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# The Reform of Ethics Rules in Arkansas Government

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# The Reform of Ethics Rules In Arkansas Government\*

**Robert B Leflar**

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## I. Introduction

Plutarch relates the story of Phidias, the sculptor commissioned by Athens's ruler Pericles to create the great statue of Pallas Athena for the Parthenon. Phidias abused his public office by adorning the goddess's shield with his own image and that of his patron Pericles. For this act of arrogance and self-dealing with public funds he was tried, convicted, and cast into prison.<sup>1</sup>

More than 2,400 years have passed since Phidias's fall, but the temptation of self-dealing in public office has not abated. Former Arkansas state senator Nick Wilson, once considered a leading reformer, is now serving time in federal prison for a child-support enforcement program scam.<sup>2</sup> Wilson joins a deplorable procession of high state officials recently convicted of felonies.<sup>3</sup>

The greatest casualty of these ethical travesties has been the public's faith in government. These betrayals of the public trust add to the general sense of cynicism and disillusionment about participation in public affairs. As the United States Supreme Court recently observed:

Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered

when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'<sup>4</sup>

It is likely that the voters of Arkansas expect the General Assembly to address the problems of corruption and conflicts of interest in expeditious fashion. Federal criminal laws address the most blatant forms of public corruption, and Arkansas law already contains various provisions relating to the ethics of public service. However, there is plenty of room for improvement in the state's code and legislative rules, and in their enforcement. This article sets out the general nature of the problem of conflicts of interest in Arkansas government, explains the laws and rules now on the books, and suggests several possible reforms for consideration.

Fundamentally, ethics in government is a matter of individual virtue. No structure of rules, however elaborate, can ensure virtuous behavior by public servants. However, the existence of a code, a reasonable structure of clear rules, can serve several valuable purposes. It can guide public officials toward an ethical stance when the proper course of action is unclear. It can stiffen backbones when there is temptation to act with partiality. And it can serve the deterrence function: officials will under-

stand that ethical transgressions may result in public sanction, should private conscience prove an insufficient spur.

The scope of the conflicts of interest problem is broader than daily press coverage indicates. It encompasses the actions not only of legislators and the statewide officials in the executive branch, but also of members of the state boards and commissions. The commission members generally serve outside the scrutiny of the media, making the everyday decisions that constitute a large part of the real work of state government. The commission members' names and duties are seldom known to the general public. But they bring their own potential conflicts of interest to the daily work of overseeing state agencies and programs. A serious analysis of the issues of government ethics must take the boards and commissions into account as well.

## II. Approaches to Regulating Conflicts of Interests

It is helpful to think of public servants—including elected officials, appointed members of boards and other governmental bodies, and public employees<sup>5</sup>—as fiduciaries of the citizenry.<sup>6</sup> The high ethical standards that fiduciaries are expected to follow, to protect with undivided loyalty the interests of those for whom they act,<sup>7</sup> form a framework generally appropriate to determine the standards that public servants should follow to protect the interests of the public.<sup>8</sup> Details of the standards for public servants will differ from those applied to private fiduciaries, because the nature of their responsibilities is different. But the animating principle—the proper regulation of conflicts of interest—is the same.

A "conflict of interest" in the broad sense occurs in government when a person

in a decisionmaking position on a public issue has an interest in the outcome of that issue different from the interest of the public at large. The conflict may involve a personal pecuniary interest on the decisionmaker's part, or an interest of a close family member, a client, or an employer of the decisionmaker.

In general, there are three types of approaches to regulating conflicts of interests: disclosure requirements, selective regulation, and absolute prohibition.<sup>9</sup> As conflicted conduct becomes more threatening to the integrity of the governmental process, the regulatory approach becomes more severe. This tripartite categorization helps to explain the current state of Arkansas law, and to provide a framework for reform.

**A. Disclosure:** This is the least intrusive approach to conflict-of-interest regulation. The person with the conflict is required to disclose in some fashion that a conflict exists. Then others can take that conflict into account in deciding whether the person's arguments are persuasive. Also, if the person with the conflict is an elected official, theoretically the voting public might learn about the official's conflicts, and remember them at election time. Disclosure-based regulation does not prevent the person with the conflict from actively participating in the decision.

**B. Selective Regulation:** A second approach is to place restraints on the actions of the person with the conflict that fall short of total prohibition—what might be called "selective regulation." For example, the person with the conflict could continue to serve in the office and continue to receive benefits from the activity that causes the conflict, but he or she would be required to refrain from voting on the issue,

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or to refrain from participating in deliberations over the issue, or both. Examples of this intermediate approach include judicial recusal and legislative abstention.

**C. Prohibition:** The strongest approach to regulating conflicts of interest is to prohibit them from occurring at all, often by means of criminal sanctions. The law regulates some types of conflicts in this way. For example, elected legislators are prohibited from simultaneously being paid as lobbyists to lobby their own colleagues in the legislature.<sup>10</sup> Public servants are prohibited from accepting gifts or compensation for their official duties, except for their salary as public servants.<sup>11</sup> Federal agencies prohibit advisory committee members from being employed by or having significant amounts of stock in the industry that the agency regulates, unless the need for the individual's services is specifically found to outweigh the potential for a conflict of interest.<sup>12</sup>

### III. Existing Conflict of Interest Rules in Arkansas

#### A. General Conflict of Interest Laws and the Arkansas Ethics Commission

Corruption has plagued Arkansas government since territorial times.<sup>13</sup> State lawmakers, in the early years of statehood, had difficulty wrestling with the problem in systematic fashion. The state constitution has no express provisions on the topic.<sup>14</sup> However, the common law has long prohibited self-dealing in public office.<sup>15</sup> That common-law principle, still in force,<sup>16</sup> forms the foundation for subsequent ethics legislation.

The public reaction to the Watergate scandals provided an impetus for the ethics

laws most relevant to our modern government structure. A 1977 law prohibited conflicts of interest in county government.<sup>17</sup> Then following the passage of the federal Ethics in Government Act of 1978,<sup>18</sup> the state legislature in 1979 enacted a state-wide code of ethics for public officials and state employees<sup>19</sup> and a law setting ethical standards in the state procurement process.<sup>20</sup> The voting public viewed these laws as insufficient, and by popular initiative in 1988, by an overwhelming margin,<sup>21</sup> enacted the Disclosure Act for Lobbyists and State and Local Officials.<sup>22</sup> A second initiated act in 1990 established the Arkansas Ethics Commission to collect financial information reported by public officials and candidates and to make findings of violations.<sup>23</sup> These laws were supplemented with further legislation on financial disclosure in 1991,<sup>24</sup> on conflicts of interest by members of state boards and commissions in 1995<sup>25</sup> and by constitutional officers and legislators in 1999,<sup>26</sup> and several other clarifying amendments,<sup>27</sup> some giving broader powers to the Ethics Commission.<sup>28</sup>

The Arkansas Ethics Commission's statutory charge is to oversee compliance with the laws regulating conflicts of interest, campaign finance and lobbyist disclosures, and other matters concerned with the ethics of public servants. It is a five-person commission, with one member appointed respectively by the Governor, the Attorney-General, the Lieutenant Governor, the Speaker of the House, and the President pro tempore of the Senate.<sup>29</sup> It has rulemaking authority,<sup>30</sup> issues advisory opinions interpreting the laws within its jurisdiction,<sup>31</sup> and investigates alleged violations of those laws and fines violators.<sup>32</sup> The Commission has a director and a small staff that performs its investigative work.

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The enforcement philosophy of the Ethics Commission in its early years was to emphasize disclosure, rather than selective regulation or prohibitions, as the primary tool for addressing conflicts of interest. Illustrating this philosophy was a 1993 advisory opinion in response to this question:

Is it a conflict of interest for an officer of a private professional association to serve on a board or commission which licenses or regulates the association's industry on behalf of the state?

The Commission's response:

The Act [cited above], *as with all Arkansas law under authority of this Commission*, is addressed to full disclosure of possible conflicts of interest, rather than defining and prohibiting those with possible conflicts from participating in the governmental process . . . It is anticipated under Arkansas law that the combination of full disclosure and the discretion of appointment officials, or if the official is elected, the informed and vigilant voters, will ensure that the public interest is protected.<sup>33</sup>

One consequence of that position is that it countenanced full participation by legislators and by board and commission members in matters in which they have a clear conflict of interest, as long as they file the proper disclosure forms and unless another specific rule precludes that participation. As indicated below, that stance keeps ajar the gates to self-interested decisionmaking.

Some provisions of existing law might be interpreted as prohibiting or at least restraining the clearest conflicts of interest.

For example, section 21-8-304(a) states, "No public official . . . shall use his position to secure special privileges or exemption . . . that is not available to others" for himself, for his immediate family, or "for those with whom he has a substantial financial relationship."<sup>34</sup> The appellate courts have not had occasion to interpret this ambiguous but potentially useful provision.<sup>35</sup> The Ethics Commission has done little more: it has opined that "[w]hat constitutes 'special privileges or exemption' and 'a substantial financial relationship' are matters dependent upon the facts of a particular case."<sup>36</sup> The Attorney General, however, has cited the provision as a basis for opinions that, for example, the director or employees of a public commission may not receive payments from an association funded by the industry the commission regulates,<sup>37</sup> and a city council member may not cast a vote on a matter benefitting him personally.<sup>38</sup>

One other state law requires attention in this context: section 21-8-801's ban on public servants receiving gifts or compensation for the performance of their official duties, except from the public treasury.<sup>39</sup> That prohibition was part of the 1988 initiated act, and is therefore entrenched against capricious legislative repeal or modification.<sup>40</sup> However, the ban until recently has been widely ignored, as evidenced by the formerly common practice of legislators accepting compensation as lobbyists for special interests while purportedly serving the people.<sup>41</sup>

The Ethics Commission last year issued a forthright, common-sensical advisory opinion interpreting that law. The Commission stated:

A public servant cannot receive outside compensation for doing his or her job. If a public servant were

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allowed to accept compensation from outside sources for performing the duties and responsibilities of his or her position, such practice could lead to divided loyalties. Even if corruption were not intended, the recipient might have a tendency to provide preferential treatment, albeit unconsciously, to those persons supplementing his or her salary.<sup>42</sup>

The advisory opinion went on to ban gifts from lobbyists to public servants, unless the lobbyist and public servant have a bona fide personal or professional relationship independent of the public servant's official status. Calling attention to the novelty, in Arkansas politics, of this seemingly conventional explanation of the law, the opinion continued:

The Commission realizes it is breaking new ground with this advisory opinion. It is aware that public servants and lobbyists have been operating on interpretations of [the laws] which differ greatly from those set forth herein. Accordingly, we will give these interpretations prospective application only.<sup>43</sup>

The Commission proceeded to promulgate these principles in the form of a legally binding regulation.<sup>44</sup>

Some legislators have criticized the Commission's recent actions as outside the scope of its authority and have suggested that its rules be approved by a legislative committee before going into effect.<sup>45</sup> A better view is that the Commission is actually reaching the territory of general public expectations about what an ethics commission should do.

It cannot be said, however, that the

Ethics Commission has been unflinching in its stands on behalf of open government. Under Arkansas public ethics laws, a donative transfer is not a "gift" if its value is \$100 or less.<sup>46</sup> The disclosure law requiring public servants to file a yearly financial interest statement likewise requires a mention of "the source, date, reasonable fair market value, and description of each gift of more than \$100."<sup>47</sup> Suppose a lobbyist were to give a legislator a series of fifty-two \$99 gifts, one every week. (This type of practice is known in the trade as "stacking" and "splitting.") The Ethics Commission's recent Rules on Gifts interpret the gift disclosure requirement narrowly, as follows:

When multiple items, each individually worth less than \$100 but in the aggregate worth more than \$100, are *simultaneously* offered by a donor to a public servant, the gift being offered is deemed to be the aggregate of all the items.<sup>48</sup>

So as long as the donations are spread out over time, apparently lobbyists and others giving items of value to public servants may legally dodge the gift disclosure requirement,<sup>49</sup> and legislators may possibly even avoid the prohibition against receipt of "gifts" for the performance of public duties.

What about legislators drafting bills, participating in debate, or voting in committee or on the floor, on issues in which they or their immediate family, business associates, or clients have a financial stake? Legislators are required to file statements of financial interests and to disclose potential conflicts of interest;<sup>50</sup> are these disclosure requirements sufficient safeguards against abuse, or is stricter regulation necessary? The issue is of serious

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potential concern in Arkansas. A recent report by the Center for Public Integrity found that Arkansas ranks third worst among the 50 states, for example, in terms of the percentage of lawmakers who sat on a legislative committee regulating their own business interests.<sup>51</sup>

According to one view, there is nothing wrong with the practice of participating in self-interested legislative activity, so long as the legislator's public acts and conflicts of interest are a matter of public record. Other members can take the conflicts into account in deciding their own positions, and the voters can pass judgment on the member's public acts at the next election.<sup>52</sup>

The better view, however, is that direct conflicts of interest should disqualify legislators from voting, at least, on the matter as to which they have the conflict. Alabama law, for example, is quite clear on the subject:

A member of the legislature who has a personal or private interest in any measure or bill proposed or pending before the legislature, shall disclose the fact to the house of which he is a member, and shall not vote thereon.<sup>53</sup>

California law is even stronger, generally prohibiting legislators from participating in most aspects of the legislative process on matters as to which they have a conflict of interest.<sup>54</sup>

The General Assembly did enact a law in 1999 attempting to address one type of legislative self-dealing: obtaining state government jobs, leases, contracts, or grants while in office.<sup>55</sup> However, that law did not address the broader general issue of legislative activity in which members have a conflict of interest. The Arkansas Ethics

Commission has issued one opinion relating to the question: the Commission recently examined whether the state's ethics laws "would prohibit a member of the General Assembly from participating in the passage or defeat of a bill which would have an effect on one of his or her clients."<sup>56</sup> The Commission concluded that legislators could do so legally, as long as they were not specially compensated for performing such a legislative responsibility.<sup>57</sup> The same logic would presumably apply to allow legislative activities affecting the interests of the legislator's employer, close family members, or the legislator personally.

Suggested reforms regarding "stacking" and "splitting" practices and self-interested legislative activities are set out in Part IV of this article.

### B. Rules of the General Assembly

In the absence of laws controlling conflicts of interest by legislators in the performance of legislative duties, perhaps the citizenry could rely on the legislature to police itself in proper fashion. Unfortunately, such reliance would be unwarranted.

Both houses of the General Assembly have their own rules about conflicts of interest, but neither is adequate. The House of Representatives rule simply states:

Each representative is expected to vote on each question put before the House unless he/she has an immediate personal interest.<sup>58</sup>

So even if the member's spouse, parent, employer, client, or law partner has an immediate personal interest in the issue, the member may vote on the issue; it is a matter of the member's own conscience and willingness to face criticism for public acts.

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(And in fact, not all votes in the General Assembly are public acts for which members may be held accountable.)<sup>59</sup> There are no restrictions whatever on other self-interested legislative activities besides voting.

The Senate has a more comprehensive rule on the subject, but it too fails to address conflicts of interest sufficiently. The Senate rule provides:

A Senator shall not participate in the discussion of a question in committee, or on the floor of the Senate, or vote in committee or on the floor of the Senate on any matter in which the Senator knows:

(a) He or she, or any member of his or her family, or a business in which the Senator has a financial interest, will derive a benefit as a result of legislative action. . . .

(b) Will specifically relate to a business which employs the Senator or in which he or she receives compensation as an attorney or consultant.

. . .

However, a Senator *may* participate and vote on any matter pending before a committee or on the floor of the Senate if the Senator has disclosed any compensation or financial interest he or she may have regarding the matter.<sup>60</sup>

Under this rule, disclosure allows senators to participate fully, and even vote, on issues as to which they have a direct conflict.<sup>61</sup> Moreover, senators may apparently *draft* bills that will directly benefit them, as long as they do not participate in the debate or vote, even without disclosing the conflict.

### C. Conflicts of Interest on State Boards and Commissions

Members of many state boards and commissions are in a somewhat different position, for purposes of conflict of interest analysis, than are legislators. Whereas legislators are necessarily generalists, whose duties require addressing all aspects of government, board and commission members are in many cases specialists. Their limited public duties typically relate to a field in which they have particular expertise or experience. Frequently that is the field in which they make their living. Strict application of conflict-of-interest principles might lead to exclusion of some of the most knowledgeable citizens from the decisionmaking process.<sup>62</sup> But some restraints on conflicts of interest are necessary.

Current conflict-of-interest rules governing state boards and commissions appear inadequate in two ways, as explained below. First, several weaknesses exist in the rules now applicable to boards and commissions generally. Not all significant conflicts need be disclosed under current law. Members are allowed to vote on issues before the commission even though their close family members, business associates, or clients have a direct conflict on those issues. And even if a member is found to violate the weak conflict-of-interest rules now on the books, no penalty is likely to attach to the violation.

Second, the compositions of at least three important commissions—the State Plant Board, the Arkansas Manufactured Home Commission, and the Arkansas Pollution Control and Ecology Commission—create built-in conflicts of interest adversely affecting the public interest.



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The general conflict-of-interest rules for members of state boards and commissions may be classed as (1) disclosure rules and (2) selective regulation of participation in commission activities.<sup>63</sup> The disclosure statute is the same one that governs public officials, employees, and candidates for public office.<sup>64</sup> The statute is fairly comprehensive, but it is lacking in at least one respect. Although it requires board and commission members who are employed by businesses regulated by the body on which they serve to specifically disclose that fact,<sup>65</sup> it does not require that specific disclosure if a family member is so employed, or if the board member or a family member is an owner or major stockholder (as opposed to an employee) of a business regulated by the board on which the member serves.<sup>66</sup>

The law selectively regulating official actions by board and commission members is simple: "No member of a state board or commission shall participate in, vote on, influence, or attempt to influence an official decision if the member has a pecuniary interest in the matter under consideration by the board or commission."<sup>67</sup> The usual exception is made for incidental pecuniary interests accruing to a large class, rather than specially to the member himself or herself.<sup>68</sup>

The first problem with this law is that members may fully participate, and even vote, on issues as to which there is a direct conflict of interest on the part of their close family members, their employers or prospective employers, their clients, or other entities with which the board members are closely associated. A second problem is that even if a member were to violate the existing law by participating in the debate and voting on a matter as to which he or she

had a clear personal conflict of interest, there is no effective sanction for the violation, other than removal from office by the appointing authority (typically the Governor).<sup>69</sup> The misdemeanor penalty for other violations of the ethics laws is inapplicable to illegal voting and participation by board and commission members.<sup>70</sup>

A bill to correct most of these weaknesses in the conflict-of-interest provisions governing boards and commissions was introduced in the 1999 session of the Arkansas General Assembly,<sup>71</sup> and it passed the Senate by a 33-1 vote. However, it failed by one vote in the House Rules Committee.<sup>72</sup>

In addition to the problems noted above, applicable to all state boards and commissions, at least three particular bodies have built-in conflict-of-interest problems because of their statutory composition. These are the State Plant Board, the Arkansas Manufactured Home Commission, and the Arkansas Pollution Control and Ecology Commission.

The State Plant Board, one of the more curious creatures in state government, is responsible for regulating methods of controlling "insect pests, diseases, and noxious weeds,"<sup>73</sup> and for overseeing a variety of other agriculturally-related activities.<sup>74</sup> Unlike most other state boards and commissions (other than regulatory boards for the professions),<sup>75</sup> the Plant Board is largely composed of representatives of the regulated industries; in fact, members appointed by industry associations constitute the majority of the voting membership.<sup>76</sup> Under the laws noted above, these industry representatives may vote on measures affecting the profits of their own firms.<sup>77</sup> Although the State Plant Board staff has a high reputation for competence, the Board

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itself has come under considerable criticism for industry bias on controversial issues such as allowing the use of tomato-killing weed control chemicals benefitting rice farmers.<sup>78</sup>

A similar membership structure of the Arkansas Manufactured Home Commission, on which four of the ten members must be active in the manufactured home industry,<sup>79</sup> was found by the federal Department of Housing and Urban Development to violate federal conflict-of-interest rules.<sup>80</sup>

The composition of the Arkansas Commission on Pollution Control and Ecology, which oversees the programs of the Arkansas Department of Environmental Quality and is therefore in charge of most state environmental policy issues, raises conflict-of-interest questions different from, and somewhat subtler than, those inherent in the makeup of the State Plant Board and the Arkansas Manufactured Home Commission. The PC&E Commission, which until 1991 contained voting representatives of special interests,<sup>81</sup> is now composed of seven members appointed by the Governor, and the heads of six state agencies and commissions or their designees<sup>82</sup>—apparently the only state commission composed in substantial part of representatives of other state agencies and commissions. The problem is that the heads of the other agency entities are charged with the primary responsibility of carrying out policies in their own agencies that are not necessarily congruent with the environmental protection goals of the PC&E Commission and the Department of Environmental Quality, whose activities they control.

For example, the head of the Arkansas Forestry Commission, closely associated historically with the timber industry, is

charged in his primary job with promoting timber production as well as forest conservation.<sup>83</sup> This primary charge may conflict with the PC&E Commission's charge to control, for example, stream pollution due to runoff from logging operations. Likewise, the head of the Oil & Gas Commission, a body with historical ties to the industries it regulates, may have built-in incentives to prefer the central mission of his commission—the safe production and conservation of oil and gas<sup>84</sup>—to the more general environmental protection goals of the PC&E Commission on which he serves.

This is not to say that state agency and commission representatives do not perform conscientious service in their overlapping role as voting members of the PC&E Commission. Applying the fiduciary framework set out at the beginning of this article,<sup>85</sup> however, the danger exists that the current composition of the PC&E Commission inevitably places some of its members in the difficult, if not untenable, position of having to serve two masters.

The Arkansas Supreme Court recently held that legislators may not sit on state boards and commissions, even in an ex-officio nonvoting capacity, because of the state constitutional prohibition against lawmakers serving in “any civil office” of the state<sup>86</sup>—a prohibition grounded in both conflict of interest and separation of powers concerns.<sup>87</sup> It is ironic that legislators, elected by the people to represent their general interests and accountable to the voters at election time, are forbidden to serve and vote on boards and commissions when industry representatives accountable only to their trade associations and state agency heads answerable only to the Governor are permitted to do so.

#### IV. Suggested Reforms

The following reforms would alleviate the conflict-of-interest problems identified above, without creating significant disincentives for talented, knowledgeable people to serve in the state legislature and as members of state boards and commissions. The proposed reforms are categorized according to the three approaches to conflict-of-interest regulation set out above.<sup>88</sup>

##### A. Disclosure Reforms

1. The practice of "stacking" and "splitting" gifts to evade the law's requirement of disclosure of gifts to public servants<sup>89</sup> should be abolished. A series of gifts given over time should be cumulated over a calendar year, rather than treated separately, for purposes of determining the minimum dollar requirement for reporting of gifts. This reform could be accomplished either by legislation or by the Ethics Commission's amendment of the pertinent language in its recently promulgated Rules on Gifts.<sup>90</sup>

2. Members of state boards and commissions should be required to disclose whether they are owners or major stockholders of a business under direct regulation by the body on which they serve. They should also be required to disclose whether an immediate family member, close business associate, or client has such a stake in or is employed by a regulated business.<sup>91</sup> This change should be accomplished by amendment of section 21-8-701(d).

3. On each non-unanimous vote on a substantive issue in any body of the General Assembly and in any state board or commission, each individual member's vote should be recorded.<sup>92</sup> This requirement is necessary for purposes of public accountability, not only as to members' potential

conflicts of interest but also, more fundamentally, so that citizens can learn how each member stands on controversial issues.

This reform could be accomplished either through legislation (which would be preferable with regard to the boards and commissions) or through adoption by each body of a procedural rule.

##### B. Selective Regulation Reforms

1. No legislator or board or commission member should be allowed to vote on a matter in which he or she, or an immediate family member, close business associate, or client, has a direct pecuniary interest. This is an intermediate position, similar to Alabama's,<sup>93</sup> allowing legislators and board members to contribute their knowledge and expertise by participating in drafting and debate, provided they fulfill the requirements for disclosure of conflicts of interest.

(a) As it applies to board and commission members, this reform is best accomplished by legislation. Another way of achieving the same goal might be by advisory opinion from the Attorney General or the Ethics Commission, or rulemaking by the Ethics Commission, interpreting § 21-8-304(a) and related statutes.<sup>94</sup>

(b) Reform of the practice of self-interested voting by legislators could be accomplished either by legislation or by amendment of the rules of the two Houses of the General Assembly.<sup>95</sup>

2. Members of state boards and commissions who are selected by trade associations or other nongovernmental organizations, who are statutorily designated as special interest representatives, or who are representatives of state agencies or of other state boards or commissions, should have non-

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voting status. This will allow them to contribute their knowledge and experience to the deliberations but will avoid the conflict-of-interest problems identified above.<sup>96</sup>

### C. Additional Prohibition

Violations of the rules concerning self-interested voting by board and commission members should be Class A misdemeanors, in keeping with the usual penalty for other conflict-of-interest violations.<sup>97</sup> As noted above, at present the only sanction is removal

by the appointing authority, a rare event.<sup>98</sup>

Each of us and (for those readers who are attorneys) each of our clients, as citizens and taxpayers and competitors in the marketplace, bear the burden of self-dealing by those engaged in chicanery in public office. No code of ethics can banish improbity. But clear rules, carefully drafted and conscientiously applied, may at least restrain the transgressions that have afflicted our state of late.

## NOTES

\*. This article is a revised and expanded version of a speech to the Annual State Council Meeting of the League of Women Voters of Arkansas, Cherokee Village, Ark., April 28, 2000. The author is grateful to Prof. Steve Sheppard and Sarah Leflar for their comments and suggestions.

1. And there he "died of a sickness, or else of poison (as some say) which his enemies had prepared for him." PLUTARCH, *The Life of Pericles*, in *THE LIVES OF THE NOBLE GRECIANS & ROMANS* 132, 145-46 (James Amiot & Thomas North, trans., London, John Hayes 1676). The tale of Phidias's act of corruption is mentioned in Jon L. Mills, *The Future of Governmental Ethics: Law and Morality*, 17 DICK. J. INT'L L. 405, 411 (1999).

2. See Linda Satter, *Lawmaker Sentenced in Schemes; Wilson Fined, Ordered to Prison for 70 Months*, ARK. DEMOCRAT-GAZETTE, June 2, 2000, at 1A.

3. Examples include former Governor Jim Guy Tucker, former Supreme Court Chief Justice Webb Hubbell, former Secretary of State Bill McCuen, former Attorney General Steve Clark, and former Education Director Tommy Venters.

Other Arkansas lawmakers and former lawmakers are under public scrutiny for suspected abuse of office. See, e.g., Linda Satter & Rachel O'Neal, *Corruption Jury Deadlocks: Judge Declares Mistrial in U.S. Case Against Bearden, Bell, Todd*, ARK. DEMOCRAT-GAZETTE, April 26, 2000, at 1A; Rachel O'Neal, *Repay Grants, Senator Told; Audits by 2 Agencies Found \$102,997 in Questionable Costs, Letters Say*, ARK. DEMOCRAT-GAZETTE, May 13, 2000, at 1A (Sen. Kevin Smith accused of self-dealing in connection with Arkansas Delta Foundation grant).

4. *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 906 (2000) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

5. See ARK. CODE ANN. § 21-8-402(14)-(17) (Supp. 1999) (definitions of "public servant" and the included terms "public appointee," "public employee," and "public official").

6. The Arkansas Supreme Court has stated that "[i]t is, of course, elementary that a public officer occupies a fiduciary position, and that in disbursing public funds he must be as free from selfish

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interest, direct or indirect, as any other trustee." *State ex rel. Attorney General v. Broadaway*, 192 Ark. 634, 643, 93 S.W.2d 1248, 1253 (1936). *See generally* Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57.

7. Cardozo gave the classic statement of the fiduciary's duty:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

*Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

8. Attorney General Mark Pryor has taken a similar stance on the high standards expected of public servants. Summarizing the common-law concept of conflict of interest, he stated:

A public office is a public trust . . . and the holder thereof may not use it directly or indirectly for personal profit, or to further his own interest, since it is the policy of law to keep an official so far from temptation as to insure his unselfish devotion to the public interest. Officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public, and where a conflict of interest arises, the office holder is disqualified to act in the particular matter and must withdraw.

Ark. Op. Att'y Gen. 2000-072 (March 23, 2000) (quoting 67 C.J.S. *Officers* § 204). Previous Opinions of the Attorney General have been consistent with this stance. *See, e.g.*, Ark. Ops. Att'y Gen. 99-344 (Nov. 23, 1999), 98-275 (Dec. 29, 1998), 94-283 (Nov. 4, 1994), and 93-446 (Feb. 3, 1994) (quoting 63A AM. JUR. 2D *Public Officers and Employees* § 321 (1984)).

9. The boundary between "selective regulation" of acts holding the potential for conflicts of interest and absolute prohibition of such acts is sometimes indistinct.

10. ARK. CODE ANN. § 21-8-802(a) & (e) (1996).

11. *Id.* § 21-8-801(1) (1996).

12. *See* 18 U.S.C. § 208(a) & (b)(3) (1994); 5 C.F.R. § 2635.402(a) & (d)(3)(ii) (1999).

13. *See, e.g.*, MARGARET SMITH ROSS, ARKANSAS GAZETTE: THE EARLY YEARS 64-67, 73-74 (1969). Ross recounts the mishandling of public funds by both territorial Gov. Robert Crittenden and his political rival Henry Conway, territorial delegate to the U.S. Congress. The corruption charges formed part of the reason for their infamous duel on the east bank of the Mississippi River, in which Crittenden mortally wounded Conway.

14. Proposed constitutional revisions have included provisions requiring the General Assembly to enact a Code of Ethics for public officials. *See, e.g.*, proposed ARK. CONST. OF 1970, art. 11, § 5; proposed ARK. CONST. OF 1980, art. 11, § 6. However, those proposed new constitutions were rejected at the polls.

The state constitution does prohibit state legislators from holding "any civil office under this state." ARK. CONST. art. 5, § 10. The Supreme Court has explained this provision as guarding against one type of conflict of interest: between the "interests that a member of the legislature might have as an elected official with the power, influence and authority to create positions and offices, and the interest he might have as a private citizen who would desire to hold such civil office by appointment or election." *Harvey v. Ridgeway*, 248 Ark. 35, 48, 450 S.W.2d 281, 288 (1970). *See also* ARK. CONST. art. 6, § 22 (prohibiting constitutional officers from holding any other civil or military office).

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15. *See, e.g.*, Price v. Edmonds, 232 Ark. 381, 384, 337 S.W.2d 658, 660 (1960).

16. *Id.*

17. 1977 Ark. Acts 742, § 115; ARK. CODE ANN. § 14-14-1202 (1998). The 1977 ethics provision was part of a law implementing the thorough restructuring of county government required by Amendment 55 to the state constitution.

18. Pub. L. No. 95-521, tit. 2, 92 Stat. 1824.

19. 1979 Ark. Acts 570, ARK. CODE ANN. §§ 21-8-301 to -305 (1996).

20. 1979 Ark. Acts 483, ARK. CODE ANN. §§ 19-11-701 to -717 (1998).

21. Seventy-eight percent of the voters favored the 1988 initiative. *See* Michael Rowett, *Ethics Panel Refining Legislative Proposals*, ARK. DEMOCRAT-GAZETTE, July 15, 2000, at 1B.

22. 1988 Ark. Initiated Act No. 1. Some provisions of the 1988 initiated act were amended by a second initiated act voted on in 1990. As amended, the 1988 initiated act is now codified as ARK. CODE ANN. §§ 21-8-401 to 21-8-803 (1996 & Supp. 1999).

23. Standards of Conduct and Disclosure Act for Candidates in Political Campaigns, 1990 Ark. Initiated Act No. 1, § 6, ARK. CODE ANN. § 7-6-217 (2000).

The Arkansas Supreme Court found the initial composition of the Ethics Commission to violate the constitutional principle of separations of powers, since the Chief Justice of the Supreme Court held the power of appointment of one of its members -- a non-judicial post. *Spradlin v. Arkansas Ethics Comm'n*, 314 Ark. 108, 858 S.W.2d 684 (1993). Later legislation reconstituted the Commission membership in constitutional fashion.

A third initiative, 1996 Ark. Initiated Act No. 1, dealt with campaign finance reform. This article does not address the laws governing campaign finances.

24. 1991 Ark. Acts 326, ARK. CODE ANN. §§ 21-8-305 to -309; 1991 Ark. Acts 808, ARK. CODE ANN. §§ 21-8-901 to -903.

25. 1995 Ark. Acts 1123, ARK. CODE ANN. §§ 21-8-1001 to -1005.

26. 1999 Ark. Acts 34, ARK. CODE ANN. §§ 21-1-401 to -408 (Supp. 1999).

27. *E.g.*, 1999 Ark. Acts 553, §§ 30-50.

28. *E.g., id.* § 30.

29. ARK. CODE ANN. § 7-6-217(a)(1) (2000). At least one member must be a woman, at least one must be a member of a minority race, and at least one must be a member of the minority party. *Id.* § 7-6-217(b)(1).

30. *Id.* § 7-6-217(g)(1).

31. *Id.* § 7-6-217(g)(2).

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32. *Id.* § 7-6-217(g)(3).
33. Ark. Ethics Comm'n Advisory Op. 93-EC-006 (Sept. 27, 1993) (emphasis added).
34. ARK. CODE ANN. § 21-8-304(a) (1996).
35. The provision has been referred to by an appellate court only once, in a dissenting opinion and without elaboration. *See Biedenharn v. Hogue*, 338 Ark. 660, 670, 1 S.W.3d 424, 430 (1999) (Brown, J., dissenting).
36. Ark. Ethics Comm'n Advisory Op. 2000-EC-003 (March 17, 2000).
37. Ark. Att'y Gen. Op. 98-288 (Jan. 27, 1999).
38. Ark. Att'y Gen. Op. 97-120 (May 12, 1997).
39. ARK. CODE ANN. § 21-8-801(1) (1996) provides: "No public servant shall: (1) Receive a gift or compensation as defined in [§ 21-8-402(5) & (7)], other than income and benefits from the governmental body to which he or she is duly entitled, for the performance of the duties and responsibilities of his or her office or position."
40. *See* ARK. CONST. Amend. 7 (two-thirds vote required to amend or repeal initiated acts).
41. For example, Senator Joe Yates and Representative "Doc" Bryan were once notorious for their lobbying efforts on behalf of the poultry industry, while they simultaneously represented their districts. More recently, Senator Tom Kennedy resigned following criticism that he had sponsored an energy deregulation law favorable to Entergy Corporation, Act 1556 of 1999, and then accepted employment as Entergy's chief lobbyist while still serving in the state senate. *See* Rob Moritz, *Lawmaker Now Lobbyist Resigns Seat; Kennedy Stayed on for Special Session*, ARK. DEMOCRAT-GAZETTE, May 3, 2000, at 10B.
- A separate ethics issue is the employment of top-level state employees by private industry soon *after* they leave public office, to work—often as lobbyists—on the very issues for which they were responsible as public servants. About 30 states, not including Arkansas, have "revolving door laws" to regulate this practice. *See* Sandra Norman-Eady, OLR Research Report 2000-R-0154: Governmental Ethics (2000) (Connecticut General Assembly Office of Legislative Research report) <<http://www.cga.state.ct.us/2000/rpt/olr/htm/2000-r-0154.htm>> (visited July 26, 2000). That topic, however, is beyond the scope of this article.
42. Ark. Ethics Comm'n Advisory Op. 99-EC-007, Part III-C (July 30, 1999).
43. *Id.*
44. Ark. Ethics Comm'n, Rules on Gifts §§ 300-306 (Feb. 18, 2000).
45. *See* Michael Rowett, *Gift Rules Unclear, Too Strict, Legislators Say*, ARK. DEMOCRAT-GAZETTE, March 3, 2000, at 1B.
46. ARK. CODE ANN. § 21-8-402(5)(B)(vii) (Supp. 1999).

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47. *Id.* § 21-8-701(8). The reporting requirement for gifts over \$100 also applies to gifts to the public servant's spouse; gifts of more than \$250 to dependent children must also be reported.

48. Ark. Ethics Comm'n, Rules on Gifts § 306(b) (Feb. 18, 2000) (emphasis added).

49. The Ethics Commission opined that "[i]f used as a technical means to avoid reporting, such practices [as "stacking" and "splitting"] violate both the intent and spirit of the Act. There may be situations, however, in which it would be permissible to divide the cost of lobbying expenditures." The Commission therefore determined that, rather than banning the practices outright, it would address them through the rulemaking process. Ark. Ethics Comm'n Advisory Op. 99-EC-006. As of the date of this writing, the Commission has not done so.

The same Advisory Opinion continued: "the Commission *encourages* lobbyists to avoid reporting through the use of technicalities or ambiguities." (Emphasis added.) Apparently the Commission inadvertently omitted the negative. *Compare* Ark. Ethics Comm'n, Rules on Lobbyist Registration and Reporting § 510 (1996). Even so, encouragements and requirements are fundamentally different when it comes to enforceability.

50. *See* ARK. CODE ANN. §§ 21-8-701, -803 & -901 (1996 & Supp. 1999).

51. Fifty-five percent of Arkansas legislators sat on such committees. CENTER FOR PUBLIC INTEGRITY, OUR PRIVATE LEGISLATURES: PUBLIC SERVICE, PERSONAL GAIN (2000) <[http://63.72.70.130/cpint/cgi-bin/50states/Findings.asp?Display=3#Potentials for Conflict](http://63.72.70.130/cpint/cgi-bin/50states/Findings.asp?Display=3#Potentials%20for%20Conflict)> (visited July 24, 2000).

52. For example, Rep. John Dorso, Majority Leader and Chair of the Rules Committee of the North Dakota House of Representatives, took this position at the National Conference of State Legislators, July 17, 2000. Rep. Dorso stated that asserted conflicts of interest are not allowed as a reason for abstention in North Dakota, because they might provide legislators with an easy way of avoiding taking a stance on controversial issues. (One recalls the story of the young Illinois legislator Abraham Lincoln dodging a vote in Springfield by jumping out of a back window of the state capitol.)

The author thanks Rep. Jan Judy of Fayetteville for her report of Rep. Dorso's presentation.

53. ALA. CONST. art. IV, § 82. However, Alabama legislators may engage in legislative activities, other than voting, as to which they have a conflict of interest, as long as the conflict is properly disclosed. ALA. CODE § 36-25-5(b) (Supp. 1999).

54. CAL. GOV'T CODE § 87100 (1993) provides:

No public official at any level of state or local government shall make, participate in making or in any way use or attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a financial interest.

*See also id.* § 87102.5 (specifying prohibited legislative acts) and § 87103 (Supp. 2000) (defining "financial interest").

55. 1999 Ark. Acts 34, ARK. CODE ANN. §§ 21-1-401 to -408 (Supp. 1999). The law applies to legislators, constitutional officers and their spouses, but not to other immediate family members. It prohibits specified types of state employment during the officeholder's term, and (with respect to positions newly created or upgraded) for two years after leaving office. *Id.* § 21-1-402. Leases, contracts, and grants may be obtained from the state only through competitive bidding or after special review. *Id.* § 21-1-403.



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56. Ark. Ethics Comm'n Advisory Op. 2000-EC-003 (March 17, 2000).

57. *Id.* See also Michael Rowett, *Legislators Can Vote on Bills That Affect Clients, Panel Decides*, ARK. DEMOCRAT-GAZETTE, March 18, 2000, at 4B.

58. Ark. House of Representatives Rule 5 (81st Gen. Assembly, 1997).

59. Votes in House committees are not recorded, as of the 1999 session, unless requested by two committee members. See Ark. House of Representatives Committee Chairpersons Manual and House Committee Rules, at 8 (Rule 28: "if requested by any two committee members"); compare Ark. House of Representatives Rule 67(a)(5) ("if requested by any committee member") (81st Gen. Assembly, 1997).

The Senate has no specific rule on the recording of individual votes in committee. According to Senate Rules Committee Chairman Morrill Harriman of Van Buren, it is rare for a member to ask for a roll-call vote in committee. At the discretion of the committee chair, the minutes sometimes reflect individual members' votes when a show of hands is taken, and sometimes note that a member has spoken for or against a particular bill. Personal communication from Sen. Harriman, July 25, 2000.

60. Ark. Senate Rule 24.07 (emphasis added). The rule also provides the standard exception: "This prohibition does not apply when the matter provides a benefit which accrues generally to other like businesses, professions, occupations, or other groups."

61. Such self-interested votes in Senate committees are frequently unrecorded. See *supra* note 59.

62. As one scholar put it, there is a "tradeoff between neutrality and information." Saul Levmore, *Efficiency and Conspiracy: Conflicts of Interest, Anti-Nepotism Rules, and Separation Strategies*, 66 FORDHAM L. REV. 2099, 2101 (1998).

63. See Part II of this article, *supra*.

64. ARK. CODE ANN. §§ 21-8-701 to -703 (Supp. 1999).

65. *Id.* § 21-8-701(d)(10).

66. Board and commission members must list in their financial disclosure statements, for themselves and their spouses, their major sources of income and their officerships and directorships in firms regulated in any way by the state. *Id.* § 21-8-701(d)(3)-(5). However, these interests need not be listed for other close family members, and the listing is not required to specify (as the § 701(d)(10) listing does) that the connection is to a business regulated by the body on which the member serves.

67. *Id.* § 21-8-1001(a)(1) (1996).

A commission member, even its chair, does not fall afoul of the law if he or she recuses on a vote from which the member stands to benefit prodigiously. This aspect of the law recently aroused attention when the Arkansas Department of Economic Development granted subsidies to a business whose president is chair of the state Economic Development Commission, which oversees that department's activities. See Theo Francis, *Subsidy Package Raises Questions of State Fairness; Critics of Akin Deal Object to Move to Attract Furniture Jobs to Another City*, ARK. DEMOCRAT-GAZETTE, June 4, 2000, at G1.

68. The prohibition against participation does not apply "if the only pecuniary interest that may accrue to the member is incidental to his or her position or accrues to him or her as a member of a profession,

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occupation, or large class to no greater extent than the pecuniary interest could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class." ARK. CODE ANN. § 21-8-1001(b) (1996).

69. *Id.* § 21-8-1004(a). The law gives the Ethics Commission power, in its discretion, to "investigate complaints alleging a violation of this subchapter and . . . make recommendations to the appointing authority." *Id.* § 21-8-1004(b). The current director of the Ethics Commission is unaware of any instance of a board or commission member's ever having been removed for a conflict-of-interest violation. Personal communication from Graham Sloan, July 26, 2000.

70. Board and commission members are subject to a misdemeanor penalty for purposefully filing false financial disclosure statements, receiving gifts or unauthorized compensation for performing public duties, and disclosing confidential government information. ARK. CODE ANN. §§ 21-8-403 & -801 (1996). However, the penalty section is inapplicable by its terms to the provision concerning conflicts of interest by board and commission members. *See id.* § 21-8-403 (referring to subchapters 4-8 but not subchapter 10 of the chapter on ethics and conflicts of interest).

71. S.B. 883, sponsored by Sen. Jim Argue of Little Rock. (The author notes, in the interest of full disclosure, that he assisted Sen. Argue with the drafting of this bill on behalf of the Arkansas Citizens First Congress, a coalition of grassroots organizations.)

72. Governor Huckabee and the Arkansas Farm Bureau Federation lobbied against the bill in the House. *See Reform's Not for Everybody*, ARK. TIMES, May 7, 1999, at 8.

73. ARK. CODE ANN. § 2-16-207(a)(1) (1996).

74. The Plant Board registers pesticides for use in the state and enforces its registration regulations, *id.* §§ 2-16-401 to -419 (1996 & Supp. 1999); oversees programs for the control of such pestilences as Johnson grass, boll weevils, and fire ants, *id.* §§ 2-16-501 to -705; and regulates grain warehousing, cotton gins, nurserymen, seed standards, fertilizers, ginseng, apiaries, and the processing, grading, labeling, and marketing of agricultural products. *Id.* §§ 2-17-201 to 2-20-310 & 2-20-701 to 2-23-110.

75. Professional regulatory commissions, of course, are composed chiefly of members of the profession in question. *See, e.g., id.* §§ 17-95-301 (1995 & Supp. 1999) (Arkansas State Medical Board), 17-96-101 & -201 (Arkansas State Podiatry Examining Board), and 17-97-201 (Arkansas Board of Examiners in Psychology).

76. The Plant Board consists of 16 members, of whom 14 vote. Eight of these voting members, by statute, are elected by industry associations: the Arkansas Agricultural Pesticide Association, the Arkansas Agricultural Aviation Association (cropdusters), the Arkansas Forestry Association (timber industry), the Arkansas Pest Control Association, the Arkansas Feed Manufacturers' Association, the Arkansas Seed Dealers Association, the Arkansas Seed Growers Association, and the State Nurseryman's Association. *Id.* § 2-16-206(a)(7)-(14) (Supp. 1999). One other member is appointed by the Governor "to represent the Arkansas fertilizer and cotton oil mills." *Id.* § 2-16-206(a)(4). The Governor also appoints a "practical cotton grower," a "practical rice grower," and two other farmers, all actively engaged in their respective businesses. *Id.* § 2-16-206(a)(3), (5) & (15). The State Horticultural Society appoints a "practical horticulturist." *Id.* § 2-16-206(a)(6).

The two non-voting members, curiously, are the two who would be expected to be least aligned with a particular segment of the industry: the heads of the Departments of Entomology and Plant Pathology

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at the University of Arkansas. *Id.* § 2-16-206(a)(1) & (2). These two academics had voting power until a 1995 law stripped them of their votes. 1995 Ark. Acts 166, ARK. CODE ANN. § 6-64-106 (1996).

No specialists in toxicology or public health, no labor representative, and no representative of the organic farming industry sit on the State Plant Board.

77. *See* ARK. CODE ANN. § 21-8-1001(a)(2), *supra* note 68.

78. *See, e.g.*, Doug Thompson, *Panel Heavy on Industry Takes Lumps on Herbicide*, ARK. DEMOCRAT-GAZETTE, July 6, 1999, at 1A (controversy over weed killer Facet); *Don't Mess with 'Maters*, ARK. DEMOCRAT-GAZETTE, July 6, 1999, at 8B (editorial) (same).

79. ARK. CODE ANN. § 20-25-105(a)(1) (2000).

80. *See Arkansas Mobile Home Commission Not Out of the Woods Yet*, N.W. ARK. TIMES, Feb. 20, 1999. Federal regulations require that approved state plans, eligible for federal funding, provide for a state agency to address safety hazards and consumer complaints about manufactured homes. Personnel involved in carrying out the state plan must be free from conflicts of interest. *See* 24 C.F.R. §§ 3282.302(b)(10) & 3282.359 (1999). The Arkansas Manufactured Home Commission fails to meet this requirement.

81. The Commission was formerly composed of five members designated by various state agencies, the State Geologist, and five special interest representatives: one representing local government, one representing "agricultural and livestock interests," one representing industry, one engaged in mining, and one member of a conservation organization. ARK. CODE ANN. § 8-4-104(b) (1987), *repealed by* 1991 Ark. Acts 744. The late Chuck Cremeen, an attorney with the Arkansas Chapter of the Sierra Club, was instrumental in persuading the General Assembly to abandon the system of special interest representation on the Commission.

82. The state agencies with voting power on the Commission are the Department of Health, the Game & Fish Commission, the Forestry Commission, the Soil and Water Conservation Commission, the Oil & Gas Commission, and the State Geology Commission. ARK. CODE ANN. § 8-4-104(b) (2000).

83. *See id.* §§ 15-31-101(b) & 15-31-106(a)(4) (2000).

84. *See id.* § 15-71-110 (Supp. 1999).

85. *See supra* notes 5-8 and accompanying text.

86. *State Bd. of Workforce Educ. v. King*, 336 Ark. 409, 985 S.W.2d 731 (1999), *citing* ARK. CONST. art. 5, § 10. The holding applies only to boards and commissions that exercise executive power, not to those merely of an advisory nature. The General Assembly responded by passing 1999 Ark. Acts 1414, removing legislators from 47 boards and commissions and setting up a procedure to determine if legislators must be removed from others as well.

87. *See Harvey v. Ridgeway*, 248 Ark. 35, 48, 450 S.W.2d 281, 288 (1970), quoted *supra* note 14.

88. *See supra* Part II.

89. *See supra* notes 46-49 and accompanying text.

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90. Ark. Ethics Comm'n, Rules on Gifts § 306(b) (Feb. 18, 2000), quoted in text accompanying note 48 *supra*; *see also* note 49.

91. As explained in notes 65-66 *supra* and accompanying text, the provisions of ARK. CODE ANN. § 21-8-701(d)(3)-(5) & (10) (Supp. 1999) are insufficiently specific on these matters.

92. *See supra* note 59 and accompanying text.

93. *See supra* note 53 and accompanying text.

94. *See supra* text accompanying notes 34-38.

95. *See supra* notes 58 & 60 and accompanying text.

96. *See supra* notes 73-87 and accompanying text.

97. *See* ARK. CODE ANN. § 21-8-403 (1996).

98. *See supra* notes 69-70 and accompanying text.