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Attorney General Opinions

Bill Allain

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ATTORNEY GENERAL'S OPINIONS

The Authority To Issue An Attorney General's Opinion

The Attorney General of Mississippi is empowered by the law of this state to issue written answers to questions posed by authorized persons. Section 7-5-25, Miss. Code Ann. (1972) sets forth a list of those authorized to request such opinions. In general, the list includes the governor, the legislature, the chancery and circuit court clerks, the secretary of state, the various state departments, state officers and commissioners operating under the laws of this state, the heads and trustees of state institutions, district attorneys, the various county and city officials and their attorneys.

The Attorney General's Opinions function as a protective measure, so that there can be no civil or criminal liability against any person or governmental entity who has properly requested the opinion, setting forth all governing facts on the basis of which the Attorney General's Office has prepared and delivered a legal opinion, and which the requesting party has followed in good faith. This general proposition holds true, unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without substantial support. No opinion shall be given or considered if said opinion is given after suit is filed or prosecution begun.

*Issuance Of An Attorney General's Opinion**

Attorneys in the Attorney General's Office are assigned to specific areas of law in which they specialize. After an opinion request is received by the Office of the Attorney General, it is assigned to the attorney whose area of law it might concern. He then researches the problem and prepares a draft of the opinion or answer. This draft is then submitted to the Opinion Committee which is composed of nine attorneys in the office, including the Attorney General. The Opinion Committee meets twice weekly, on Tuesday and Thursday. At the meeting of the Committee, the draft is discussed and reviewed. The Committee either suggests changes, requests more information, or approves the draft if it is agreed that the analysis of the law is correct.

Should changes be suggested or more information requested, the Committee sends the draft back to the attorney for revision. Upon correction or addition, the draft is returned to the Committee where it is again processed. If there are no further changes, additions, or corrections suggested, the draft will be given final approval and issued as an official Attorney General's Opinion.

*Prepared by Attorney General's Office

OPINION NO. SO 80-01

SUBJECT: TUITION FOR EXCEPTIONAL CHILDREN. A handicapped child whose parents reside in Mississippi, but who attends an out-of-state public school, is not eligible for financial assistance under Miss. Code Ann. §§ 37-23-61 to 75 (1972). One of the requirements of eligibility for financial assistance is "attendance in a private or parochial school."

DATE RENDERED: October 20, 1980

REQUESTED BY: Dr. Bob McCord

OPINION BY: Bill Allain, Attorney General, by Susan L. Runnels, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Allain has received your letter of request dated September 25, 1980, and has assigned it to me for research and reply. Your inquiry states as follows:

> The attached information from the files of our Special Education Office will give you the background relative to a request for the State to pay out-of-state tuition for a handicapped child. Please give us your written opinion to the following question. If a handicapped child and his parents reside in Mississippi, the child is enrolled in an out-of-state public school and he/she is required to pay out-of-state tuition, may the out-of-state public school be considered to be a private or parochial school as defined in Section 37-23-61 through 37-23-75 of the Mississippi Code?

Mississippi Code Annotated § 37-23-63 (Supp. 1980) provides as follows:

> Every child who is a resident citizen of the State of Mississippi under twenty-one (21) years of age, who cannot pursue all regular classwork due to reasons of defective hearing, vision, speech, mental retardation, or other mental or physical conditions as determined by competent medical authorities and psychologists, who has not finished or graduated from high school, and who is in attendance in a private or parochial school, shall be eligible and entitled to receive state financial assistance in the amount set forth in section 37-23-69.

This section establishes one of the requirements of eligibility for state financial assistance to be "attendance in a private or parochial school."

Further, § 37-23-69 (Supp. 1980) addresses the determination and payment of financial assistance under two sets of circumstances. Under subsection (a) of this statute the applicant chooses to attend an accredited private or parochial school having an appropriate program for the applicant and meeting federal and state regulations, and under subsection (b) the public school district of his residence cannot satisfy the applicant's needs and thereby places him or her in an accredited

private or parochial school having an appropriate program for the applicant and meeting federal and state regulations. As you will note, both allowances under this section are based upon attendance at an accredited private or parochial school.

Lastly, § 37-23-75 (1972) provides for a violation of the law and penalty whenever a person obtains, seeks to obtain, expends, or seeks to expend "any financial assistance funds for any purpose other than in payment or reimbursement for the tuition cost for the attendance of his child or ward at a private or parochial school."

Therefore, it is the opinion of this office an applicant attending an out-of-state public school is not eligible for financial assistance under §§ 37-23-61 through 75. If this office can be of benefit in the future, please do not hesitate to contact us.

Sincerely,
BILL ALLAIN, ATTORNEY GENERAL

BY: Susan L. Runnels

Susan L. Runnels
Special Assistant Attorney General

SLR: hs

OPINION NO. SO 80-02

SUBJECT: RENEWAL FEES FOR NONRESIDENT ARCHITECTS. A higher license fee requirement for nonresidents is violative of the Privileges and Immunities Clause of the United States Constitution. Fundamental activities such as pursuit of common callings are protected under the Constitution. The ability to practice architecture in Mississippi is the pursuit of a common calling of resident and nonresident architects.

DATE RENDERED: August 28, 1980

REQUESTED BY: Mr. W.W. Easley, II

OPINION BY: Bill Allain, Attorney General, by Larry J. Stroud, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your letter of August 1, 1980, and has assigned it to me for reply. In your letter you state:

> The ever increasing cost of operating the State Board of Architecture and the keeping of the files therein is rapidly becoming a burden on our financial balance.

> Many states require a higher renewal fee for out-of-state residents; and if this is permissible, we would like to move in that direction.
>
> To require a minimum of fifty percent higher fee for nonresidents would bring us to a point of continued solvency.
>
> May we please have the benefit of your knowledge concerning the legality of such a move under our present law?

The Supreme Court of the United States in *Toomer V. Witsell*, 334, U.S. 385, 92 L.Ed. 1460, 68 S.Ct. 1156 (1948) struck down a South Carolina law that required nonresident fishermen, to pay a higher license fee than resident fishermen, holding that the law violated the Privileges and Immunities Clause of the United States Constitution.

In *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978), the controversy was about a statute requiring nonresidents to pay a higher fee for hunting elk than residents. The court, in upholding the statute, said that elk hunting "is not a means to the nonresident's livelihood." The court clearly indicated that fundamental activities (pursuit of common callings, being one such fundamental activity) are protected under the Privileges and Immunities Clause. Mr. Justice Blackmun, writing for the majority, emphasized this when he used the following passage:

> With respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions.

There could be little doubt that the ability to practice architecture in Mississippi is the pursuit of a common calling of resident and nonresident architects. As such, for the reasons cited above, it is our opinion that a regulation requiring nonresident architects to pay higher renewal fees than resident architects is not valid.

Trusting that the above will prove of value to you, I am

Very truly yours,

BILL ALLAIN, ATTORNEY GENERAL

BY: Larry J. Stroud

Larry J. Stroud
Special Assistant Attorney General

LJS:cm

OPINION NO. SO 80-03

SUBJECT: NAME CHANGES BY PRISONERS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS. Any

citizen may change his name either by adoption of another name without any legal proceedings, or by a chancery court decree. Only the latter procedure is binding on others. While there is no absolute prohibition against name changes by persons in the custody of the Mississippi Department of Corrections, courts may decline to grant name change petitions if convinced the request is made for fraudulent or improper purposes.

DATE RENDERED: October 31, 1980

REQUESTED BY: Mr. Leonard C. Vincent

OPINION BY: Bill Allain, Attorney General, by W. V. Westbrook, III, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your letter of request dated October 27, 1980, and has referred it to the undersigned for research and reply. In your letter, you posed the following question:

> There have been several persons incarcerated in the Mississippi Department of Corrections that have filed petitions for name changes in Chancery Court.
>
> It is my understanding that there is some case law that would prevent incarcerated persons from changing the name that they were sentenced under.
>
> It would be most helpful if your office would issue the Mississippi Department of Corrections at [sic] Attorney General's Opinion concerning name changes of persons incarcerated in the Mississippi Department of Corrections.

In our state, any citizen may change his name in two ways. First, he may change his name at will, without any legal proceedings, by merely adopting another name, but it would not be binding on anyone else. *Coplin v. Woodmen of the World*, 62 So. 7, 9 (S.C. Miss. 1913). Second, he may apply for a chancery court decree changing his name pursuant to Miss. Code Ann. § 93-17-1 (1972):

> The chancery court or the chancellor in vacation of the county of the residence of the petitioners shall have jurisdiction upon the petition of any person to alter the names of such person to make legitimate any offspring of the petitioner not born in wedlock, and to decree said offspring to be an heir of the petitioner.

A careful survey of applicable Mississippi case law and other statutes disclosed no absolute prohibition against name changes by persons in the custody of the Mississippi Department of Corrections. However, as a general rule, our courts may decline to grant individual name change petitions if convinced the request is made for fraudulent or other improper purposes. *See:* Annot: Denial of Petition to Change

Adult's Name, 79 A.L.R. 3d 559 (1977); 56 Am. Jur. 2d Names §12 (1971); 65 C.J.S. Names §11 (1966).

I trust that this is responsive to your inquiry. Please call on our office again if we can be of further assistance.

Respectfully,
BILL ALLAIN, ATTORNEY GENERAL

BY: W.V. Westbrook

W.V. Westbrook, III
Special Assistant Attorney General

WVW,III:jc

OPINION NO. SO 80-04

SUBJECT: PAYMENT OF COUNTY EMPLOYEES' SALARIES WHILE ON MILITARY LEAVE. Pursuant to Miss. Code Ann. § 33-1-21 (1972), employees of the state, any county, municipality, or other political subdivision, are entitled to receive pay when officially ordered to military training for a period not exceeding fifteen days.

DATE RENDERED: August 28, 1980

REQUESTED: Mr. S. H. Roberson

OPINION BY: Bill Allain, Attorney General, by Richard M. Allen, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your opinion request dated August 26, 1980 and has assigned it to me for research and reply, your letter of request stating:

> Two of Coahoma County Road Department employees belong to the Reserves of the United States Army and were ordered to participate in training at an encampment for a two-weeks period. One notified the head of the Department that he was leaving. The other gave no notice whatsoever.
>
> The Board of Supervisors has inquired whether the Board should pay the salaries of these persons while they are on the encampment.

Miss. Code Ann. Section 33-1-21 (1972) provides as follows:

> (a) All officers and employees of any department, agency, or institution of the State of Mississippi, or of any county, municipality, or other political subdivision, who shall be members of any of the reserve components of the armed forces of the United States, or former members of the service of the United States discharged or released therefrom under conditions other than dishonorable,

> shall be entitled to leave of absence from their respective duties, without loss of pay, time, annual leave, or efficiency rating, on all days during which they shall be ordered to duty to participate in training at encampments, field exercises, maneuvers, outdoor target practice, or for other exercises, for periods not to exceed fifteen (15) days . . . .

It appears to me from the above section that, during this two weeks' period, the County is obligated to pay such employees.

I was unable, after some research, to find any applicable statute regarding members of the National Guard, and I am certain that we have some employees who are members of the National Guard.

Would they be entitled to pay when they are going to their summer camp?

I attach a copy of this office's opinion to Colonel John H. Stennis, dated July 14, 1977, and in direct response to your inquiry, I quote, in part, from page four thereof:

> (2) Under the statute, when a state employee, a member of the Mississippi Air National Guard, or Mississippi Army National Guard, is officially ordered to military training for a period of time in excess of fifteen (15) days, the employee shall be entitled to a leave of absence from the employee's respective duties without loss of time, annual leave, or efficiency rating until relieved from duty.

It necessarily follows that they are entitled to pay for this period.

Yours very truly,
BILL ALLAIN, ATTORNEY GENERAL

BY: Richard M. Allen

Richard M. Allen
Special Assistant Attorney General

RMA/ped
Enclosure

OPINION NO. CV 80-14

SUBJECT: STATUTE OF LIMITATIONS FOR MINORS. A minor who enters into a contract may rescind the contract at any time. Subsequent to the minor attaining the age of eighteen, he must have ratified the contract in writing, to be amenable to suit.

DATE RENDERED: October 23, 1980

REQUESTED BY: Hon. Gerald D. Blanton

OPINION BY: Bill Allain, Attorney General, by Ryan Hood, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your letter of October 10, 1980, and has assigned it to the undersigned for research and reply. In your letter you state:

> Where a minor enters into a conditional sales contract for an automobile, and then reaches adulthood, how long can he wait before rescinding the contract as a minor?

Your attention is invited to Section 93-19-13 of the Mississippi Code, 1972, as amended, which reads:

> All persons eighteen (18) years of age or older, if not otherwise disqualified, or prohibited by law, shall have the capacity to enter into binding contractual relationships affecting personal property. Nothing in this section shall be construed to affect any contracts entered into prior to July 1, 1976.
>
> In any legal action founded on a contract entered into by a person eighteen (18) years of age or older, the said person may sue in his own name as an adult and be sued in his own name as an adult and be served with process as an adult.

In the event a minor entered a contract when he was under the age of eighteen (18), he may rescind the contract at any time. Upon the minor reaching the age of eighteen (18), and still desiring to be bound by the contract, the minor must ratify the contract in writing as set out under Section 19-3-11 of the Mississippi Code, 1972, which reads:

> An action shall not be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the person to be charged therewith.

Very truly yours,
BILL ALLAIN, ATTORNEY GENERAL

BY: Ryan Hood

Ryan Hood
Special Assistant Attorney General

RH:cm

OPINION NO. CV 80-15

SUBJECT: STATUTE OF LIMITATIONS ON CLAIMS ASSERTED AGAINST A COUNTY HOSPITAL. Miss. Code Ann. § 15-1-51 (1972) states the statute of limitations begins to run in favor of the state or any subdivision or municipal corporation thereof, at the time

when the claimant first had the right to demand payment. The community hospital is an arm of the city or county, and is included in this section.

DATE RENDERED: November 3, 1980

REQUESTED BY: Mr. Jack E. Harper, Jr.

OPINION BY: Bill Allain, Attorney General, by Richard M. Allen, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your opinion request dated October 23, 1980 and has assigned it to me for research and reply, your letter of request stating:

> I have received inquiry about whether or not Section 15-1-51 is applicable to claims against a county created or county operated hospital. Particularly, I request your opinion on the following question:
>
> > Does Section 15-1-51 of the Code of 1972 Annotated, as amended, preclude the running of the statute of limitation on claims asserted against a hospital created and operated by a county in the State of Mississippi.

Section 15-1-51, Mississippi Code of 1972, states in part:

> Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporations therein. The statutes of limitation shall begin to run in favor of the state, the counties and municipal corporations at the time when the plaintiff first had the right to demand payment of the officer or board authorized to allow or disallow the claim sued upon.

A community hospital being the creature and an arm of the city or county, it is the opinion of this office that the cited Code section also includes the hospital created and operated by a county or city in the State of Mississippi.

Yours very truly,
BILL ALLAIN, ATTORNEY GENERAL

BY: Richard M. Allen

Richard M. Allen
Special Assistant Attorney General

RMA/ped

OPINION NO. CV 80-13

SUBJECT: GOOD SAMARITAN STATUTE, MISS. CODE ANN. § 73-25-37 (1972). Any individual who in good faith and exercising reasonable care renders emergency care to an injured person at the scene or in transporting the injured person, shall not be subject to civil liability.

DATE RENDERED: September 2, 1980

REQUESTED BY: Hon. Wade O. Smith

OPINION BY: Bill Allain, Attorney General, by Ryan Hood, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your letter of August 29, 1980, and has assigned it to the undersigned for research and reply. In your letter you state:

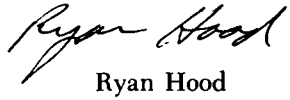
> I am writing you concerning what I or any other citizen may do in assisting or rescuing persons injured in accidents such as car wrecks, fires or other events, before I or others would be liable to be sued by the victims. What can be done, and cannot be done under our good samaritan act? I am asked these questions by many citizens, namely the McNeil Volunteer Fire Department has had a certain amount of training in first aid and the moving of injured people. They are interested in what acts they could perform under our Mississippi laws.

This office would respectfully invite your attention to Section 73-25-37 of the Mississippi Code, 1972, as amended, which reads:

> *No* duly licensed, practicing physician, dentist, registered nurse, licensed practical nurse, *certified registered emergency medical technician*, or any other person who, in good faith and in the exercise of reasonable care, renders emergency care to any injured person at the scene of an emergency, or in *transporting said injured person* to a point where medical assistance can be reasonably expected, shall be liable for any civil damages to said injured person as a result of any acts committed in good faith and in the exercise of reasonable care or omissions in good faith and in the exercise of reasonable care by such persons in rendering the emergency care to said injured person. (Emphasis Added)

Predicated upon the above statute, an individual who undertakes to aid another shall not be subject to civil liability as long as the individual acted in good faith and used reasonable care. It would be impossible by way of legal opinion to state what would constitute good faith and reasonable care generally and in all cases is a question of fact to be determined in each particular instance.

Very truly yours,
BILL ALLAIN, ATTORNEY GENERAL

BY: 
Ryan Hood
Special Assistant Attorney General

RH:cm

OPINION NO. CR 80-01

SUBJECT: FIREMEN'S AUTHORITY TO CONDUCT SEARCH. A fireman acting in his official capacity only has authority to investigate and seize evidence of arson, and not to otherwise seize objects in plain view or conduct a search of the structure while extinguishing the blaze. A fireman who conducts an unlawful search or seizure may be subject to civil and criminal liability.

DATE RENDERED: September 19, 1980

REQUESTED BY: Mr. Wayne G. Lee

OPINION BY: Bill Allain, Attorney General, by Ryan Hood, Special Assistant Attorney General

°Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your letter of September 16, 1980, and has assigned it to the undersigned for research and reply. In your letter you state:

> With the incidence of arson increasing at an alarming rate, we in the fire investigative service require more knowledge as to our rights while investigating such fires.
>
> Would you please give us an opinion concerning this problem:
>
> If a fire occurs in a home or other structure, do we have the right to pick up certain things in that building or home of a personal nature such as telephone bills, past due notices from banks, overdrafts from banks, real estate transactions, insurance information, finance information, betting information (in case a gambler), etc? Must these documents be in plain view or can we look for them in filing cabinets, dresser drawers, closets, etc.?
>
> We are aware of the Supreme Court decision in *Michigan vs. Tyler,* but must we have a search warrant while the house is still on fire and the fire department is still present? Mainly, do we have a right at all to take these items? Also, can these documents be subpoenaed by an insurance company or used in a criminal case?

In response to your first set of questions, a fireman acting in his official capacity does not possess the necessary authority to seize ob-

jects in plain view or conduct a search of the structure while in the process of extinguishing the blaze. The general rule, as stated above, has one exception, that being a fireman may investigate and seize evidence of arson.

A fireman who conducts an unlawful search and seizure of the property of another may incur civil and criminal liability.

In reply to your second set of questions, your attention is invited to *Michigan v. Tyler,* 436 U.S. 499 (1978). The court held that fire officials may seize *evidence of arson* while in the process of extinguishing the blaze.

In response to your third inquiry, only a court of competent jurisdiction could address the issue of what evidence is subject to subpoena.

Sincerely yours,
BILL ALLAIN, ATTORNEY GENERAL

BY: 

Ryan Hood
Special Assistant Attorney General

RH:cm

OPINION NO. CR 80-02

SUBJECT: COMPOUNDING A FELONY. A Police officer who abstains from prosecuting a felon, in return for the future activities of the perpetrator as an informer, has not violated Miss. Code Ann. § 97-9-9 (1972), as long as the policeman does not receive any personal consideration for not arresting the felon.

DATE RENDERED: October 29, 1980

REQUESTED BY: Hon. Forrest Allgood

OPINION BY: Bill Allain, Attorney General, by Ryan Hood, Special Assistant Attorney General

*Full text of Attorney General's Opinion is reprinted as follows:

Attorney General Bill Allain has received your letter of October 14, 1980, and has assigned it to the undersigned for research and reply. In your letter you state:

> Recently in one of the counties of our district a police officer abstained from prosecuting a felony committed in his presence (possession of marijuana) in return for the defendant's future activities as an informant. There has been some discussion by members of the community about this. Primarily I am concerned with the possibility of the officer having violated Section 97-9-9; all be it unwittingly.

There are no Mississippi cases on compounding a felony that I, in my brief research, have been able to find. However, I am of the opinion that the statute requires that a man, "take any money or property of another, or any gratuity or reward," or any agreement for such in return for concealing the crime or abstaining from prosecution. If the police officer involved did not realize any personal gain in the form of "money or property of another, or any gratuity or reward," I feel the statute does not apply. The only words that concern me are the words, "gratuity or reward."

What does the Attorney General's office think of this? I would like an opinion on whether or not Section 97-9-9 applies to this situation.

It is the opinion of this office that as long as the policeman does not receive any personal consideration for not arresting a felon, the policeman has not violated Section 97-9-9 of the Mississippi Code of 1972. This opinion is limited to this Code section only and is not to be construed as applying to any other provision or law.

Trusting that the above is of some value to you, I am

Very truly yours,
BILL ALLAIN, ATTORNEY GENERAL

BY: Ryan Hood

Ryan Hood
Special Assistant Attorney General

RH:cm