

STATE OF MISSISSIPPI



JIM HOOD  
ATTORNEY GENERAL

OPINIONS  
DIVISION

January 3, 2020

J. Richard Barry, Esquire  
Attorney for the Kemper County Board of Supervisors  
Post Office Box 2009  
Meridian, Mississippi 39302

Re: Appointment of County Prosecuting Attorney

Dear Mr. Barry:

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:

Several years ago Kemper County abolished the elected position of County Attorney. For the past many years, the Kemper County Board of Supervisors has appointed an attorney to fill that position under Section 19-3-49 of the Mississippi Code Annotated.

At present, there is only one active member of the Mississippi Bar, who is a resident of Kemper County. The Board is considering appointing an attorney who is not a resident of Kemper County.

The questions we request an opinion from your office are as follows:

1. Can the Board of Supervisors of Kemper County appoint and contract with a County Attorney who resides outside of the County under Section 19-3-49?

2. Alternately, can the Board of Supervisors of Kemper County appoint and contract with a County Attorney who resides outside of the County under Section 19-3-49 if it determines there is no qualified member of the Bar that resides in Kemper County?

3. Further, can the Board of Supervisors of Kemper County name as County Attorney the attorney serving as Board Attorney (firm) if that person is not a resident of Kemper County?

Additionally, Marvin Wiggins, the current county prosecutor, has written into our office and asked us to consider Article 12, Section 250 of the Mississippi Constitution of 1890, as well as Sections 19-23-1 *et seq.* of the Mississippi Code Annotated, and a previous opinion to the Honorable J. Max Kilpatrick.

### **Brief Response**

The board of supervisors can contract with an attorney who is not a resident of Kemper County to serve as county prosecutor. In a county where there is no elected prosecutor, there is no requirement that the board of supervisors appoint someone who lives in the county to fill the appointed county prosecutor seat as the county prosecutor in such a case does not hold "office."

### **Response and Legal Analysis**

In response to your first question, Section 19-3-49 of the Mississippi Code Annotated establishes the office of appointed county prosecutor. Section 19-3-49(1) states, in relevant part:

(1) In all counties of this state wherein there is no elected county prosecuting attorney, the boards of supervisors shall have the power and authority to employ a competent attorney to appear and prosecute in cases requiring the services of the county prosecuting attorney. The compensation paid to the person so employed shall be paid from the general fund of such county and shall not exceed, during any calendar year, the amount authorized by law to be paid as salary to the county prosecuting attorney in such county. The employment of a county prosecuting attorney as authorized by this section shall be pursuant to a contract which shall provide that the salary of such county prosecuting attorney shall not be reduced, increased or terminated for the period of the contract. Such contract shall be for the period of the remainder of the term of office of the board of supervisors which employs the county prosecuting attorney; however, the contract shall provide expressly or by reference to



this section that the contract shall be abrogated upon the creation and filling of the office of elected county prosecuting attorney.

(Emphasis added). Section 19-3-49 alone gives the board the discretion in choosing any person they deem competent to fulfill the role of county prosecutor.

Mr. Wiggins' request asks this office to consider that Article 12, Section 250 of the Mississippi Constitution of 1890 would apply to the position in question. Article 12, Section 250 states:

All qualified electors and no others shall be eligible to office, except as otherwise provided in this Constitution; provided, however, that as to an office where no other qualification than that of being a qualified elector is provided by this Constitution, the Legislature may, by law, fix additional qualifications for such office.

Article 12, Section 250 requires that any person who holds "office" be a qualified elector. The ultimate question in determining if the appointed county prosecutor is required to be a qualified elector rests on whether or not he holds "office" as contemplated by Article 12, Section 250. The Supreme Court of Mississippi previously held:

[t]he term office has no legal or technical meaning attached to it, distinct from its ordinary acceptations. An office is a public charge or employment; but, as every employment is not an office, it is sometimes difficult to distinguish between employments which are, and those which are not offices. It is generally, if not universally true that a duty or employment arising out of a contract, and dependent for its duration and extent upon the terms of such contract is never considered an office.

***Golding v. Armstrong***, 231 Miss. 889, 896, 97 So. 2d 379, 382 (1957).

Section 19-3-49 importantly states that the only way the contract can end prior to the period of the remainder of the term of office of the board of supervisors is when it "shall be abrogated" by establishing the office of elected county prosecutor. The fact that a contract of an appointed county prosecutor is abrogated upon the creation of the office of the elected county prosecutor necessarily implies that the appointed county prosecutor does not hold "office." Therefore, the appointed county prosecutor would not be subject to the requirements of Article 12, Section 250. Mr. Wiggins' request states that the outgoing board is considering appointing an attorney who is not a resident of Kemper County. The board may, in its discretion, choose any competent attorney to act as county prosecutor, but should be aware that Section 19-3-49 requires the contract of employment "be for the period of the remainder of the term of office of the board of supervisors which employs the county prosecuting attorney."



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Mr. Wiggins also asserts that Sections 19-23-1 *et seq.* of the Mississippi Code Annotated support his position that the appointed county prosecutor must be a qualified elector. Sections 19-23-1 *et seq.* provide for the office of elected county prosecutor and do not apply to appointed county prosecutors. Mr. Wiggins further asks us to uphold our opinion in Kilpatrick. Our opinion to Kilpatrick dealt with a county where the county prosecutor was elected not appointed.<sup>1</sup> Therefore, we believe that our opinion in Kilpatrick is still correct, but does not apply to the facts that were presented in both your and Mr. Wiggins' requests.

Section 19-3-49 prescribes the requirements for the appointed county prosecutor, and does not require that the attorney live within the county. The appointed county prosecutor does not hold "office" and is not subject to Article 12, Section 250. Therefore, the board of supervisors may contract with an attorney it deems competent to perform the duties of county prosecutor.

Your second question is moot. In response to your third question, please see our response to your first question above.

Our prior opinion to the Honorable Jones H. Hoskins, dated July 27, 1981, is amended in conformity with this opinion.

If we can be of further assistance, do not hesitate to call us.

Very truly yours,

JIM HOOD, ATTORNEY GENERAL

By: 

Emiko Hemleben  
Special Assistant Attorney General

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<sup>1</sup> We previously opined in regard to an elected county prosecutor:

. . . [T]hat the appropriate method to fill a temporary vacancy in the office of county prosecuting attorney is to declare the vacancy, name a person to fill that vacancy on an interim basis and call a special election for the remainder of the term . . . .

Section 19-23-9 requires a county prosecuting attorney to possess all the qualifications of other county officers in addition to being a regular licensed and practicing lawyer. That necessarily means that the person named to fill the vacancy must be a qualified elector of the county. Therefore, one who establishes residency in another county would not be eligible to hold the office in question even on an interim basis.