

STATE OF MISSISSIPPI



JIM HOOD  
ATTORNEY GENERAL

OPINIONS  
DIVISION

June 21, 2019

David L. Brewer, Esq.  
Pike County Prosecuting Attorney  
Post Office Box 20  
Summit, Mississippi 39666-0020

Re: Opinion Request Concerning County Prosecutor

Dear Mr. Brewer:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response.

### Background and Issues Presented

Your request states:

As the Pike County Prosecuting Attorney, years ago I realized the necessity of having a "Special Assistant Prosecutor" to handle cases wherein I had conflicts of interest, to fill in when necessary to my illness or other unavoidable absence and to appear in the event that the duties of my office require my presence at two places at the same time. Realizing the inevitability of needing a lawfully-appointed special prosecutor, I took the initiative of having the Board of Supervisors vote on and approve a special assistant county prosecutor. He is a local private attorney, is not on the county payroll and receives payment on a case-by-case basis. This has been our manner of operation and the resolution provides that a particular individual shall serve as special prosecutor when necessary because of the aforementioned reasons. Furthermore, it was done based on my reading of MS AG Op., Bragg (August 20, 1999).

Recently, an individual suggested that my special assistant is bound by the prohibition against County Attorneys engaging in criminal defense work in the Circuit pursuant to Section 19-23-13 of the Mississippi Code which states:

The county prosecuting attorney shall not represent or defend any person in any criminal prosecution in the name of the state, county or municipality of the county, nor shall he give any advice against the state, his county or in a criminal case against a municipality of his county, and shall not represent any person in any case against the state, his county, or in a criminal case arising in a municipal court of his county. Nothing herein shall prohibit any county prosecuting attorney from defending any person in any criminal prosecution in any county not within the circuit court district of such county prosecuting attorney.

My reading of this statute is that it merely applies to myself as the elected county attorney and not to a private attorney appointed by the board to fill in on a case-by-case basis. Please advise as to your opinion on this matter. Simply stated the question presented is **whether a special assistant county prosecutor appointed by the board of supervisors is prohibited by Section 19-23-13 from practicing in counties in his circuit court district?** I see no authority for this restriction on a special

assistant  
**OFFICIAL OPINION**  
Brief Response

Section 19-23-13 prohibits only the elected county prosecuting attorney from practicing within the limitations listed in the code section. Section 19-23-13 does not apply to prosecutors who are appointed on a case-by-case basis when the county prosecuting attorney needs to recuse himself.

### Discussion and Legal Analysis

You mention to us in your request that you had the board of supervisors appoint a standing "Special Assistant Prosecutor." We note that this position is not statutorily created, and is something specific to your county. We have consistently opined when a county prosecutor needs to recuse himself the appropriate method is for the justice court clerk to notify the board of supervisors so the board may make the appointment, spread upon the minutes, of a special prosecutor as soon as possible. MS AG Op., Bragg (August 20, 1999); MS AG Op., Barefield (December 8, 2000).

Your question is whether an attorney who is appointed as special prosecutor is prohibited from practicing in his circuit court district by Section 19-23-13 of the Mississippi Code. Section 19-23-13 of the Mississippi Code states:

The county prosecuting attorney shall not represent or defend any person in any criminal prosecution in the name of the state, county or municipality of the county, nor shall he give any advice against the state, his county or in a criminal case against a municipality of his county, and shall not

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represent any person in any case against the state, his county, or in a criminal case arising in a municipal court of his county. Nothing herein shall prohibit any county prosecuting attorney from defending any person in any criminal prosecution in any county not within the circuit court district of such county prosecuting attorney.

In reviewing this statute, it is important to know how the term "county prosecuting attorney" is defined. Section 19-23-1 of the Mississippi Code states that the "county prosecuting attorney" is an office which is "elected in the county at each general election for state and county officers." Based on this definition, it is the opinion of this office that Section 19-23-13 applies only to the elected county prosecuting attorney.

In a previous opinion to the Honorable Edward Peters, this office was asked a similar question regarding a special prosecutor in the circuit court. Like county attorneys, district attorneys have a statute that prohibits them from private practice. See Miss. Code Ann. Section 25-31-35 (as amended). In Peters, we opined:


... these sections [including Section 25-31-35] apply by their own terms only to district attorneys or their legal assistants, and do not apply to a special prosecutor appointed or approved by the court to handle a particular case. Therefore, it is our opinion that a special prosecutor appointed pursuant to court order may represent criminal defendants in counties outside the circuit court district in which he is specially appointed.

Likewise, we are of the opinion that Section 19-23-13 prohibits only the elected county prosecuting attorney from practicing within the limitations listed.

If we may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By: 

Emiko Hemleben  
Special Assistant Attorney General