

STATE OF MISSISSIPPI



JIM HOOD  
ATTORNEY GENERAL

OPINIONS  
DIVISION

February 1, 2019

Mr. John McWilliams, Esq.  
Board Attorney, Sunflower County  
Post Office Box 107  
Indianola, Mississippi 38751-0107

Re: Public Defender

Dear Mr. McWilliams:

Attorney General Jim Hood is in receipt of your opinion request and has assigned it to me for research and reply.

### Background and Issues Presented

Your request states:

I write on behalf of the Board of Supervisors of Sunflower County to request your official opinion regarding employment of attorneys to represent indigent persons charged with criminal offenses in Sunflower County.

One manner of doing this is provided through Section 99-15-15 of the Mississippi Code, which authorizes a court appointment of legal counsel and Section 99-15-17 of the Mississippi Code, which provides for compensation of the appointed attorney. Sunflower County has utilized that method in the past; however, it experienced difficulty in knowing how much this method would cost and how to budget for an expense which was unknown in amount.

Another method is the establishment of a formal Office of Public Defender, under Sections 25-32-1 *et seq.* of the Mississippi Code. When the Office of Public Defender is established, the Senior Circuit Judge appoints the Public Defender, and the Public Defender appoints any Assistant Public Defender(s). Sunflower County utilized this method in the early 1990s; however, it found it unsatisfactory because the required provision of office space, secretarial assistance, and expenses of operating the office proved just too expensive.

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For several years, therefore, Sunflower County has operated under a sort of "hybrid" system by which the County has contracted with private attorneys to serve as employees of the County and provide the necessary criminal defense for a set amount, with these private attorneys being responsible for the provision of their own office space, secretarial assistance, etc. We felt that this method was authorized by Home Rule, and it is discussed in several opinions issued by your office, namely one to Will Hickman dated June 9, 1981; one to Tommy Cadle dated April 4, 1986; and one to Jeffrey Hollimon dated June 17, 1992.

Our most recent Public Defender contract was with two (2) private attorneys, but one (1) of these attorneys was recently elected as Chancery Court Judge, and will therefore be unable to continue. A question has arisen, and we are requesting your official opinion on whether the Sunflower County Board of Supervisors is authorized and responsible for selecting, and contracting with the new attorney, or whether that authority and responsibility and duty properly belongs to the Senior Circuit Judge?

Our Senior Circuit Judge feels that selection of attorneys for this part-time position is within his authority and responsibility, as they will be practicing in the Circuit Court and he would be better able to judge their qualifications and performance. The Board of Supervisors feels that selection and contracting with a part-time Public Defender should be within their authority and responsibility since the person so selected would be a County employee.

Accordingly, we are asking for your official opinion of whether the selection of part-time Public Defenders for indigent criminal representation is within the authority of the Senior Circuit Judge or that of the Board of Supervisors?

Please understand that there is no litigation pending regarding this matter and no animosity between the Sunflower County Board of Supervisors and our Senior Circuit Judge. I have discussed this matter with the Senior Circuit Judge and he agreed that we should request your official opinion and this request has been reviewed by him prior to submission.

### **Short Response**

Two separate methods exist under state law for the appointment of counsel for indigent defendants. Under both methods, the judge is granted authority over selection of the appointed counsel. Counties may not usurp the judge's authority to select counsel by adopting a method not prescribed by statute.

### **Analysis and Legal Discussion**

State law provides two methods for the appointment of a public defender. The first is on

a case-by-case basis as established by Section 99-15-15 of the Mississippi Code. Section 99-15-15 prescribes that any court or judge in vacation may appoint counsel for a person they have deemed to be indigent who faces punishment by confinement for ninety (90) days or more, or commission of an act of delinquency. Rule 7.1(b) of the Mississippi Rules of Criminal Procedure, which was adopted in July of 2017, now governs and states that an indigent defendant shall be entitled to an attorney in any criminal proceeding which may result in the loss of liberty or where the court decides the interest of justice requires. The adoption of Rule 7.1(b) affects Section 99-15-15 by now authorizing the courts to appoint counsel for an indigent defendant any time the person faces a loss of liberty. Both Section 99-15-15 and Rule 7.1(b) allow the judge to appoint counsel on a case-by-case basis to serve as a public defender.

The second method for hiring public defenders is the establishment of an office of the public defender under Sections 25-32-1 *et seq.* of the Mississippi Code. Section 25-32-1 gives the Board of Supervisors of any county the authority to create an office of the public defender and to determine if that person will be full-time or part-time. Section 25-32-3 of the Mississippi Code specifically lays out the parameters for hiring a public defender and assistant public defenders as follows:

(1) When the office of public defender is established, the circuit judge or the senior circuit judge, if there be more than one (1) circuit judge, shall appoint a practicing attorney to serve the county or counties as public defender until the end of the term of office of the district attorney and thereafter for a term of four (4) years and said term shall coincide with the term of the district attorney. Such appointee shall be selected from a list of two (2) or more attorneys recommended by the county or regional bar association. In the event a vacancy shall occur in the office of the public defender, the circuit judge or the senior circuit judge, if there be more than one (1) circuit judge, shall appoint another person to serve as public defender until the end of the regular term of office.

(2) Assistant public defenders may be authorized by the board of supervisors, or boards of supervisors if two (2) or more counties are acting jointly. The public defender shall appoint all assistant public defenders. Such assistant public defenders may be compensated in such an amount as may be authorized by the respective board of supervisors; provided, however, that in no case may such assistant public defenders receive compensation in an amount greater than that received by the public defender.

(Emphasis added.) In your letter, you cite three of our previous opinions. All three opinions deal with the establishment of the public defenders office under Sections 25-32-1 *et seq.* and compensation of part-time public defenders. All three previous opinions state that Sections 25-32-5 and 25-32-7 of the Mississippi Code apply only to setting the salary and providing office space and secretarial staff for full-time Public Defenders. The

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opinions further state that a county Board of Supervisors has the ability to negotiate with a part-time public defender to fix compensation without making provision for office space, secretarial assistance, or other expenses. See MS AG Op., Hickman (June 9, 1981); MS AG Op., Cadle (April 4, 1986); and MS AG Op., Hollimon (June 17, 1992)<sup>1</sup>. Section 25-32-3 clearly states that the circuit judge or the senior circuit judge, if there is more than one, shall appoint a practicing attorney to serve as public defender. Section 25-32-3 further states that in the event a vacancy shall occur, the court shall appoint another person to serve as public defender. If there is more than one attorney hired, the "public defender shall appoint all assistant public defenders."

Under both Section 99-15-15 and Section 25-32-3, the judge has the authority to select the attorney who will fulfill the role of public defender. However, consistent with our previous opinions, the Board of Supervisors is responsible for negotiating with any selected part-time public defender and determining the amount of compensation. Accordingly, it is the opinion of this office that a county may not remove this authority from the courts by devising a local method under the home rule statute for hiring public defenders. Such a method would be in direct conflict with state law.

If we may be of further assistance, please advise.

**OFFICIAL OPINION**

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Emiko Hemleben  
Special Assistant Attorney General

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<sup>1</sup> None of these opinions relied on home rule, and, instead, were based on the statutory scheme for setting up a public defender's office which we have opined can be either full-time or part-time.