

January 21, 1998

OPINION NO. 98-005

The Honorable Kevin J. Baxter  
Erie County Prosecuting Attorney  
247 Columbus Avenue, Suite 319  
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

We have received your request for an opinion concerning the operation of the telephone system of the Erie County Juvenile Court and the employment of outside legal counsel by the court. You have asked the following questions:

1. Can the Juvenile Judge require the county commissioners to provide to him a phone service option not provided to other county offices?
2. Can the Juvenile Judge employ private legal counsel to help in the preparation of his budget without the approval of the county commissioners as specified in R.C. 305.14?

Your letter notes that the current county telephone system has the capacity to provide the phone service option in question and the court budget has funds that can be appropriated to pay for the service.

In telephone conversations with my staff, you described the circumstances of the juvenile judge's request for outside legal counsel. The juvenile judge indicated that he needed counsel to assist him in the preparation of his budget and to advise him on the best manner for presenting his funding requests. The judge indicated that he anticipated that the county commissioners would reject the requested funding and that the matter would need to be decided by the courts. The situation involves questions of the most appropriate procedure to use for presenting the request as well as questions of the propriety of including particular items and amounts in the request, with a view toward having the request survive imminent litigation. Because you represent the board of county commissioners, you perceived a conflict between advising the juvenile judge on this matter and providing necessary representation to the board of county commissioners. Therefore, you acquiesced in the judge's request that you ask the court of common pleas to appoint outside legal

counsel pursuant to R.C. 305.14. The juvenile judge asked the county commissioners to concur in your request for outside counsel, but the board of county commissioners has not consented to join in that request. Thus, the issue raised by your second question is whether the juvenile judge is empowered to employ private legal counsel to help in the preparation of his budget when litigation concerning that budget is anticipated and the county prosecuting attorney would face a conflict of interest in attempting to represent both the juvenile judge and the board of county commissioners on that matter.

Let us consider first the question of phone service options. In order to address that question we need to look at the statutes under which juvenile court facilities are provided and paid for. R.C. 307.01(A) requires the board of county commissioners to provide a courthouse and offices for county officers when, in its judgment, they are needed. The board of county commissioners must also provide "equipment, stationery, and postage, as it considers reasonably necessary for the proper and convenient conduct of county offices, and such facilities as will result in expeditious and economical administration of such offices." R.C. 307.01(A). Pursuant to this provision, the board of county commissioners is responsible for providing telephone equipment for the court of common pleas, including the juvenile court, *see* R.C. 2151.07, and for other county offices. *See* 1983 Op. Att'y Gen. No. 83-053. *See generally* 1996 Op. Att'y Gen. No. 96-016.

Funding for the administrative expenses of the juvenile court is secured pursuant to R.C. 2151.10, which provides for the juvenile judge to request an appropriation to cover estimated administrative expenses that the judge "considers reasonably necessary for the operation of the court." R.C. 2151.10.<sup>1</sup> Expenses of providing telephone service may be included within these administrative expenses. *See, e.g.*, 1983 Op. Att'y Gen. No. 83-053.

In the situation you have presented, it is not clear whether the phone service option would be

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<sup>1</sup> R.C. 2151.10 was declared unconstitutional as "an impermissible legislative encroachment upon the judiciary" on the grounds that, by granting the county commissioners discretion to determine the amount to appropriate to the juvenile court, subject to review in mandamus proceedings, it grants the county commissioners financial power over judicial administration that "unconstitutionally restricts and impedes the judiciary." *State ex rel. Johnston v. Taulbee*, 66 Ohio St. 2d 417, 419, 421, 423 N.E.2d 80, 81, 83 (1981). As discussed more fully in this opinion, the Ohio Supreme Court has recognized the inherent power of the courts to exercise their functions without being inhibited by the General Assembly. *Id.* at 420-21, 423 N.E.2d at 82. To preserve the independence of the judiciary, the Ohio Supreme Court has applied to the method for funding prescribed by R.C. 2151.10, the presumption that a court's request for funding is reasonable and necessary for the proper administration of the court. *See, e.g., State ex rel. Weaver v. Lake County Bd. of Comm'rs*, 62 Ohio St. 3d 204, 580 N.E.2d 1090 (1991). Corresponding provisions governing funding for other divisions of the common pleas court appear in R.C. 307.01(B) and R.C. 2101.11, and the same presumption has been recognized in those instances. *See, e.g., State ex rel. Morley v. Lordi*, 72 Ohio St. 3d 510, 651 N.E.2d 937 (1995); *State ex rel. Britt v. Board of County Comm'rs*, 18 Ohio St. 3d 1, 480 N.E.2d 77 (1985); 1997 Op. Att'y Gen. No. 97-012.

provided as part of the court's equipment or facilities pursuant to R.C. 307.01(A) or as part of the juvenile court's operating expenses pursuant to R.C. 2151.10. *See, e.g.*, 1983 Op. Att'y Gen. No. 83-053. In either case, however, the standard to be applied is that the county commissioners must provide the requested service, unless the board can show that the requested service is unreasonable or unnecessary for the proper administration of the court's business. This is the standard that applies generally to the funding of the courts of common pleas. *See, e.g.*, 1996 Op. Att'y Gen. No. 96-015; 1993 Op. Att'y Gen. No. 93-043.

The Ohio Supreme Court has recognized that "a juvenile court, as a division of the court of common pleas, has inherent authority to require funding that is reasonable and necessary to the administration of the court's business." *State ex rel. Morley v. Lordi*, 72 Ohio St. 3d 510, 511, 651 N.E.2d 937, 939 (1995). The Ohio Supreme Court has, thus, held that a board of county commissioners must provide the funding requested by a court of common pleas unless the board demonstrates that the court submitted a request that is unreasonable and unnecessary. The burden of proof is upon the party opposing the requested funding to demonstrate that it constitutes an abuse of discretion and is unreasonable. *Id.* at 512, 651 N.E.2d at 939; *see also State ex rel. Donaldson v. Alfred*, 66 Ohio St. 3d 327, 329, 612 N.E.2d 717, 719 (1993). The presumption that the court's request for funding is reasonable and necessary operates to maintain and preserve the independence and autonomy of the judicial system. *State ex rel. Morley v. Lordi*, 72 Ohio St. 3d at 512, 651 N.E.2d at 939; *see also State ex rel. Weaver v. Lake County Bd. of Comm'rs*, 62 Ohio St. 3d 204, 580 N.E.2d 1090 (1991); *State ex rel. Lake County Bd. of Comm'rs v. Hoose*, 58 Ohio St. 3d 220, 569 N.E.2d 1046 (1991); 1996 Op. Att'y Gen. No. 96-015.

The same presumption applies to particular services that the court requests. *See, e.g.*, 1997 Op. Att'y Gen. No. 97-012 (syllabus) ("[a] board of county commissioners has no authority to approve or disapprove the travel expenses of a juvenile court judge"); 1996 Op. Att'y Gen. No. 96-015 (syllabus) ("[a] board of county commissioners is obligated to comply with an appropriation request from the court of common pleas for implementation of a courthouse security plan, unless the board demonstrates that the request is either unreasonable or unnecessary for the proper administration of the court's business"); 1994 Op. Att'y Gen. No. 94-043 (syllabus) ("[s]hould a court include in its budget as a cost of operation of the court an amount for payment of professional association dues on behalf of a judge of that court, to the extent that a political subdivision is responsible for the payment of the court's operating costs, it has a duty to appropriate the requested sum, unless it can show that the request is unreasonable or not necessary for the proper administration of the court's business"); 1993 Op. Att'y Gen. No. 93-043 (syllabus) ("[a] board of county commissioners is obligated to comply with an appropriation request from the court of common pleas for the payment of the cost of private parking for the judges of that court, unless the board can show that the request is either unreasonable or not necessary for the proper administration of the court's business").

The presumption that budget and service requests of a court are reasonable and necessary does not mean, however, that "a court has unfettered discretion to act without reason" in preparing its budget or submitting its requests. *State ex rel. Britt v. Board of County Comm'rs*, 18 Ohio St. 3d 1, 3, 480 N.E.2d 77, 79 (1985). Rather, the court is limited by the requirement that its requests be

*reasonable and necessary*. A determination as to whether that requirement is met is a question of fact, to be determined on a case-by-case basis in light of relevant facts. *Id.*; *see also, e.g., State ex rel. Hillyer v. Tuscarawas County Bd. of Comm'rs*, 70 Ohio St. 3d 94, 99, 637 N.E.2d 311, 315-16 (1994); *State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 149, 126 N.E.2d 57, 58 (1955) (syllabus, paragraph 2) ("[a] court of general jurisdiction located in a courthouse has a paramount right to space therein which is essential for the proper and efficient operation of such court, but *the necessity* for such space *constitutes a question of fact* and a court is entitled to additional space as against other branches of government only where it is shown that such space is *reasonably necessary for its operation as distinguished from being merely desirable*" (emphasis added)); 1987 Op. Att'y Gen. No. 87-039.

In the instant case, the board of county commissioners has provided the court with sufficient funds to pay for the service in question. Upon a determination by the court that the service is reasonably necessary for its operation, the commissioners must permit the court to apply the funds to the requested service, unless the commissioners can show that the service is unreasonable or unnecessary for the proper administration of the court's business.

Thus, the juvenile judge can require the board of county commissioners to provide the juvenile judge with a telephone service option not provided to other county offices *only if* the provision of the service option is *reasonable and necessary* for the proper administration of the court. If the board of county commissioners opposes the provision of the service option, the board has the burden of demonstrating that the requested service option is *unreasonable or unnecessary* for the proper administration of the court's business. Whether a particular service option is reasonable and necessary is a question of fact to be decided on a case-by-case. *See, e.g., State ex rel. Britt v. Board of County Comm'rs*, 18 Ohio St. 3d 5, 480 N.E.2d at 80 ("we are unable to conclude that the unusually high percentage of [compensation] increases as contained within the budget submitted...was reasonable and necessary").

Let us turn now to the question of employment of private legal counsel. To understand the issue, we need to look at the statutes governing the provision of legal counsel to county officers. R.C. 309.09 designates the prosecuting attorney as legal adviser of county officers and boards and gives the prosecutor the duty of providing them with legal advice and representation in matters connected with their duties. R.C. 309.09 expressly provides that "no county officer may employ any other counsel or attorney at the expense of the county, except as provided in [R.C.305.14]." R.C. 309.09(A).

R.C. 305.14 establishes a procedure by which counsel other than the prosecuting attorney may be provided for county officers. Upon the application of the prosecuting attorney and the board of county commissioners, the court of common pleas may authorize the board "to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity." R.C. 305.14(A). The compensation of persons employed under R.C. 305.14 is fixed by the board of county commissioners and paid from the county treasury. R.C. 305.17.

A juvenile judge, as a judge of the court of common pleas, is considered to be a county officer for purposes of representation by the county prosecutor or private counsel employed upon application to the court of common pleas pursuant to R.C. 305.14 and R.C. 309.09. *See* 1988 Op. Att'y Gen. No. 88-055;<sup>2</sup> 1985 Op. Att'y Gen. No. 85-014; 1955 Op. Att'y Gen. No. 5666, p. 366; *see also* 1997 Op. Att'y Gen. No. 97-012, at 2-69, n.3. Thus, the juvenile judge may follow the procedure set forth in R.C. 309.09 and R.C. 305.14 and request the prosecuting attorney to provide legal counsel or to join with the board of county commissioners in applying to the court of common pleas for the provision of legal counsel.

As the legal adviser designated by statute, the prosecuting attorney may provide reasonable and necessary legal counsel to the juvenile court judge or seek pursuant to R.C. 305.14 to have the court of common pleas authorize the employment of private counsel to assist the judge. It is appropriate for a prosecuting attorney to request that private counsel be appointed pursuant to R.C. 305.14 when the prosecuting attorney is unable to provide the necessary counsel because of a conflict of interest. *See, e.g., State ex rel. Hillyer v. Tuscarawas County Bd. of Comm'rs*, 70 Ohio St. 3d at 98, 637 N.E.2d at 315 (if the prosecuting attorney has a conflict of interest, mandamus will lie to compel the prosecutor to apply for the appointment of counsel pursuant to R.C. 305.14); *State ex rel. Jefferson County Children Servs. Bd. v. Hallock*, 28 Ohio St. 3d 179, 502 N.E.2d 1036 (1986); *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981).

Although R.C. 305.14 provides that the prosecuting attorney and the board of county commissioners must join in the request for private counsel, *see, e.g.,* 1990 Op. Att'y Gen. No. 90-096, at 2-407, it has been found that, in appropriate circumstances, one of those bodies may present the question to the court if the other refuses. *See State ex rel. Jefferson County Children Servs. Bd. v. Hallock*, 28 Ohio St. 3d at 181-82, 502 N.E.2d at 1038 (because the prosecuting attorney faced a conflict of interest, "the court of common pleas possessed jurisdiction to authorize the employment of outside counsel pursuant to R.C. 305.14 without the acquiescence of the county prosecutor"); *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d at 463-64, 423 N.E.2d at 109 (if the prosecuting attorney or the board of county commissioners refuses to join in an application for counsel under R.C. 305.14 when failure to apply for the appointment of counsel would be an abuse of discretion, an action in mandamus may be brought to require participation in the application; even if the proper procedure is not followed, there should be no reversal unless prejudice is demonstrated); 1986 Op. Att'y Gen. No. 86-036 (syllabus paragraph 3) (where the prosecuting attorney has a conflict of

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<sup>2</sup> 1988 Op. Att'y Gen. No. 88-055 concluded that a judge could not obtain reimbursement from the county or the board of county commissioners for private legal counsel that the judge retained in a defamation action or disciplinary proceeding, when the judge had failed to ask the prosecuting attorney or the board of county commissioners to provide counsel and the judge made a request for reimbursement after the legal action had been concluded. The facts at issue in that opinion are different from the facts you have presented, and this opinion does not reconsider the conclusions reached in that opinion. *See also* 1990 Op. Att'y Gen. No. 90-096. *See generally* note 3, *infra*.

interest, the failure of the prosecuting attorney to submit an application for the employment of other counsel pursuant to R.C. 305.14 "will not deprive the court of common pleas of jurisdiction to authorize the board of county commissioners to employ other legal counsel when the court deems that such employment is in the best interests of the county"); *cf. State ex rel. Stamps v. Automatic Data Processing Bd.*, 42 Ohio St. 3d 164, 538 N.E.2d 105 (1989) (mandamus is not available as a means to compel an application for special counsel if the refusal to request special counsel does not constitute an abuse of discretion).<sup>3</sup> Thus, the prosecuting attorney may himself seek the employment of private counsel pursuant to R.C. 305.14 if the board of county commissioners declines to join in the request.

Your question, however, is whether the juvenile judge may proceed to employ private legal counsel when there is no court order for the employment of such counsel pursuant to R.C. 305.14. As discussed above, the court has inherent power to take action to secure money and resources that are necessary for it to perform its statutory duties. The court cannot constitutionally be bound to follow procedures that prevent it from obtaining the resources necessary to perform its duties. *See State ex rel. Johnston v. Taulbee*, 66 Ohio St. 2d 417, 420-21, 423 N.E.2d 80, 82 (1981) ("the courts possess *inherent powers* to effectuate an orderly and efficient administration of justice without being financially or procedurally inhibited by the General Assembly"); 1997 Op. Att'y Gen. No. 97-012. Therefore, if a court finds that, in order to perform its statutory functions, it needs legal services, it has inherent power to take action that is reasonable and necessary to secure those services. *See, e.g., State ex rel. Donaldson v. Alfred*.

In ordinary circumstances, the reasonable course of action for a juvenile judge seeking legal counsel is to ask the county prosecutor to provide or request legal counsel in accordance with R.C. 309.09 and R.C. 305.14. *See generally* 1955 Op. Att'y Gen. No. 5666, p. 366. If the prosecutor requests the employment of private counsel pursuant to R.C. 305.14, it is then appropriate for the judge to wait for the court of common pleas to act upon that request and to comply with the court's decision or challenge it through established procedures. If an application for the appointment of counsel is brought pursuant to R.C. 305.14, the court of common pleas may authorize the employment of private counsel at the expense of the county. R.C. 305.14; R.C. 305.17; *State ex rel.*

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<sup>3</sup> In *State ex rel. Hillyer v. Tuscarawas County Bd. of Comm'rs*, 70 Ohio St. 3d 94, 637 N.E.2d 311 (1994), the Ohio Supreme Court upheld the court of appeals' appointment of independent counsel and award of attorney fees to a judge who had brought a mandamus action to compel the board of county commissioners to provide reasonable and necessary funds for the operation and administration of the county court. In that case, the prosecutor had previously attempted to mediate the dispute between the judge and the board of county commissioners, and had filed an answer on behalf of the board. The board had previously refused to make an application for counsel to the court of common pleas and failed to comply with the order of the court of appeals that it make such an application. The *Hillyer* opinion states: "[A]lthough the court of appeals would normally lack authority to [appoint independent counsel for the judge], the board's failure to comply with the initial writ vested the court with the power to bypass the normal statutory procedure." *State ex rel. Hillyer v. Tuscarawas County Bd. of Comm'rs*, 70 Ohio St. 3d at 98, 637 N.E.2d at 315 (1994).

*Corrigan v. Seminatore*, 66 Ohio St. 2d at 465, 423 N.E.2d at 110 ("[r]eliance upon inherent power is not necessary here, inasmuch as R.C. 305.14 confers power upon the common pleas court to authorize the appointment of legal counsel other than the prosecuting attorney to represent a county board or officer...where to do so is in the best interests of the county").

If, however, the prosecuting attorney fails to provide the requested legal counsel and no application for legal counsel is made pursuant to R.C. 305.14, and if the judge reasonably finds that outside counsel is required for the court to perform its duties, then the court may exercise its inherent authority to obtain that counsel. See *State ex rel. Donaldson v. Alfred* (a municipal court is entitled to funding for legal representation when the acts for which counsel is requested fall within the court's normal duties, a funding order explicitly states the nature of the services being requested, and a conflict prevents the municipality from providing representation).

Because R.C. 305.14 sets forth a procedure for a county officer to follow in obtaining private legal counsel, it is appropriate for a common pleas judge to follow that procedure when reasonably possible. The courts have recognized the responsibility of the various branches of government to cooperate with one another in carrying out their duties. See, e.g., *State ex rel. Johnston v. Taulbee*, 66 Ohio St. 2d at 420, 423 N.E.2d at 82 (1981) ("a reasonably exercised spirit of mutual cooperation among the various branches of government is essential"); *State ex rel. Giuliani v. Perk*, 14 Ohio St. 2d 235, 237, 237 N.E.2d 397, 399 (1968) ("[t]he public interest is served when courts co-operate with executive and legislative bodies in the complicated budgetary processes of government. However, such voluntary co-operation should not be mistaken for a surrender or diminution of the plenary power to administer justice which is inherent in every court whose jurisdiction derives from the Ohio Constitution").

If, however, there is some impediment to the court's obtaining legal counsel pursuant to prescribed statutory procedures, and if the court finds that it needs legal counsel, then the court may take steps that are reasonable and necessary to obtain that counsel. The constitutional separation of powers requires that a court have inherent power to procure legal counsel without abiding by statutory procedural requirements when it is *reasonable and necessary* for the court to procure counsel in order to perform its duties. See, e.g., *State ex rel. Arbaugh v. Richland County Bd. of Comm'rs*, 14 Ohio St. 3d 5, 470 N.E.2d 880 (1984) (although courts should, when possible, voluntarily cooperate in the budget process established by statute, they have no constitutional duty to follow statutory procedures); 1997 Op. Att'y Gen. No. 97-012; 1989 Op. Att'y Gen. No. 89-029, at 2-123 (recognizing "the inherent power of the court to hire such personnel as the proper and efficient administration of justice requires"); see also *State ex rel. Donaldson v. Alfred*; note 3, *supra*.

Therefore, if a juvenile judge seeks legal counsel to help in the preparation of the court's budget and to provide advice and representation with respect to anticipated litigation, and if the county prosecuting attorney is unable to provide that legal counsel because of a conflict of interest, the juvenile judge is entitled to obtain that counsel if it is reasonable and necessary for the proper administration of the court's business, regardless of whether the board of county commissioners approves, and the judge may take reasonable steps to secure that legal counsel. In ordinary circumstances, it is reasonable for the judge to ask the county prosecuting attorney to provide or

request legal counsel in accordance with R.C. 309.09 and R.C. 305.14. A juvenile judge may employ legal counsel apart from R.C. 309.09 and R.C. 305.14 *only if* such action is *reasonable and necessary* to secure counsel for the proper administration of the court's business. Whether a particular action is reasonable and necessary is a question of fact to be decided on a case-by-case basis.

Factors to be considered in determining whether it is reasonable and necessary for a juvenile judge to employ counsel apart from R.C. 309.09 and R.C. 305.14 include the need of the judge for legal counsel on a particular matter and the ability of the county prosecuting attorney or the prosecuting attorney's staff to provide that counsel. If it is determined that the action of employing legal counsel apart from R.C. 309.09 and R.C. 305.14 is reasonably necessary, that action must be performed in a reasonable manner. Thus, for example, counsel must be employed for reasonable compensation and under reasonable terms. Determinations of reasonableness are questions of fact to be decided in light of particular circumstances.

For the reasons discussed above, it is my opinion and you are advised:

1. The juvenile judge can require the board of county commissioners to provide the juvenile judge with a telephone service option not provided to other county offices only if the provision of the service option is reasonable and necessary for the proper administration of the court. If the board of county commissioners opposes the provision of the service option, the board has the burden of demonstrating that the requested service option is unreasonable or unnecessary for the proper administration of the court's business. Whether a particular service option is reasonable and necessary is a question of fact to be decided on a case-by-case basis.

2.If a juvenile judge seeks legal counsel to help in the preparation of the court's budget and to provide advice and representation with respect to anticipated litigation, and if the county prosecuting attorney is unable to provide that legal counsel because of a conflict of interest, the juvenile judge is entitled to obtain that counsel if it is reasonable and necessary for the proper administration of the court's business, regardless of whether the board of county commissioners approves, and the judge may take reasonable steps to secure that legal counsel. In ordinary circumstances, it is reasonable for the judge to ask the county prosecuting attorney to provide or request legal counsel in accordance with R.C. 309.09 and R.C. 305.14. A juvenile judge may employ legal counsel apart from R.C. 309.09 and R.C. 305.14 only if such action is reasonable and necessary to secure counsel for the proper administration of the court's business. Whether a particular action is reasonable and necessary is a question of fact to be decided on a case-by-case basis.

Respectfully,

BETTY D. MONTGOMERY  
Attorney General

January 21, 1998

The Honorable Kevin J. Baxter  
Erie County Prosecuting Attorney  
247 Columbus Avenue, Suite 319  
Sandusky, Ohio 44870-2636

SYLLABUS:

98-005

1. The juvenile judge can require the board of county commissioners to provide the juvenile judge with a telephone service option not provided to other county offices only if the provision of the service option is reasonable and necessary for the proper administration of the court. If the board of county commissioners opposes the provision of the service option, the board has the burden of demonstrating that the requested service option is unreasonable or unnecessary for the proper administration of the court's business. Whether a particular service option is reasonable and necessary is a question of fact to be decided on a case-by-case basis.
2. If a juvenile judge seeks legal counsel to help in the preparation of the court's budget and to provide advice and representation with respect to anticipated litigation, and if the county prosecuting attorney is unable to provide that legal counsel because of a conflict of interest, the juvenile judge is entitled to obtain that counsel if it is reasonable and necessary for the proper administration of the court's business, regardless of whether the board of county commissioners approves, and the judge may take reasonable steps to secure that legal counsel. In ordinary circumstances, it is reasonable for the judge to ask the county prosecuting attorney to provide or request legal counsel in accordance with R.C. 309.09 and R.C. 305.14. A juvenile judge may employ legal counsel apart from R.C. 309.09 and R.C. 305.14 only if such action is reasonably necessary to secure counsel for the proper administration of the court's business. Whether a particular action is reasonable and necessary is a question of fact to be decided on a case-by-case basis.