

**OPINION NO. 95-035****Syllabus:**

In the absence of contrary provision in the Summit County charter and absent approval by the court of common pleas of the appointment of other counsel in accordance with R.C. 305.14(A), it is the duty of the Summit County Prosecuting Attorney, rather than the county executive or the county council, to bring an action for the recovery of funds found by the Auditor of State to be owing to the county.

---

**To: Maureen O'Connor, Summit County Prosecuting Attorney, Akron, Ohio**  
**By: Betty D. Montgomery, Attorney General, November 30, 1995**

I have before me your opinion request in which you ask whether the county executive or the county council of Summit County, which has adopted a charter in accordance with Ohio Const. art. X, § 3, may undertake the duties imposed by statute upon the county prosecuting attorney. As a preliminary matter, I note that the interpretation of municipal or county charter provisions is not within the opinion rendering function of the Attorney General. In this instance, however, the Summit County Court of Appeals has addressed the scope of the prosecuting attorney's powers and duties under the Summit County charter in *County of Summit ex rel. Slaby v. Morgan*, C.A. No. 10270 (Ct. App. Summit County Nov. 25, 1981). Thus, the question you ask does not require an interpretation of the Summit County Charter, but only application of the principles established by the court in *Morgan*.

In order to answer your question, it is first necessary to discuss the impact upon county government by the adoption of a county charter. As a general rule, counties are creatures of statute with only those powers affirmatively granted by statute. *Geauga County Bd. of Comm'rs v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 621 N.E.2d 696 (1993). Ohio Const. art. X, § 3, however, which authorizes the people of a county to adopt a charter, states in pertinent part:

The people of any county may frame and adopt or amend a charter as provided in this article.... Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or

exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation.... Any charter or amendment which alters the form and offices of county government or which provides for the exercise by the county of power vested in municipalities by the constitution or laws of Ohio, or both, shall become effective if approved by a majority of the electors voting thereon.

Article X, § 3 of the Ohio Constitution thus allows the people of a county to adopt a charter that prescribes the form and officers of county government. In the adoption of such a charter, the people must provide for the exercise and performance of all powers imposed by law upon counties and county officers. 1994 Op. Att'y Gen. No. 94-095; 1985 Op. Att'y Gen. No. 85-039.

Your question specifically concerns the extent of authority imposed upon the county prosecuting attorney vis-a-vis that of the county council and the county executive under the Summit County charter. As noted above, this issue was addressed by the Summit County Court of Appeals in the case of *County of Summit ex rel. Slaby v. Morgan*. In that case, a dispute arose out of the adoption by council of a resolution establishing various departments and their personnel that were to be under the direction of the county executive. One such position was that of general counsel to the county executive. After the county executive hired a person as general counsel, the prosecuting attorney filed suit, questioning the authority of the council to create such a position and the authority of the county executive to hire an attorney to fill that position. In discussing the powers granted by the charter to the county prosecuting attorney, the court noted that article IV, § 4.01 of the Summit County charter provided simply that the prosecutor's "duties shall continue to be determined in the manner provided by general law," *id.*, slip op. at 8.

The court of appeals then found that because the Summit County charter authorized council to establish departments and divisions of county government under the supervision of the county executive, council's establishment of the category of "Executive Personal Staff," including the position of general counsel, was lawful and valid. As stated by the court, "[t]he enactment in question clearly does not create in that post a new department or division of law in the administration; it merely provides that general counsel may be appointed as a *personal aide* to the executive." *Id.*, slip op. at 9 (emphasis added). The *Morgan* court further found that the charter provision authorizing the county executive to appoint, suspend, discipline, and remove certain county personnel was sufficient authority for the county executive to appoint a person to the newly created general counsel position.

After noting that nothing in the record indicated "the enactment of any further legislation tending to delineate the duties, powers or qualifications delegated or required of the occupant of the office of general counsel," *id.*, slip op. at 5, the court proceeded to address the functions that might be performed by the general counsel for the county executive, in light of the powers

granted to the prosecuting attorney by R.C. 309.09.<sup>1</sup> The *Morgan* court resolved the potential conflict between the general counsel and the prosecuting attorney, as follows:

In and of itself the creation of the position [of general counsel] does not serve in any manner to impart power or duty upon its occupant to represent the executive in his official capacity. Confirmation of such a view results from the consideration of the words previously mentioned as being contained in Summit Charter, Article IV. *That article specifically implaces upon the Prosecuting Attorney of this County the obligations imposed upon him by the general law of this state, one of which is the representation of various county officials in their official capacity.*

....  
We are of the opinion that *the prosecuting attorney alone is the legal representative of both the county council and executive within the prescribed limits of the statutes of this state....*

....  
To dispel any implication to the contrary, we must add that although the prosecuting attorney is not the exclusive legal advisor to agencies of county government, general counsel by some implication arising by virtue of the creation of a staff position is not empowered by law or charter to represent any of these entities.

*Id.*, slip op. at 12-14 (emphasis added in italics). The action of the county council and the county executive in the creation of and appointment to the position of general counsel to the county executive notwithstanding, the court stated, "the prosecuting attorney shall be deemed

---

<sup>1</sup> At the time *County of Summit ex rel. Slaby v. Morgan*, C.A. No. 10270 (Ct. App. Summit County Nov. 25, 1981), was decided, R.C. 309.09 (1977-1978 Ohio Laws, Part. II, 2437 (Am. H.B. 316, eff. Oct. 25, 1978)) stated in pertinent part:

(A) The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards,...and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such county officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in [R.C. 305.14].

....  
(B) Whenever the board of county commissioners employs an attorney other than the prosecuting attorney of the county, without the authorization of the court of common pleas as provided in [R.C. 305.14(A)] either for a particular matter or on an annual basis, to represent the board of county commissioners in its official capacity and to advise it on legal matters, the board of county commissioners shall enter upon its journal an order of the board in which the compensation to be paid for such legal services shall be fixed. The compensation shall be paid from the county general fund. The total compensation paid, in any year, by the board of county commissioners for legal services under this division shall not exceed the total annual compensation of the prosecuting attorney for that county.

to be the sole legal representative of the county executive *except in those instances to the contrary specifically provided by statute.*" *Id.* at 14 (emphasis added). Accordingly, pursuant to the Summit County charter, the Summit County Prosecuting Attorney possesses those powers and duties imposed by statute upon prosecuting attorneys. The court found no local legislation that varied the role of the prosecuting attorney from that prescribed by statute.

It is my understanding that your concern arises out of a recent finding by the Auditor of State for the recovery of certain county funds. You question whether the prosecuting attorney, rather than another office of county government, is empowered to bring an action for the recovery of such funds. Because the powers and duties of the Summit County Prosecuting Attorney are those prescribed by statute, *County of Summit ex rel. Slaby v. Morgan*, it is necessary to examine the statutory provisions governing the prosecuting attorney's duty to prosecute actions on behalf of the county.

Pursuant to R.C. 309.09(A), the prosecuting attorney "shall be the legal adviser of the board of county commissioners...and all other county officers and boards.... He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in [R.C. 305.14]."<sup>2</sup> See generally *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981) (syllabus, paragraph one) ("[a]pplication by both the prosecuting attorney and the board of county commissioners is a prerequisite to authorization by a court of common pleas pursuant to R.C. 305.14 of appointment of other counsel to represent a county officer, except where the prosecuting attorney has a conflict of interest and refuses to make application"). R.C. 309.09(C), however, authorizes the board of county commissioners to employ an attorney other than the prosecuting attorney without obtaining court approval under R.C. 305.14 "either for a particular matter or on an annual basis, to represent the board of county commissioners in its official capacity and to advise it on legal matters." (Emphasis added.)

In the situation you describe, the county council proposes to hire legal counsel to prosecute an action for the recovery of funds found by the Auditor of State to be due the county. R.C. 309.12, however, expressly authorizes the county *prosecuting attorney* to bring a civil action in the name of the state for the recovery of county funds that the prosecuting attorney

---

<sup>2</sup> Pursuant to R.C. 305.14(A), the court of common pleas, upon application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the board or any county officer with official business or in the prosecution or defense of any action to which the board or officer is a party, in its official capacity. R.C. 305.14(B) authorizes the board of county commissioners, acting under R.C. 309.09, to employ legal counsel "to represent it in any matter of public business coming before such board, and in the prosecution or defense of any action or proceeding in which such board is a party or has an interest, in its official capacity." Where the proposed action is for the recovery of county funds, however, the action is brought on behalf of the county, not on behalf of the county executive or the county legislative body. See *State ex rel. Rulison v. Weaver*, 21 Ohio Dec. 108 (C.P. Hamilton County 1909), *aff'd sub nom. Weaver v. State ex rel. Rulison*, 83 Ohio St. 508 (1911); see generally *Jones v. Comm'rs of Lucas County*, 57 Ohio St. 189, 48 N.E. 882 (1897) (limitations on authority of county commissioners to act on behalf of county in financial transactions).

believes have been misapplied or illegally withdrawn from the county treasury. *See generally State ex rel. Maher v. Baker*, 88 Ohio St. 165, 180, 102 N.E. 732, 736 (1913) (interpreting G.C. 2921 (now R.C. 309.12) "so that the power of the prosecuting attorney in reference to public moneys, property, contracts, and the like, may be construed in the spirit in which the statute was enacted, to-wit, the full and complete protection of the people's property, the people's contracts, the people's moneys"). In the alternative, the county prosecuting attorney may bring an action for the recovery of public funds under the authority of R.C. 117.28.<sup>3</sup> *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918). Should the prosecuting attorney fail to bring an action for the recovery of funds under R.C. 117.28 within a certain period of time, R.C. 117.28 authorizes the Attorney General to commence action for the recovery of such funds.

Both R.C. 309.12 and R.C. 117.28 are provisions of general law that, pursuant to Summit County charter art. IV, define the duties of the Summit County Prosecuting Attorney. Accordingly, it is the Summit County Prosecuting Attorney who has authority to bring an action for the recovery of county funds. The only exceptions to the commencement of an action by the prosecuting attorney on behalf of the county for the recovery of public funds are where the court of common pleas approves the appointment of counsel, other than the prosecuting attorney, in accordance with R.C. 305.14(A) or where the county prosecuting attorney fails to bring an action under R.C. 117.28 within a certain period of time, in which case the Attorney General may bring an action under that section for the recovery of such funds. I conclude, therefore, that, in the absence of contrary provision in the Summit County charter and absent approval by the court of common pleas of the appointment of other counsel in accordance with R.C. 305.14(A), it is the duty of the Summit County Prosecuting Attorney, rather than the county executive or the county council, to bring an action for the recovery of funds found by the Auditor of State to be owing to the county. *Cf. City of Cuyahoga Falls v. Robart*, 58 Ohio St. 3d 1, 567 N.E.2d 987 (1991) (syllabus) ("[w]hen a city charter provides for representation of the city by its law director in all lawsuits, the city has no authority to provide for the hiring of outside counsel, in place of the law director, to act on behalf of the city in particular litigation, unless the law director is ill, absent, or otherwise disqualified from acting").

Based on the foregoing, it is my opinion, and you are hereby advised that, in the absence of contrary provision in the Summit County charter and absent approval by the court of common pleas of the appointment of other counsel in accordance with R.C. 305.14(A), it is the duty of the Summit County Prosecuting Attorney, rather than the county executive or the county council, to bring an action for the recovery of funds found by the Auditor of State to be owing to the county.

---

<sup>3</sup> R.C. 117.28 concerns the institution of an action to recover any public money that has been illegally expended, unaccounted for, or uncollected, as determined by an audit report. *See generally State ex rel. Holcomb v. Walton*, 66 Ohio App. 3d 751, 756, 586 N.E.2d 176, 179 (Butler County 1990) ("R.C. 117.28 does not prevent the prosecuting attorney from bringing an action to recover illegally expended funds beyond the one-hundred-twenty-day period specified therein. The appropriate limitation period is the six years specified by R.C. 2305.07") (citation omitted)); *Portage Lakes Joint Vocational School Dist. Bd. v. Bowman*, 14 Ohio App. 3d 132, 133, 470 N.E.2d 233, 234 (Summit County 1984) ("[t]he law is established that an action brought pursuant to R.C. 117.10 [a predecessor to R.C. 117.28] may be brought within six years from the date of the filing of the report with the prosecuting attorney").