



**STATE OF ARKANSAS**  
**THE ATTORNEY GENERAL**  
**LESLIE RUTLEDGE**

Opinion No. 2015-038

July 17, 2015

The Honorable Bart Hester  
State Senator  
P.O. Box 85  
Cave Springs, Arkansas 72718

Dear Senator Hester,

You have requested my opinion regarding, what you describe as, “the potential conflict between Amendment 80 to the Arkansas Constitution and Ark. Code Ann. § 16-10-101.” Specifically, you ask “[W]hat is the process or policy in the absence of the Chief Justice of the Arkansas Supreme Court?”

**RESPONSE**

I take this question to be asking about the rules for selecting an acting Chief Justice (ACJ) when the elected Chief Justice (ECJ) is unable to serve in a given case or set of cases. For the reasons explained below, I do not think there is a conflict between Amend. 80, § 2 and Ark. Code Ann. § 16-10-101(d). They can be read harmoniously. Both provisions *establish the pool* of candidates who (under certain circumstances) are qualified to serve as an ACJ: namely, the remaining elected associate Justices. Section 16-10-101(d) goes further to *prescribe the method* for selecting the ACJ from among the remaining Justices: namely, by order of seniority. Thus, the statute is more specific than Amendment 80 but does conflict with it.

**DISCUSSION**

Before expounding the two provisions, it will be useful to have both provisions stated in full:

- **Amend. 80, § 2:** “During any temporary period of absence or incapacity of the Chief Justice, an acting Chief Justice shall be selected by the Court from among the remaining justices.”

- **Ark. Code Ann. § 16-10-101(d)**: “In the event of the absence of the Chief Justice or his or her inability to perform the duties described in this section, or as required by rule or order of the Supreme Court, the duties may be performed by the several associate justices of the Supreme Court in the order of their seniority of service on the Supreme Court.”

Three observations show that these provisions are compatible. Each provision establishes: (1) criteria for when the ECJ is considered unable to serve; (2) that, if those criteria are met, an ACJ must be selected;<sup>1</sup> (3) that only the remaining elected associate Justices are eligible to serve as an ACJ. The statute then goes further than the Amendment 80 by specifying that the elected associate justices are eligible to serve as an ACJ by order of seniority. These observations can be concisely reflected in the following chart:

	<b>Amend. 80, § 2</b>	<b>§ 16-10-101(d)</b>
Criteria	“During any temporary period of - absence, or -incapacity of the Chief Justice”	In the event of [the Chief Justice’s] - absence, -inability to perform duties, or -as required for rule or order
Effect of ECJ’s inability	“an acting Chief Justice shall be selected by the Court”	“duties may be performed by the several associate justices of the Supreme Court”
Pool of Candidates	“selected...from among the remaining justice”	“the several associate justices of the Supreme Court”
Manner of Selecting from Among Candidates	[Silent]	“in the order of their seniority”

If Amendment 80 stated that order-of-seniority was not the manner of selecting an ACJ, then there *would* be a conflict between the two provisions. But there is clearly no express

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<sup>1</sup> There is an important difference between the two provisions regarding the effect of the ECJ’s absence or inability. Amendment 80 states that, when the ECJ is absent or unable to serve, an ACJ “*shall* be selected.” But the statute states that the ECJ’s “duties *may* be performed by” the ACJ. (Emphases added.) When the constitution and a statute conflict, the constitution trumps. Thus, to the extent there is a conflict between Amend. 80 and the statute regarding *whether* the Court must select an ACJ, the answer is clear. The constitution trumps, and an ACJ must be selected.

conflict between the two provisions. Further, in my opinion, there is no latent conflict because both provisions can be followed.

In response to your question, therefore, when the ECJ is considered absent or otherwise unable to serve in a case or set of cases,<sup>2</sup> the Court selects the next most senior, elected associate Justice to serve in place of the ECJ.

A final question is whether the Arkansas Supreme Court is *required* to follow section 16-10-101(d)'s prescription regarding the method of selecting the ACJ. Amendment 80 gives the Arkansas Supreme Court authority over its own practice and procedures.<sup>3</sup> Because the manner of selecting an ACJ is almost certainly considered a matter of practice and procedure, the Arkansas Supreme Court has the authority to provide (by rule or order) a different manner of selecting an ACJ. But, in the absence of such a rule order (as is the case here), the Arkansas Supreme Court is required to follow the manner of selection stated in section 16-10-101(d).

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,



LESLIE RUTLEDGE  
Attorney General

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<sup>2</sup> While the two provisions use somewhat different terminology to describe the criteria, the provisions seem to be referring to essentially the same underlying facts.

<sup>3</sup> Ark. Const. amend. 80, § 3; *see Summerville v. Thrower*, 369 Ark. 231, 238–39, 253 S.W.3d 415, 420 (2007); *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135.