendum petitions. This certification does not necessarily indicate the approval or disapproval of the contents thereof.



LESLIE RUTLEDGE
Attorney General of the State of Arkansas

Popular name

The Lawsuit Reform Amendment of 2016: An Amendment to Limit Attorney Contingency Fees and Non-Economic Damages in Medical Lawsuits

Ballot title

An amendment to the Arkansas constitution providing that the practice of contracting for or charging excessive contingency fees in the course of legal representation of any person seeking damages in an action for medical injury against a health-care provider is hereby prohibited; providing that an excessive medical-injury contingency fee is greater than thirty-three and one-third percent (33 1/3%) of the amount recovered; providing that, for the purposes of calculating the amount recovered, the figure that shall be used is the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the medical-injury claim; providing that this limitation shall apply whether the recovery is by settlement, arbitration, or judgment; providing that this limitation shall apply regardless of the age or mental capacity of the plaintiff; providing that the prohibition of excessive medical-injury fees does not apply to workers' compensation cases; providing that the General Assembly may enact legislation which enforces this prohibition, and that it may also enact legislation that determines the relative values of time payments or periodic payments and governs the consequences and penalties for attorneys who contract for or charge excessive medical-injury contingency fees; providing that the General Assembly shall enact a measure which specifies a maximum dollar amount for a non-economic damage award in any action for medical injury against a health-care provider, but that such a measure may never be smaller than two hundred and fifty thousand dollars (\$250,000); providing that the General Assembly may, after such enactment, amend it by a vote of two-thirds of each house, but that no such amendment may reduce the maximum dollar amount for a non-economic damage award in any action for medical injury against any health-care provider to less than two hundred and fifty thousand dollars (\$250,000); providing that the Supreme Court shall adjust this figure for inflation or deflation on a

biennial basis; and providing that this amendment does not supersede or amend the right to trial by jury.

Text of proposed amendment

SECTION 1. Section 3 of Amendment 80 to the Arkansas Constitution is amended to read as follows:

§ 3. Rules of pleading, practice, and procedure.

(A) The Except as provided in subsection (B) of this section, the Supreme Court shall prescribe the rules of pleading, practice, and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.

(B) (1) The practice of contracting for or charging excessive contingency fees in the course of legal representation of any person or entity seeking damages in an action for medical injury against a health-care provider is hereby prohibited.

(a) An excessive contingency fee is in excess of thirty-three and one-third percent (33 1/3%) recovered.

(b) The above limitation shall apply regardless of whether the recovery is by settlement, arbitration, or judgment; the above limitation shall also apply regardless of the age or mental capacity of the person or entity for whom the recovery is made.

(c) For purposes of subsection (B) (1) (a), "recovered" refers to the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(d) The terms “action for medical injury,” “health-care provider,” and “medical injury” are defined in this Amendment’s addition to Article 5, Section 32 of the state Constitution.

(e) The prohibition of excessive medical-injury attorney fees described in this subsection does not extend to workers’ compensation cases.

(B) (2) The General Assembly’s power to enact laws that prohibit excessive contingency fees includes the subsidiary power to enact laws which govern (a) how the total value or present value of a set of periodic payments should be calculated, (b) how or whether life expectancy or other relevant factors shall be taken into account with respect to those calculations, (c) to what extent the use of total value or present value calculations for such periodic payments shall be required when determining excessive contingency fees, and (d) the consequences and penalties for attorneys who contract for or charge excessive medical-injury contingency fees.

(B) (3) The General Assembly shall have power to enforce, by appropriate legislation, the provisions of this section.

(B) (4) A rule of pleading, practice, and procedure enacted by law under subdivision (B) (1), (B) (2), or (B) (3) of this section shall supersede a conflicting rule of pleading, practice, and procedure prescribed by the Supreme Court.

SECTION 2. Section 32 of Article 5 of the Arkansas Constitution is amended to read as follows:

32. Workmen’s Compensation Laws — Actions for personal injuries.

(a) The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same.

Provided, that otherwise, except as provided in subsection (b) of this section, no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in

case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.

(b) (1) (A) The General Assembly shall enact laws that specify the maximum dollar amount of non-economic damage awards in a civil action for medical injury brought against a health-care provider.

(b) (1) (B) The maximum dollar amount award of non-economic damages specified under subdivision (b) (1) (A) of this section shall be at least two hundred fifty thousand dollars (\$250,000) per health-care provider against whom a judgment is rendered, regardless of whether the health-care provider is a health-care professional or a health-care business.

(b) (2) (A) "Action for medical injury" means all actions, including actions for wrongful death, whether based in tort, contract, or otherwise, to recover damages on account of medical injury.

(b) (2) (B) "Health-care provider" means either a "health-care professional" or a "health-care business."

(b) (2) (C) "Health-care professional" means an individual providing and billing for health-care services (including a physician, certified registered nurse anesthetist, physician's assistant, nurse, optometrist, chiropractor, physical therapist, dentist, podiatrist, pharmacist, psychologist, or veterinarian) that is licensed by the state or otherwise lawfully providing professional health-care services.

(b) (2) (D) "Health-care business" means an entity providing and billing for health-care services (including a hospital, nursing home, community mental health center, ambulatory surgical treatment center, birthing center, intellectual disability institutional habilitation center, nonresidential substitution-based treatment center for opiate addiction, outpatient diagnostic center, recuperation center, rehabilitation facility, hospice, clinic, or home health-care agency) that is licensed by the state or otherwise lawfully providing health-care services; and including an owner, officer, employee, or agent of such a health-care business acting in the course and scope of employment in the providing of health care services.

(b) (2) (E) "Medical injury" means any adverse consequence or any set of adverse consequences arising out of or sustained in the course of the professional services being rendered by a health-care provider to a

patient or resident, whether resulting from negligence, error, or omission in the performance of such services; or from rendition of such services without informed consent or in breach of warranty or in violation of contract; or from failure to diagnose; or from premature abandonment of a patient or of a course of treatment; or from failure to properly maintain equipment or appliances necessary to the rendition of such services; or otherwise arising out of or sustained in the course of such services.

(b) (3) (A) The General Assembly may, for the purposes of this section, further define "health-care professional" in law, so long as that definition includes the categories listed in section (b) (2) (C).

(b) (3) (B) The General Assembly may, for the purposes of this section, further define "health-care business" in law, so long as that definition includes the categories listed in section (b) (2) (D).

(b) (3) (C) The General Assembly may, for the purposes of this section, further define "medical injury" in law, so long as that definition includes the categories listed in section (b) (2) (E).

(b) (4) (A) By a majority vote of each house, the General Assembly shall enact laws in the 2017 Regular Session implementing subdivision (b) (1) of this section.

(b) (4) (B) After enacting the laws as required by subdivision (b) (4) (A) of this section, the General Assembly may amend a law required by subdivision (b)(1) of this section by a two-thirds vote of each house.

(b) (4) (C) In no event shall a law implementing subdivision (b) (4) (A) or (b) (4) (B) of this section violate subdivision (b) (1) (B) of this section.

SECTION 3. This amendment does not supersede or amend the right of trial by jury as declared by the Arkansas Constitution.

SECTION 4. In January of 2018 and every two years after January of 2018, the Supreme Court of Arkansas shall issue a rule which adjusts the maximum dollar amount of non-economic damage awards for inflation or deflation to the nearest multiple of one thousand dollars (\$1,000). The biennial adjustment shall be based upon the Consumer Price Index or a comparable index chosen by the Court; when reasonably possible, the particular index the Court chooses shall remain

the same over time. The sole intent and effect of the biennial adjustment shall be to compensate for the effects of inflation or deflation with reasonable precision.

SECTION 5. In the event that any section, subsection, subdivision, paragraph, subparagraph, item, sentence, clause, phrase or word of this amendment is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall not affect the remaining portions of this amendment, which shall remain in full force and effect as if the portion so declared or adjudged invalid or unconstitutional was not originally a part of this amendment.

SECTION 6. This amendment shall be effective on January 1, 2017.