

Opinion No. 2013-067

December 23, 2013

The Honorable Mark Martin
Secretary of State
State Capitol, Suite 256
Little Rock, Arkansas 72201-1094

Dear Mr. Martin:

You have requested my opinion on the following questions concerning the preparation of a popular name for a resolution of the Arkansas General Assembly that was passed at the 2013 regular session:¹

1. Does the Attorney General still have the statutory authority to prepare a Popular Name for the constitutional amendments referred by the Eighty-Ninth General Assembly? If the answer is “yes,” I request that you prepare a Popular Name for SJR 7 (Issue No. 1).
2. If the answer to the first question is “no,” what is the proper course for preparing a Popular Name for SJR 7 (Issue No. 1)?

RESPONSE

It appears that the answer to your first question is “no.” It is my opinion in response to your second question that legislative clarification is plainly warranted, so that the procedure for identifying and distinguishing legislatively proposed amendments on the ballot is clearly established. Pending such clarification,

¹ Pursuant to Article 19, Section 22 of the Arkansas Constitution, the General Assembly may propose up to three constitutional amendments for referral to the voters. The resolution at issue, Senate Joint Resolution (SJR) 7 (Issue No. 1), was passed by the 89th General Assembly and will appear on the state’s November 4, 2014 General Election ballot.

however, it is my opinion that the Secretary of State may supply a popular name as a means of identifying SJR 7 on the ballot. My office is available for consultation in this regard.

DISCUSSION

Question 1 - Does the Attorney General still have the statutory authority to prepare a Popular Name for the constitutional amendments referred by the Eighty-Ninth General Assembly? If the answer is “yes,” I request that you prepare a Popular Name for SJR 7 (Issue No. 1).

As you noted in submitting your request for my opinion, in prior years the request for my assistance in preparing popular names for legislatively proposed constitutional amendments was made pursuant to A.C.A. § 7-9-110. This section previously stated as follows, in relevant part:

The Attorney General shall fix and declare the popular name by which each amendment to the Arkansas Constitution and each initiative and referred measure shall be designated.²

The term “amendment” was defined as “any proposed amendment to the Arkansas Constitution, whether proposed by the General Assembly or by the people[.]”³

As you have further noted, section 7-9-110 was amended during the 2013 legislative session to delete the language requiring the Attorney General to fix the popular name for constitutional amendments proposed by the General Assembly.⁴ The relevant subsection now provides:

The popular name of each state measure shall be designated as provided in § 7-9-107, and the number of the measure on the ballot shall be designated as provided in § 7-9-116.⁵

An amendment referred to the voters by the legislature pursuant to Ark. Const. art. 19, § 22 is not a “measure” covered by this provision. Under the definitional section, as also amended by Act 1413 of 2013, the term “measure” includes “an

² A.C.A. § 7-9-110(a) (Repl. 2011).

³ A.C.A. § 7-9-101(2) (Repl. 2011).

⁴ See Acts 2013, No. 1413, § 12.

⁵ *Id.*, codified in relevant part at A.C.A. § 7-9-110(a) (Supp. 2013).

amendment;”⁶ but “amendment” now means “an amendment to the Arkansas Constitution *that is proposed by the people*[.]”⁷

Accordingly, it appears that the Attorney General has not been authorized to fix and declare a popular name for constitutional amendments proposed by the General Assembly pursuant to Ark. Const. art. 19, § 22.

Question 2 - If the answer to the first question is “no,” what is the proper course for preparing a Popular Name for SJR 7 (Issue No. 1)?

Pending legislative clarification – which is indicated for the reasons explained below – I believe the Secretary of State may prepare a popular name for SJR 7. Some explanation of the relevant constitutional and statutory provisions will be helpful before further explaining this response.

This question arises not only as a consequence of the recent amendment to A.C.A. § 7-9-110 by Act 1413 of 2013, discussed above, but also due to the General Assembly’s failure to designate a popular name in SJR 7. Such designation is authorized by A.C.A. § 7-9-204, as also amended by Act 1413. Section 7-9-204 now states:

The General Assembly may designate in the joint resolution proposing an amendment to the Arkansas Constitution the popular name and ballot title of the amendment for the election ballot.⁸

The joint resolution in question – SJR 7 – designates neither a popular name nor a ballot title; hence, your question regarding the preparation of a popular name.⁹ This question arises, understandably, due to the constitutional requirement that amendments proposed by the General Assembly be distinguished and identified for the voters. Article 19, section 22 of the Arkansas Constitution provides as follows:

⁶ A.C.A. § 7-9-101(5) (Supp. 2013) (codification of Acts 2013, No. 1413, § 2).

⁷ *Id.* at (2) (emphasis added).

⁸ A.C.A. § 7-9-204 (Supp. 2013) (codification of Acts 2013, No. 1413, § 19). Section 7-9-204 previously stated that “[*t*]he title of the joint resolution proposing an amendment to the Arkansas Constitution *shall be the ballot title* of the proposed constitutional amendment.” A.C.A. § 7-9-204 (Repl. 2011) (codification of Acts 2001, No. 150, § 1) (emphasis added).

⁹ You have not asked about a ballot title for the amendment. As noted further herein, several statutes seem to assume there will be both a popular name and a ballot title for legislatively referred constitutional amendments. But as with a popular name, there currently is no express law assigning responsibility for supplying a ballot title for such proposals.

Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the State for approval or rejection; and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution, but no more than three amendments shall be proposed or submitted at the same time. *They shall be so submitted as to enable the electors to vote on each amendment separately.*¹⁰

The Arkansas Supreme Court has held based upon the language emphasized above that the submission to the voters must be sufficient to “distinguish and identify” the proposal:

Art. 19, [§] 22 does not specifically require a ballot title. All that is required is that the proposed amendments under Art. 19, [§] 22 ‘be so submitted as to enable the electors to vote on each amendment separately.’ *So, the purpose of the ‘Ballot Title’ under Art. 19, [§] 22 is not to inform the voter, but merely to distinguish and identify the amendment....* When the purpose of a ballot title is to identify, as opposed to inform, the title is sufficient if it *distinguishes the proposed amendment from others and is recognizable as referring to the amendment that was previously published in the newspapers.* A ballot title which meets this test will be upheld unless it is worded in some way so as to constitute a manifest fraud upon the public.¹¹

¹⁰ Ark. Const. art. 19, § 22 (emphasis added).

¹¹ *Becker v. Riviere*, 277 Ark. 252, 255, 641 S.W.2d 2 (1982 (emphasis added)). *See also Thiel v. Priest*, 342 Ark. 292, 299, 28 S.W.3d 296 (2000); *Walmsley v. McCuen*, 318 Ark. 269, 272, 885 S.W.2d 10 (1994); *Becker v. McCuen*, 303 Ark. 482, 486, 798 S.W.2d 71 (1990).

Amendments referred by the General Assembly under art. 19 § 22 are governed by different standards than those initiated by the people under Ark. Const. amend. 7 (codified at Ark. Const. art. 5 § 1). *Berry v. Hill*, 232 Ark. 648, 650, 339 S.W.2d 433 (1960); *Theil*, 342 Ark. at 299.

As reflected in the above passage, according to the court no ballot title is necessary for an amendment proposed under art. 19, § 22.¹² The court has consistently made this observation in ballot title cases, that is, in cases involving challenges to ballot titles that have been attached to General Assembly proposals notwithstanding the apparent absence of a ballot title requirement.¹³ The proposed amendment must nevertheless be separately identified so as to satisfy art. 19, § 22. And the court has observed that the *popular name* serves this function. In one of the earlier cases, the court commented that “[t]he popular name actually serves the constitutional requirement of submission in a manner enabling the voters to vote on the proposed amendments separately.”¹⁴ The court reiterated this point in a more recent case where it was asked to overrule its historical adherence to a less demanding standard of review when analyzing art. 19, § 22 proposals:

In the *Chaney* decision, the court noted the two entirely different methods by which it has reviewed referred constitutional amendments under art. 19, § 22, as compared to initiative proposals under Amendment 7. The *Chaney* court further pointed out that proposals referred by the General Assembly require no ballot title, unlike those measures that are initiated under Amendment 7. Art. 19, § 22, only requires that proposals by the General Assembly be so submitted as to enable the people to vote on each amendment separately, and this court in *Chaney* determined that the popular name, alone, served this function. [Citation omitted.]¹⁵

When the court observed in *Thiel v. Priest* (decided in 2000) that the popular name serves the function of enabling the voters to vote on each legislative proposal separately, the Attorney General was responsible for fixing the popular name. This was in accordance with Act 512 of 1993, which transferred responsibility for fixing popular names for legislative proposals from the Governor, Secretary of

¹² Note the quotation marks around the term “Ballot Title” in the above excerpt. This presumably is in recognition of the fact that while legislative proposals must be separately identified for the voters pursuant to art. 19, § 22, a ballot title is not specifically required in order to meet this constitutional directive.

¹³ See *Forrester v. Martin*, 2011 Ark. 277, * 5 (June 23, 2011); *Thiel*, 342 Ark. at 299; *Walmsley*, 318 Ark. at 272; *McCuen*, 303 Ark. at 486; *Riviere*, 277 Ark. at 254; *Chaney v. Bryant*, 259 Ark. 294, 300, 532 S.W.2d 741 (1976).

¹⁴ *Chaney*, 259 Ark. at 297.

¹⁵ *Thiel*, 342 Ark. at 299 (emphasis added). The court declined to overrule “the manifest-fraud standard to review art. 19, § 22 measures.” *Id.* at 300.

State and State Comptroller to the Attorney General.¹⁶ The 1993 act also made the Secretary of State alone responsible for fixing the number by which such proposals are to be designated. Previously, a 1933 act directed the Governor, Secretary of State, and State Comptroller¹⁷ to “fix and declare a number and a popular name by which each amendment to the constitution of Arkansas, and each initiated and referred measure shall be designated.”¹⁸ The 1933 act was apparently prompted by confusion regarding the designation of amendments and other measures on the ballot.¹⁹

The setting of popular names for legislatively proposed constitutional amendments thus dates from 1933. As a consequence of the amendments discussed above, however, currently no law expressly directs any official to prepare a popular name (or ballot title)²⁰ for legislative proposals. The Secretary of State assigns an “issue number,” but no official is assigned responsibility for preparing a popular name:

(a) The Secretary of State shall fix and declare the number of the issue by which state measures shall be designated on the ballot.

(b) Each state measure shall be identified with the issue number designated by the Secretary of State.

* * *

¹⁶ Acts 1993, No. 512, § 9. The Attorney General was already responsible, pursuant to a 1943 enactment, for approving popular names and ballot titles for measures initiated or referred to the people under the provisions of Amendment 7 to the Arkansas Constitution. *See* Acts 1943, No. 195, § 4 (codified, as amended, at A.C.A. § 7-9-107 (Supp. 2013)).

¹⁷ The office of state comptroller was abolished by Acts 1967, No. 468, § 2.

¹⁸ Acts 1933, No. 71, § 1.

¹⁹ Act 71 of 1933 act was entitled “An Act to Properly Designate the Several Amendments to the Constitution of Arkansas, and Initiated and Referred Acts, and to Avoid Confusion.” It appears that amendments proposed by the General Assembly were originally numbered by the Governor. *See* Acts 1879, No. 80, §§ 4, 7. It further appears that legislative proposals were not designated by popular name until 1933, when Act 71 of that year was enacted. Other than the number designation, I am unaware how legislatively proposed amendments were identified on the ballot between 1879 and 1933.

²⁰ Recall that prior to its recent amendment, A.C.A. § 7-9-204 (originally enacted in 2001) required that the title of legislative proposals shall be the ballot title. *See* n. 8, *supra*. The Arkansas Supreme Court had previously held that neither Ark. Const. art. 19, § 22 nor the statutes requires a ballot title for legislative proposals. *McCuen*, 303 Ark. at 486; *Chaney*, 259 Ark. at 297. It is apparent from several ballot title cases that a title was nevertheless designated, sometimes (but not always) in the resolution itself. *See, e.g., Thiel*, 342 Ark. at 295; *McCuen*, 303 Ark. at 485; *Riviere*, 277 Ark. at 254. I do not know how ballot titles were supplied in those cases where the joint resolution did not itself supply the title. *See, e.g., Chaney*, 259 Ark. at 296.

(e) Measures referred to a vote by the General Assembly shall be captioned, “CONSTITUTIONAL AMENDMENT (OR OTHER MEASURE) REFERRED TO THE PEOPLE BY THE GENERAL ASSEMBLY”.²¹

It is clear from subsection (e) above that this “issue number” designation encompasses constitutional amendments proposed by the General Assembly. This is also evident under the statute that governs the ballot form:

Each statewide measure shall be designated on the ballot as an issue, and the issues shall be numbered consecutively beginning with ‘Issue 1’ and in the following order:

(A) Constitutional amendments proposed by the General Assembly, if any....[.]²²

The “issue number” designation plainly will not, standing alone, sufficiently identify and distinguish the legislative proposal(s) so as to satisfy Ark. Const. art. 19, § 22. Indeed, several statutes seem to contemplate the additional identification of legislative proposals by popular name and ballot title.²³ But, as noted above, no official has been expressly assigned the duty to prepare either a popular name or a ballot title when the joint resolution does not designate one.

There is, nevertheless, a practical necessity of sufficiently identifying legislative proposals on the ballot. Once the General Assembly has voted to propose a constitutional amendment and the necessary journal entries have been made, Ark. Const. art. 19, § 22 requires that the proposal be “published ... for six months immediately preceding the next general election ..., at which time the same shall be submitted to the electors of the State....” With regard to submission, art. 19, § 22 expressly requires that such proposals “be so submitted as to enable the electors to vote on each amendment separately.” These are “procedural constitutional requirements.”²⁴ They plainly cannot be disregarded.²⁵ The constitution does not

²¹ A.C.A. § 7-9-116 (Repl. 2011).

²² A.C.A. § 7-9-117(c)(2)(A) (Repl. 2011).

²³ *E.g.*, A.C.A. § 7-9-113 (Repl. 2011) (publication of notice to contain the number, popular name, and ballot title); A.C.A. § 7-9-117 (Rep. 2011) (title and popular name to be printed upon official ballot, followed by “FOR ISSUE NO.....AGAINST ISSUE NO.....”).

²⁴ *Chaney v. Bryant*, 259 Ark. at 299.

²⁵ *Id.*

specify how the submission requirement is to be satisfied and ideally this will be expressly addressed by the General Assembly, either in the joint resolution proposing the amendment or by statute. Absent legislative clarification, however, I believe the Secretary of State has the power, if not the duty, to ensure that proper submission to the electorate occurs. I believe this reasonably follows from his significant statutory role in the submission process. The Secretary of State is responsible for publishing the necessary notices²⁶ and he must certify legislatively referred constitutional amendments to the county board of election commissioners for posting and placement on the ballot.²⁷ The county board in turn must print the official ballot “in the manner certified by the Secretary of State.”²⁸

The Secretary of State is therefore the official chiefly responsible under the statutes for undertaking critical procedural steps in meeting not only the publication requirement, but also the requirement that legislative proposals be “submitted to the electors of the State...” I believe it reasonably follows that he can act to avoid a failure of submission in the event the General Assembly has not designated a popular name or ballot title in the joint resolution, or otherwise expressly addressed the procedure for identifying and distinguishing legislatively proposed amendments on the ballot.

As regards a popular name for SJR 7, specifically, my office will be available for consultation.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM:EAW/cyh

²⁶ A.C.A. § 7-9-113 (Repl. 2011).

²⁷ A.C.A. §§ 7-5-204(a)-(c); 7-9-117(a) (Repl. 2011).

²⁸ *Id.*