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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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February 1, 2005

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Honorable Robert L. Childree
State Comptroller
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**THIS OPINION HAS BEEN
OVERRULED BY *WRIGHT V.
CHILDREE*, ---SO.2D---, 2006
WL 3759345 (S. CT. DEC. 22,
2006)**

Indigent Defense Fund – Indigents –
Overhead Expenses – State Comptroller –
Attorney Fees

Act 99-427 amended section 15-12-21(d)
of the Code of Alabama to eliminate
overhead as an expense for which an
appointed attorney can be reimbursed. An
attorney can only be reimbursed for out-of-
pocket expenses that are approved by the
trial court in advance of being incurred.

Dear Mr. Childree:

This opinion of the Attorney General is issued in response to your
request.

QUESTION

May an attorney representing an indigent defen-
dant claim both office overhead at a rate approved in
advance by the trial court and expenses under the “Uni-
form Guidelines for Attorney Fee Declarations?”

FACTS AND ANALYSIS

Your request includes the following facts:

Prior to the advent of *May v. State*, 672 So. 2d
1307 (Ala. Crim. App. 1993), which, by order of the
Alabama Court of Criminal Appeals, instituted the
payment of office overhead to attorneys representing

indigent defendants in criminal proceedings, the Indigent Defense Commission of the Alabama Bar in conjunction with the Administrative Office of Courts and the Office of the Comptroller issued a set of "Uniform Guidelines for Attorney Fee Declarations." The guidelines outlined administrative processes for attorneys to use in filing fee declarations for services they performed in representing indigent defendants and specifically provided for certain expenses incurred by the attorney, including things such as travel, office expenses (copies, postage), etc. From the adoption of the guidelines until *May*, which provides for office overhead, the Comptroller honored the specifics of the guidelines and reimbursed attorneys based on the specifics contained therein. After *May*, the amount paid for office overhead has been deemed to cover all office expenses due to the attorney. However, some attorneys have contended that they should be entitled to both *May* overhead and office expenses in accordance with the guidelines.

Section 15-12-21 of the Code of Alabama provides for the compensation of attorneys and the payment of expenses incurred in the defense of indigent defendants. ALA. CODE § 15-12-21 (Supp. 2003). The first part of section 15-12-21(d) sets the hourly rate for in-court and out-of-court time and the maximum fee depending on the severity of the crime or type of case. *Id.* The latter part of that section states, in pertinent part, as follows:

Counsel shall also be entitled to be reimbursed for *any expenses reasonably incurred in the defense of his or her client*, to be approved in advance by the trial court. Preapproved expert fees shall be billed at the time the court is notified that all work by the expert has been completed, and shall be paid forthwith.

ALA. CODE § 15-12-21(d) (Supp. 2003) (emphasis added).

As indicated in your request, overhead reimbursement by appointed attorneys is governed by *May* and its progeny. The decision of the Alabama Court of Criminal Appeals that office overhead expenses were reimbursable was based on the predecessor language to the language emphasized above: "any expenses reasonably incurred in *such defense*." 672 So. 2d at 1308 (emphasis added), *cert. denied as improvidently granted*, 672 So. 2d 1310 (Ala. 1995). It is notable that

Judge Montiel dissented in *May*, writing: "While I am sympathetic to the plight of attorneys who routinely represent indigent defendants for what amounts to inadequate compensation, I believe the majority improperly attempts to correct a real problem with indigent representation." 672 So. 2d at 1309.

In *Ex Parte Barksdale*, 680 So. 2d 1029 (Ala. Crim. App. 1996), the Alabama Court of Criminal Appeals held, relying in part on the opinion of the Attorney General to the Honorable Robert L. Childree, State Comptroller, dated April 19, 1996, A.G. No. 96-00192, that, as with all other expenses, overhead must be approved by the trial court in advance of being incurred. 680 So. 2d at 1030. Act 99-427 amended the statute to provide, among other changes, for the change in the expense language. The Supreme Court of Alabama approved *Barksdale* in *Lyons v. Norris*, 829 So. 2d 748 (Ala. 2002) (on application for rehearing). In doing so, however, the Court discussed whether overhead was still authorized at all in light of the act, focusing primarily on the change in the expense language, stating as follows:

In June 1999, the Alabama Legislature passed the "Investment in Justice Act of 1999." Act No. 99-427, 1999 Ala. Acts. In pertinent part, Act No. 99-427 substantively amended § 15-12-21 to increase attorney fees for appointed work at the trial level. Under the Act, the rate of compensation for attorneys representing indigent criminal defendants was increased to \$40 per hour for out-of-court time and \$60 per hour for in-court time. The fee limits, which have been increased substantially, are now based on the severity of the crime, and there is no limit on the total fee that can be paid to an attorney representing a defendant charged with a capital offense or with an offense that carries a possible sentence of life imprisonment without parole. Section 15-12-21, as amended, also specifies that "the court for good cause shown may approve an attorney's fee in excess of the maximum amount allowed." Section 15-12-21 now provides that to be reimbursable, any expenses incurred must be incurred, specifically, "in the defense of his or her client." Here, the attorneys seek reimbursement for office-overhead expenses, including but not limited to: professional license fees; malpractice, casualty, health, general-liability, and workers' compensation insurance; office salaries; ad valorem taxes; office supplies; postage and express-delivery charges; depreciation for office equipment and

furniture; local and long-distance telephone charges; “CLE expenses, including travel and lodging for out-of-town seminars (incurred one or more times per year)”; utilities; various bank fees and interest on business loans; and other professional fees. Although whether these fees are actually incurred “in the defense of [an attorney’s] client” is highly questionable, that issue is not presently before this Court. Neither does this Court have before it the question of the applicability of Act No. 99-427 to office-overhead expenses. However, *the change in language in Act No. 99-427 from “any expenses reasonably incurred in such defense” to “any expenses reasonably incurred in the defense of his or her client,” prohibits reimbursement of office-overhead expenses based on calculations of the pro rata cost of an attorney’s criminal practice compared to his overall practice. At the same time, it precludes advance calculations of office-overhead expenses for a specific criminal defendant. The increase in fees, together with the ability of the courts to approve fees in excess of the mandated maximum “for good cause shown,” further indicates the Legislature’s intent to eliminate reimbursement for “office-overhead expenses” under Act No. 99-427.*

Lyons, 829 So. 2d at 751 n. 1 (emphasis added).

The Alabama Court of Civil Appeals has characterized *Lyons* as a plurality opinion. *State Dep’t of Human Resources v. Estate of Harris*, 857 So. 2d 818, 822 (Ala. Civ. App. 2002). Three justices agreed with the above language. Justices Brown and Stuart concurred in the opinion, which was authored by Chief Justice Moore. Four justices disagreed with the language. Justice Harwood concurred specially, writing that the overhead discussion was not necessary and not properly before the Court. He was joined by Justices Houston, Lyons, and Woodall. Although Justice Johnstone concurred in part and dissented in part, and Justice See joined in his concurrence, because Justice Johnstone dissented that expenses do not have to be approved in advance, and he concurred in overruling the application for rehearing because the applicant was not properly before the Court, both justices indicated that they otherwise agreed with the main opinion. *Lyons*, 829 So. 2d at 755-756.

Even though *Lyons* appears to be binding, the language at issue is dicta. It is, nevertheless, instructional. The Supreme Court repeatedly emphasized in

the opinion that, “[a]lthough whether these fees are actually incurred ‘in the defense of [an attorney’s] client’ is highly questionable, that issue is not presently before this Court. Neither does this Court have before it the question of the applicability of Act No. 99- 427 to office-overhead expenses” [*id.* at 751 n. 1], and “[t]he current dispute turns on the meaning attributed to the phrase ‘approved in advance by the trial court.’” *Id.* at 752. Nonetheless, this Office finds the reasoning in *Lyons* highly persuasive. Moving from the general, “*in such defense*,” to the more specific, “*in the defense of his or her client*,” coupled with the history of the statute and the increase in fees, indicates the Legislature’s intent to restrict section 15-12-21(d) expenses to out-of-pocket expenses.

This Office acknowledges the Legislature’s “resolution” in Act 2002-129 that the intent of Act 99-427 was “that overhead expenses shall be paid in addition to in-court and out-of-court fees” 2002 Ala. Acts No. 2002-129, 347. This resolution, however, is not controlling. As the Supreme Court of Alabama has explained:

“A resolution such as this one is not a law; it is merely the form in which the Legislature expresses an opinion. The Legislature has no power to make or change law by resolution. Art. IV § 61, Ala. Constitution (‘No law shall be passed except by bill. . . .’); *Gunter v. Beasley*, 414 So.2d 41 (Ala.1982). Whatever the Legislature may have intended by [the joint resolution] is irrelevant to our resolution of the issues presented on this appeal. The controlling law here is that expressed in the applicable . . . acts. See *Opinion of the Justices No. 275*, 396 So.2d 81 (Ala. 1981); *Opinion of the Justices No. 265*, 381 So.2d 183 (Ala.1980) (a statute cannot be amended by a joint resolution of the Legislature).”

Bama Budweiser of Montgomery v. Anheuser-Busch, Inc., 783 So. 2d 792, 798 (Ala. 2000), quoting *Laidlaw Transit, Inc. v. Ala. Educ. Ass’n*, 769 So. 2d 872, 883 (Ala. 2000).

Section V of the “Uniform Guidelines for Attorney Fee Declarations” lists the following as expenses requiring preapproval: Private investigators, expert witnesses, transcripts of trials or hearings not otherwise available, interpreters, and scientific tests. The section then lists the following as expenses not requiring preapproval: Copying, long distance telephone calls, and travel. Contrary to this categorization, the Supreme Court made clear in *Lyons* that

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“expenses . . . are specifically addressed by § 15-12-21(d). The plain language of § 15-12-21(d) indicates that an order approving an expense must be entered before counsel incurs the expense.” 829 So. 2d at 753.

CONCLUSION

Act 99-427 amended section 15-12-21(d) of the Code of Alabama to eliminate overhead as an expense for which an appointed attorney can be reimbursed. An attorney can only be reimbursed for out-of-pocket expenses that are approved by the trial court in advance of being incurred.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

TK/BFS/GWB

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