September 20, 2004

The Honorable Dave Yost
Delaware County Prosecuting Attorney
140 North Sandusky Street
Delaware, Ohio 43015

SYLLABUS: 2004-032

1. Pursuant to R.C. 309.09(A), the county prosecuting attorney has the duty of acting for the county veterans service commission in the capacity of an attorney with respect to all matters for which the commission needs an attorney. The county prosecuting attorney may exercise reasonable discretion in determining the manner of performing this duty.

2. A county prosecuting attorney is not authorized by R.C. 309.09(A) or (B) to act as legal counsel of a joint fire district created under R.C. 505.371; however, pursuant to R.C. 309.09(E), the county prosecuting attorney may, in the prosecuting attorney's discretion, choose to act as legal adviser of a joint fire district at no cost to the district. A county prosecuting attorney who chooses to act as legal adviser of a joint fire district may serve in the capacity of an attorney with respect to all matters for which the joint fire district needs an attorney and may exercise reasonable discretion in determining the manner of providing legal services. (1989 Op. Att'y Gen. No. 89-021 at 2-97 n.1, 1988 Op. Att'y Gen. No. 88-074, 1987 Op. Att'y Gen. No. 87-003, and 1985 Op. Att'y Gen. No. 85-071, overruled in relevant part on the basis of statutory amendment).

3. A county prosecuting attorney has no statutory duty, obligation, or authority to act as legal counsel of a private nonprofit corporation such as the Council for Older Adults. Whether a county prosecuting attorney who, notwithstanding the lack of statutory authority, acts as legal counsel of a private nonprofit corporation such as the Council for Older Adults with respect to matters necessary for the performance of that entity's functions would retain civil immunity protections under R.C. Chapter 2744 must be determined on a case-by-case basis.

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September 20, 2004

OPINION NO. 2004-032

The Honorable Dave Yost
Delaware County Prosecuting Attorney
140 North Sandusky Street
Delaware, Ohio 43015

Dear Prosecutor Yost:

We have received your request for an opinion regarding a county prosecuting attorney's obligation and discretionary ability to act as legal counsel for various entities. You have asked whether a county prosecuting attorney has a duty or obligation to act as legal counsel for the county veterans service commission, a joint fire district created under R.C. 505.371, or a private nonprofit corporation known as the Council for Older Adults. If the prosecutor does have the duty or obligation to act as legal counsel, you ask about the extent of that duty or obligation. If the prosecutor does not have the duty or obligation to act as legal counsel, you ask whether the county prosecuting attorney may, within his or her discretion, choose to act as legal counsel for the entity with respect to matters "necessary for the performance of its functions" and still retain civil immunity protections.

After considering your questions and reviewing relevant statutes, case law, and Attorney General opinions, we conclude that, pursuant to R.C. 309.09(A), the county prosecuting attorney has the duty of acting for the county veterans service commission in the capacity of an attorney with respect to all matters for which the commission needs an attorney, and the county prosecuting attorney may exercise reasonable discretion in determining the manner of performing this duty. We conclude also that a county prosecuting attorney is not authorized by R.C. 309.09(A) or (B) to act as legal counsel of a joint fire district created under R.C. 505.371; however, pursuant to R.C. 309.09(E), the county prosecuting attorney may, in the prosecuting attorney's discretion, choose to act as legal adviser of a joint fire district at no cost to the district, may serve in the capacity of an attorney with respect to all matters for which the joint fire district needs an attorney, and may exercise reasonable discretion in determining the manner of providing legal services. We conclude, further, that a county prosecuting attorney has no statutory duty, obligation, or authority to act as legal counsel of a private nonprofit corporation such as the Council for Older Adults. Whether a county prosecuting attorney who, notwithstanding the lack of statutory authority, acts as legal counsel of a private nonprofit

corporation such as the Council for Older Adults with respect to matters necessary for the performance of that entity's functions would retain civil immunity protections under R.C. Chapter 2744 must be determined on a case-by-case basis. The legal basis for these conclusions is set forth in the analysis that follows.

You have explained that your questions have arisen because you are interested in establishing a standard policy governing the provision of legal counsel to the various agencies that request legal advice from your office. To assist you with that function, we first discuss general principles that govern the provision of legal services by a county prosecuting attorney and then turn to your specific questions.

Statutory authority of county prosecuting attorney to provide legal counsel to public officers and entities

The county prosecuting attorney, elected pursuant to R.C. 309.01, has only the powers and duties established by statute, either expressly or by necessary implication. *See, e.g.,* R.C. 309.08; R.C. 309.09; *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (syllabus, paragraph 1) (1940); *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 57, 128 N.E. 173 (1920); 2000 Op. Att'y Gen. No. 2000-008 at 2-38; 1994 Op. Att'y Gen. No. 94-035 at 2-175. The county prosecuting attorney is designated as "legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax-supported public libraries." R.C. 309.09(A). The prosecuting attorney is also designated as legal adviser for all township officers, boards, and commissions, unless the township has adopted a limited home rule government pursuant to R.C. Chapter 504 and has not entered into a contract to have the prosecuting attorney serve as the township law director, in which case the township law director is the legal adviser for all township officers, boards, and commissions. R.C. 309.09(B); *see also* R.C. 504.15; 1913 Op. Att'y Gen. No. 231, vol. II, p. 1222 at 1222 (G.C. 2917 [now R.C. 309.09] "contemplates that the prosecuting attorney shall advise such … officers in their official capacity and not in their personal or individual capacity. When a prosecuting attorney advises an officer he represents the interests of the public"). Other statutory provisions designate the prosecuting attorney as legal adviser to various entities.[1] Of particular interest with

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[1] *See, e.g.,* R.C. 146.06 (volunteer fire fighters' dependents fund board); R.C. 1515.11 (soil and water conservation district); R.C. 3313.35 ("[e]xcept in city, joint vocational, and cooperative education school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education and the governing board of an educational service center in the county in which the prosecuting attorney is serving"); R.C. 3709.33 ("[i]n general health districts the prosecuting attorney of the county constituting all or a major part of such district shall act as the legal advisor of the board of health"). The Revised Code provides a variety of arrangements under which certain entities may procure legal services of the county prosecutor. *See, e.g.,* R.C. 309.09(D) (prosecuting attorney and board of county commissioners may contract with a board of park commissioners for the prosecuting attorney to provide legal services to the park district); R.C. 343.01(E)(2) (board of directors of a joint solid waste management district may "designate

regard to your request, R.C. 309.09(E) states that the prosecuting attorney "may be, in the prosecuting attorney's discretion, the legal adviser of a joint fire district created under [R.C. 505.371], at no cost to the district." [2]

The Attorney General of Ohio has frequently been asked to consider whether particular entities are county or township boards for purposes of receiving legal services of the county prosecuting attorney pursuant to R.C. 309.09(A) or (B). For purposes of R.C. 309.09, county boards are generally "limited to boards which are essentially a subdivision of a county or a subordinate department of the county." 1981 Op. Att'y Gen. No. 81-059 at 2-237; *accord* 1999 Op. Att'y Gen. No. 99-028 at 2-186; 1985 Op. Att'y Gen. No. 85-071 at 2-277. A body that is a legal entity separate and distinct from the county is not considered to be a county board for purposes of receiving legal services of the county prosecuting attorney pursuant to R.C. 309.09(A), and a body that is a legal entity separate and distinct from a township is not considered to be a township board or commission for purposes of receiving legal services of the county prosecuting attorney pursuant to R.C. 309.09(B). *See, e.g.,* 2001 Op. Att'y Gen. No. 2001-028; 1993 Op. Att'y Gen. No. 93-001; 1981 Op. Att'y Gen. No. 81-059.[3]

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the prosecuting attorney of one of the counties forming the district to serve as the legal advisor of the district" or employ other legal counsel and require written opinions or instructions from the prosecuting attorney of any of the counties forming the district). Specific provisions also govern the authority of a county, township, county board of mental retardation and developmental disabilities, or public children services agency to employ legal counsel other than the county prosecuting attorney. R.C. 305.14; R.C. 309.09; R.C. 505.62.

[2] R.C. 309.09(E) was recently enacted in Sub. H.B. 299, 125th Gen. A. (2004) (eff. June 10, 2004).

[3] Previous opinions of the Ohio Attorney General have found that a county prosecutor does not serve as legal adviser to an entity that is established on a multi-county basis or to an entity that may include one or more municipalities or other subdivisions that are not statutory clients of the prosecuting attorney, for these are not county or township boards. *See, e.g.,* 2001 Op. Att'y Gen. No. 2001-028 (joint township hospital district); 1994 Op. Att'y Gen. No. 94-082 (regional transit authority); 1994 Op. Att'y Gen. No. 94-035 (county-wide park district or joint ambulance district); 1993 Op. Att'y Gen. No. 93-001 (regional planning commission); 1990 Op. Att'y Gen. No. 90-017 (countywide emergency management agency); 1989 Op. Att'y Gen. No. 89-102 (joint solid waste management district board of directors); 1985 Op. Att'y Gen. No. 85-012 (regional organization for civil defense); 1983 Op. Att'y Gen. No. 83-064 (joint board of county commissioners for the creation of a multicounty detention and treatment facility); 1981 Op. Att'y Gen. No. 81-059 (joint recreation district); 1979 Op. Att'y Gen. No. 79-039 (joint ambulance district); 1975 Op. Att'y Gen. No. 75-014 (joint county community mental health and retardation board); 1961 Op. Att'y Gen. No. 2383, p. 366 (regional planning commission).

When a board is not a county or township board, the members of that board do not become county or township officers by virtue of their membership on the board, even if they are appointed to serve as representatives of a county or township. Rather, they perform their duties for the board of which they are members. *See, e.g.,* 1993 Op. Att'y Gen. No. 93-001; 1990 Op. Att'y Gen. No. 90-017; 1989 Op. Att'y Gen. No. 89-102; 1985 Op. Att'y Gen. No. 85-071; 1979 Op. Att'y Gen. No. 79-039.

Authority of county prosecuting attorney to provide legal counsel when not designated as legal adviser

Several Attorney General opinions address the question whether a county prosecuting attorney is permitted to provide legal counsel to an individual or entity when the county prosecuting attorney is not designated as legal adviser of that individual or entity. These opinions conclude generally that, in the absence of a grant of statutory authority to serve as legal counsel to an individual or entity, a county prosecuting attorney is not permitted to provide that individual or entity with legal services.

For example, in 1998 Op. Att'y Gen. No. 98-025 at 2-134, the Attorney General concluded, under the law then in effect, that a county prosecuting attorney had no duty to represent a township board of zoning appeals when a decision of the board was appealed to the court of common pleas.[4] The Attorney General then considered whether the prosecuting attorney might voluntarily provide legal representation to the board and concluded that the prosecuting attorney could not, stating: "[T]he county prosecuting attorney is not empowered to enlarge the scope of the duties of the office of prosecuting attorney by providing legal representation other than as authorized by law." 1998 Op. Att'y Gen. No. 98-025 at 2-135. This conclusion is based on the general principle that "there is no authority for the prosecutor, acting in an official capacity, to take on that task [of legal representation] voluntarily, thereby devoting public resources to a function not delegated to the prosecutor by statute." *Id.*; *accord* 1994 Op. Att'y Gen. No. 94-035 at 2-177 ("[t]he resources of a county office, such as that of the prosecuting attorney, cannot be extended to other political subdivisions located in the county absent statutory authority to do so").

This conclusion is consistent with principles that have been expressed by various Attorneys General over the course of many years. As was stated in 1964 Op. Att'y Gen. No. 1297, p. 2-322 at 2-324:

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[4] Since the issuance of 1998 Op. Att'y Gen. No. 98-025, R.C. 309.09(B) has been amended to include township boards and commissions among the entities that a county prosecuting attorney is required to represent, so that the conclusion reached in the 1998 opinion regarding the legal representation of a township board of zoning appeals is no longer valid. *See* 1997-1998 Ohio Laws, Part IV, 8655 (Am. Sub. S.B. 201, eff. Dec. 21, 1998) (title) (including among purposes: "to require the county prosecuting attorney to act as legal advisor to any township board or commission"); 1999 Op. Att'y Gen. No. 99-032.

> I am not aware of any statutory provision which would authorize a prosecuting attorney to enlarge the scope of his duties. Then, too, there might be a possibility of conflict of interest arising between a board which is not entitled to call upon the prosecuting attorney as legal counsel and one which the prosecutor has a legal duty to represent. I could not say that a prosecuting attorney may volunteer to represent in his official capacity a board which he has no duty to serve as legal adviser.

See also 1984 Op. Att'y Gen. No. 84-099; 1915 Op. Att'y Gen. No. 700, vol. II, p. 1459 at 1460 ("[i]nasmuch as the directors of the county agricultural society are not county officers and said board of directors is not a county board, … the prosecuting attorney is neither required nor authorized to act as the legal adviser of said directors. Furthermore, I am of the opinion that the prosecuting attorney of the county in the proper discharge of his official duties can not accept employment from the directors of said agricultural society").[5]

Authority of prosecuting attorney to provide legal counsel to a private entity

Prior Attorney General opinions have also addressed the question whether the prosecuting attorney is authorized to act as legal counsel for a private entity. They have consistently concluded that the prosecuting attorney has no such authority. A private entity cannot be a county board or a township board or commission for purposes of R.C. 309.09 and, therefore, is not entitled to receive legal services from the county prosecuting attorney pursuant to R.C. 309.09(A) or (B). *See* 1989 Op. Att'y Gen. No. 89-074 at 2-339 ("a county prosecutor is under no duty to advise a non-profit corporation"); *see also* 1999 Op. Att'y Gen. No. 99-028 (nonprofit corporation that is recognized by the board of county commissioners as a convention and visitors' bureau and receives public funds but is not organized and controlled by the county is not a county board entitled to legal advice or representation from the county prosecuting attorney). *See generally* 2003 Op. Att'y Gen. No. 2003-037 at 2-313 ("[a]lthough a CIC [county improvement corporation, a nonprofit corporation] may have various connections with a county, it cannot reasonably be considered a county agency" for purposes of county competitive bidding requirements).

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[5] Various Attorney General opinions have considered whether a prosecuting attorney might, in a private (rather than an official) capacity, agree to represent an entity that is not a statutory client, and have found that such representation might be permitted in some circumstances. *See, e.g.,* 1994 Op. Att'y Gen. No. 94-035 (syllabus, paragraph 3); 1979 Op. Att'y Gen. No. 79-019 at 2-70. This opinion does not address that issue, however, because your question relates only to action taken by the prosecuting attorney in the prosecuting attorney's official capacity, so as to retain civil immunity protections. *See* 1998 Op. Att'y Gen. No. 98-025 at 2-135 n.5.

As discussed above, a county prosecuting attorney has only the powers granted by statute and has no power to enlarge the scope of the duties of the office by providing legal services without statutory authority. *See, e.g.,* 1998 Op. Att'y Gen. No. 98-025 at 2-135. Therefore, a county prosecuting attorney is without authority to provide legal services to a private nonprofit corporation. *See, e.g.,* 2000 Op. Att'y Gen. No. 2000-008 (syllabus, paragraph 1) ("[a] prosecuting attorney has no duty or authority to act as legal adviser or to provide written opinions to a private entity with whom a county officer or entity transacts business"); *see also* 1989 Op. Att'y Gen. No. 89-074 at 2-339.

Having summarized these general principles regarding the county prosecuting attorney's duty and authority to render legal counsel, we turn now to your specific questions.

Authority of county prosecuting attorney to provide legal counsel to county veterans service commission

You have asked about the authority of a county prosecuting attorney to provide legal counsel to a county veterans service commission. Your question is whether the prosecuting attorney has an obligation or duty to provide such legal counsel and, if so, what the extent of that obligation or duty may be.

A veterans service commission is created in each county to provide services for veterans and their families. R.C. 5901.02. The veterans service commission is funded by the county and performs functions to benefit residents of the county. R.C. 5901.04; R.C. 5901.08; R.C. 5901.11. Members of a county veterans service commission are appointed pursuant to law and have a designation given by law, exercise public functions assigned by law, and serve a term of office. *See, e.g.,* R.C. 5901.02; R.C. 5901.021; R.C. 5901.11; R.C. 5901.14; R.C. 5901.15. In some counties, the board of county commissioners may increase the membership of the board and appoint the additional members. R.C. 5901.021. It has been recognized that a veterans service commission "is essentially a subordinate department of the county." 1993 Op. Att'y Gen. No. 93-065 at 2-308.[6]

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[6] Veterans service commissions and their predecessors, soldiers' relief commissions, have been identified as county bodies for a variety of purposes. *See, e.g., Madden v. Bower,* 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969) (including employees of a soldiers' relief commission among county employees); 1993 Op. Att'y Gen. No. 93-027 at 2-137 (a veterans service commission is a commission of the county and employees of the commission are employees of the county); 1982 Op. Att'y Gen. No. 82-081 at 2-228 ("[s]ince the sole purpose of soldiers' relief commissions is to decide how county tax proceeds for veterans' relief are to be allocated, such commissions are clearly decision-making bodies of the counties and as such are subject to R.C. 121.22 [open meetings law]"); 1980 Op. Att'y Gen. No. 80-102 (syllabus, paragraph 1) ("[t]he veterans' service officer and his staff qualify as 'county employees' while using their personal vehicles for the transportation of veterans and families of veterans on official business").

For these reasons, a county veterans service commission is considered a county board, its members are considered county officers, and the commission and its members are entitled to the legal services of the county prosecuting attorney pursuant to R.C. 309.09(A). *See* 1961 Op. Att'y Gen. No. 2064, p. 125 at 126 (under R.C. 309.09, "the prosecuting attorney is the legal advisor of the [soldiers' relief] commission [now the veterans service commission]"); 1940 Op. Att'y Gen. No. 3133, vol. II, p. 1065 (syllabus, paragraph 1) ("[t]he prosecuting attorney is the legal adviser to the members of the solders' relief commission for the county in which he holds office and for which such members have been appointed"); *see also* 2001 Op. Att'y Gen. 2001-004 (syllabus, paragraph 1) ("[m]embers of a county veterans service commission are 'officers' for purposes of Ohio Const. art. II, § 38," governing the removal of public officers); 1962 Op. Att'y Gen. No. 3067, p. 441 at 444 (overruled in part on other grounds by 1991 Op. Att'y Gen. No. 91-008) ("[a] member of a soldiers' relief commission is appointed to that position pursuant to law, has definite duties in that position, and exercises a portion of the sovereignty of the state in that position. In my opinion, therefore, such a member is a public officer within the general rule as to public officers …"); 1948 Op. Att'y Gen. No. 4130, p. 594 at 597.

We consider now your inquiry concerning the extent of the obligation or duty of the county prosecuting attorney to provide legal counsel to the veterans service commission. The statutes governing veterans service commissions contain no provisions addressing the nature or extent of legal services that the county prosecutor is authorized or required to provide. With regard to the representation of county boards, R.C. 309.09(A) states:

> The prosecuting attorney shall be the *legal adviser* of the board of county commissioners, board of elections, and all other *county officers and boards*, including all tax-supported public libraries, and any of them may *require written opinions or instructions from the prosecuting attorney in matters connected with their official duties*. The prosecuting attorney 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 section 305.14 of the Revised Code. (Emphasis added.)

Thus, the county prosecuting attorney is required to provide the county veterans service commission with written opinions or instructions in matters connected with the commission's official duties, and to prosecute and defend all suits and actions which the commission or its members direct or to which they are parties.

The term "legal adviser" is not defined by statute. At one time, a distinction was recognized between the functions of a legal adviser and the functions of legal counsel. For example, in 1909 the Hamilton County Court of Common Pleas observed: "The statutes seem to have always recognized a difference between legal adviser and legal counsel; the former being charged with the giving of opinions and the latter with the prosecution and the defense of actions." *State ex rel. Hunt v. Bd. of County Comm'rs,* 8 Ohio N.P. (n.s.) 281, 287 (C.P. Hamilton County 1909), *aff'd sub nom. Ireton v. State ex rel. Hunt,* 81 Ohio St. 562, 91 N.E.

1131 (1910); *see also* R.C. 309.09; *State ex rel. Will v. Taylor,* 3 Ohio N.P. (n.s.) 505, 511-12 (C.P. Franklin County 1905) (distinguishing between county prosecuting attorney and county solicitor), *aff'd*, 77 Ohio St. 597, 84 N.E. 1133 (1907); *State v. Stafford,* 8 Ohio N.P. 470, 472 (C.P. Clarke County 1901); 1988 Op. Att'y Gen. No. 88-066 at 2-336.

In more recent years, however, the statutory term "legal adviser" has been construed generally to mean counselor and attorney and to carry with it the obligation or duty of providing all types of legal services that an officer or board needs for the performance of its statutory functions.[7] In construing statutory language naming the prosecuting attorney "legal adviser" for township officers, an Attorney General's opinion from 1930 states:

> From the terms of the foregoing statute, it clearly appears that a prosecuting attorney is charged with the duty of giving legal advice to all township officers with reference to their public duties, if they choose to call upon him for such advice….
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> … Just what is included within the term "legal advice" is not fixed by statute, nor is the statute definite as to just what services of a prosecuting attorney township officers are entitled to in connection with the transaction of the public business of the township….
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> *The statute seems to contemplate providing* for the township trustees *a person to perform any and all legal services that such trustees may need to have performed,* and I believe the drawing of legal papers such as contracts, leases and deeds and the like, are as much legal services as the giving of legal advice, and am therefore of the opinion that if the township trustees require the prosecuting attorney to prepare a lease for the leasing of a portion of the township hall not needed for township purposes, it becomes the duty of the prosecuting attorney to prepare such lease as a part of his official duties for which his salary is fixed, and that he cannot be paid any other or further compensation from the township treasury for the performing of those services.
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> ….
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> The limits of what is included within the term ["legal adviser"] have never been fixed by the courts of Ohio nor has the term been positively defined by this office. In my former opinion, … it was held to include the duty to prepare legislation for the construction of a township road. In common everyday usage,

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[7] Clearly an exception exists when legal services are provided by another attorney in accordance with statutory provisions. *See, e.g.,* R.C. 305.14; R.C. 309.09; R.C. 505.62 (annexation proceedings). Further, there can be no duty to provide legal services in a matter in which the officer or board is not authorized to act. *See, e.g.,* 1989 Op. Att'y Gen. No. 89-083 at 2-391 ("[t]he duty of a county prosecuting attorney to represent a board of township trustees, however, is not absolute, but depends upon such board's authority to participate in a legal proceeding or controversy"); *see also* 1993 Op. Att'y Gen. No. 93-001 at 2-3; 1988 Op. Att'y Gen. No. 88-088.

> the term "legal adviser" is used as being practically synonymous with "attorney", and I am of the opinion that the Legislature meant by the use of the term in [G.C. 2917, now R.C. 309.09], wherein it provided that the Prosecuting Attorney should be the legal adviser for all township officers, to use the term as it is generally understood, that is, to mean that *the Prosecuting Attorney should act* for the township trustees *in the capacity of an attorney with respect to all matters where the trustees needed an attorney, whether to advise them, prepare legal documents for them, or to conduct litigation*.

1930 Op. Att'y Gen. No. 1814, vol. I, p. 679 at 680-82 (emphasis added); *see also Kline v. Bd. of Township Trs.*, 13 Ohio St. 2d 5, 7-8, 233 N.E.2d 515 (1968) ("the prosecuting attorney of a county is the legal adviser and counsel of a board of township trustees within the county and is required to prosecute and defend any action which may affect such board"); 2000 Op. Att'y Gen. No. 2000-008; 1993 Op. Att'y Gen. No. 93-001 at 2-3; 1988 Op. Att'y Gen. No. 88-066 at 2-336 n.2.

Thus, both the language of R.C. 309.09(A) and the general usage of the term "legal adviser" indicate that the county prosecuting attorney has the obligation or duty to act for a county board in the capacity of an attorney with respect to all matters for which the board needs an attorney. Accordingly, this is the obligation that the county prosecuting attorney has to the county veterans service commission. *See, e.g.,* 2000 Op. Att'y Gen. No. 2000-008 at 2-40 ("[t]he prosecuting attorney's duties as legal adviser to county officers and entities, therefore, clearly include the duty to provide such clients with written opinions 'in matters connected with their official duties'"); 1998 Op. Att'y Gen. No. 98-005 at 2-30 (R.C. 309.09 gives the prosecutor the duty of providing county officers and boards "with legal advice and representation in matters connected with their duties"); 1990 Op. Att'y Gen. No. 90-096 at 2-409 to 2-410 ("a county officer is entitled to legal representation at county expense … in only those situations in which the action or proceeding is premised upon conduct or behavior that occurs in conjunction with the good faith performance of official duties or responsibilities by the officer in question"); 1980 Op. Att'y Gen. No. 80-076 (overruled in part on other grounds by 1988 Op. Att'y Gen. No. 88-055); 1930 Op. Att'y Gen. No. 1814, vol. I, p. 679 (syllabus) ("[i]t is a part of the official duties of a prosecuting attorney to prepare a lease for the leasing of a portion of a township hall … when called upon to do so by the board of trustees of the township"). This conclusion is consistent with the provisions of R.C. 309.09(A) that prohibit a county officer from employing any other counsel or attorney at the expense of the county, except as provided in R.C. 305.14.[8]

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[8] The county prosecuting attorney is also subject to statutes that require specific actions with regard to particular types of transactions in which county boards or officers engage. Whenever one of these provisions applies, the county prosecuting attorney must provide services in accordance with the statutory requirements. *See, e.g.,* R.C. 153.44 (requiring the county prosecuting attorney to review and certify certain contracts for public improvements of the county); R.C. 309.11 (requiring the county prosecuting attorney to prepare official bonds for

It is clear that the county prosecuting attorney has a myriad of obligations to various statutory clients and that, like any other attorney or public officer, the prosecuting attorney must exercise discretion in determining the manner in which to meet the various obligations. *See, e.g., State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918) ("[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty"); 2000 Op. Att'y Gen. No. 2000-008 (syllabus, paragraph 2) ("[i]n the absence of a statutory requirement that the prosecuting attorney render to a county officer or entity particular services with respect to a particular type of transaction, the nature and extent of advice the prosecuting attorney includes in written opinions or instructions under R.C. 309.09(A) regarding matters connected with the official duties of the officer or entity is a matter within the prosecuting attorney's discretion"); 1998 Op. Att'y Gen. No. 98-005 at 2-31 ("[a]s 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").

As stated in 2000 Op. Att'y Gen. No. 2000-008:

> The nature of the duties of a legal adviser are not defined by statute and do not appear to have precise boundaries.
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> ….
>
> In the absence of … statutory mandates, … the nature and extent of advice the prosecuting attorney renders to county officers and entities under R.C. 309.09(A) is a matter to be determined by the prosecuting attorney in a reasonable exercise of discretion.

2000 Op. Att'y Gen. No. 2000-008 at 2-39 to 2-41 (footnote omitted). Thus, the prosecuting attorney must determine the manner in which to carry out the various duties and obligations of the office. The Attorney General is not authorized to provide other officials with direction regarding the exercise of their discretion. *See* 1983 Op. Att'y Gen. No. 83-027 at 2-97 n.2 (the authority of the Attorney General to provide advice to county prosecutors "does not encompass matters involving the exercise of discretion"); *accord* 2000 Op. Att'y Gen. No. 2000-008 at 2-41 n.4. *See generally State ex rel. Hodges v. Taft*, 64 Ohio St. 3d 1, 8, 591 N.E.2d 1186 (1992) ("[t]hough [the Secretary of State] is required to advise the boards [of elections], the content of his advice is discretionary. Mandamus will not issue to govern how discretion is exercised").

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county officers, certify them as sufficient, and see that they are properly signed, indorsed, and deposited); R.C. 5126.032(B) (requiring legal review of a direct services contract at the request of the county board of mental retardation and developmental disabilities); R.C. 5155.31 (requiring review of the form of a document leasing a closed county home or county nursing home); 2000 Op. Att'y Gen. No. 2000-008 at 2-40 to 2-41.

We conclude, accordingly, that, pursuant to R.C. 309.09(A), the county prosecuting attorney has the duty of acting for the county veterans service commission in the capacity of an attorney with respect to all matters for which the commission needs an attorney. The county prosecuting attorney may exercise reasonable discretion in determining the manner of performing this duty.

Authority of county prosecuting attorney to provide legal counsel to joint fire district

You have also asked about the authority or discretion of a county prosecuting attorney to act as legal counsel to a joint fire district. As noted in your letter, 1985 Op. Att'y Gen. No. 85-071 concluded, in the first paragraph of the syllabus, that "[a] county prosecuting attorney is not, under R.C. 309.09, legal adviser to a joint fire district organized pursuant to R.C. 505.37 and R.C. 505.371." This conclusion was based upon the finding that a joint fire district is an entity separate from the county and from the townships within the county. *Id.*; *see* R.C. 505.371(A) (a joint fire district may be created by two or more townships, two or more municipal corporations, or a combination of townships and municipal corporations to include the territory of the municipal corporations and all or any portion of the territory of the townships, and must be given a name different from any participating township or municipal corporation); R.C. 505.371(B) (a joint fire district is governed by a board of fire district trustees that includes representatives from the participating townships and municipal corporations; the board of fire district trustees is empowered to levy a tax upon property in the district); *see also* R.C. 505.371(D); 1992 Op. Att'y Gen. No. 92-002; 1988 Op. Att'y Gen. No. 88-074.

As was stated in 1985 Op. Att'y Gen. No. 85-071 at 2-276: "It is clear that a joint fire district created pursuant to R.C. 505.371 constitutes a legal entity, separate and distinct both from the bodies which join in its creation and from the county or counties within which it is located." *See* R.C. 9.60(A)(3) (including a joint fire district, along with a municipal corporation, township, township fire district, joint ambulance district, joint emergency medical services district, and the Office of the State Fire Marshal, as a "[f]irefighting agency"); R.C. 133.01(MM) (classifying a joint fire district as a "[s]ubdivision" for purposes of uniform public securities law); R.C. 5705.01(A) and (C) (classifying a joint fire district as a "[s]ubdivision" and the board of fire district trustees as a "'[t]axing authority' or 'bond issuing authority'" for purposes of R.C. Chapter 5705); *In re Termeer*, 52 Ohio Misc. 101, 103, 369 N.E.2d 819 (C.P. Franklin County 1977) ("R.C. 505.371 provides for the board of trustees of the joint fire district to act as a separate legal entity"), *aff'd*, No. 77AP-253, 1977 Ohio App. LEXIS 7469 (Franklin County Aug. 11, 1977); 1994 Op. Att'y Gen. No. 94-004; 1990 Op. Att'y Gen. No. 90-048; 1988 Op. Att'y Gen. No. 88-074; 1981 Op. Att'y Gen. No. 81-027; 1979 Op. Att'y Gen. No. 79-039 at 2-128 (finding that a joint ambulance district, established under statutes similar to those governing a joint fire district, is not a county board and its members are not county officers, stating: "The county has absolutely no involvement in the organization, funding, or operation of the district and the functions of the board of trustees do not relate to county matters").

As a separate political subdivision, a joint fire district is not a subdivision of a county or township, nor is it a subordinate department of a county or township.[9] *Cf., e.g.,* 2001 Op. Att'y Gen. No. 2001-028 at 2-164 ("[a] joint township district hospital board, regardless of its particular composition, is an independent entity, separate and apart from the prosecutor's statutory clients, the county and townships"); 1994 Op. Att'y Gen. No. 94-082 at 2-407 ("[r]egardless of its size or the number of its participants, a regional transit authority has statutory powers that make it a separate political subdivision, rather than a county board"); 1979 Op. Att'y Gen. No. 79-039 (a joint ambulance district is not a county board and its officers are not county or township officers entitled to legal counsel from the county prosecuting attorney). Therefore, a joint fire district cannot be considered a board of a county or a board or commission of a township for purpose of R.C. 309.09, and the county prosecuting attorney is not authorized by R.C. 309.09(A) or (B) to act as legal adviser of a joint fire district. *See* 1988 Op. Att'y Gen. 88-074 at 2-365; 1987 Op. Att'y Gen. No. 87-003 at 2-11; 1985 Op. Att'y Gen. No. 85-071; *see also* 1987 Op. Att'y Gen. No. 87-089 at 2-594.

However, as noted above, R.C. 309.09 has recently been amended to grant a county prosecuting attorney discretion to choose to act as legal adviser of a joint fire district created under R.C. 505.371 at no cost to the district. *See* note 2, *supra*. Therefore, as currently provided in R.C. 309.09(E), a county prosecuting attorney, in the exercise of discretion, may act as the legal adviser of a joint fire district. As in other circumstances in which the county prosecuting attorney acts as legal adviser, the county prosecuting attorney may serve in the capacity of an attorney with respect to all matters for which the joint fire district needs an attorney and may exercise reasonable discretion in determining the manner of providing legal services.[10]

Based upon our consideration of the current provisions of R.C. 309.09, we conclude that a county prosecuting attorney is not authorized by R.C. 309.09(A) or (B) to act as legal counsel of a joint fire district created under R.C. 505.371; however, pursuant to R.C. 309.09(E), the county prosecuting attorney may, in the prosecuting attorney's discretion, choose to act as legal adviser of a joint fire district at no cost to the district. A county prosecuting attorney who

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[9] When 1985 Op. Att'y Gen. No. 85-071 was issued, R.C. 309.09 authorized a county prosecutor to be the legal adviser for all township officers, but did not mention township boards or commissions. This opinion considers also township boards and commissions, added to R.C. 309.09 in 1998. *See* note 4, *supra*.

[10] The opportunity for county prosecuting attorneys to provide legal services to joint fire districts may assist joint fire districts across the state for, as you have observed, joint fire districts are frequently located in rural areas and are often not well funded. It would clearly benefit the joint fire districts to obtain legal counsel from the prosecuting attorney instead of expending scarce resources to hire other counsel. Further, the provision of such legal services by the prosecuting attorney may be an efficient use of resources, because the matters facing the joint fire districts are likely to be matters in which the prosecuting attorney and staff are expert.

chooses to act as legal adviser of a joint fire district may serve in the capacity of an attorney with respect to all matters for which the joint fire district needs an attorney and may exercise reasonable discretion in determining the manner of providing legal services. In light of the recent amendment of R.C. 309.09, we overrule 1985 Op. Att'y Gen. No. 85-071 and other opinions concluding that a prosecuting attorney is not permitted to act as legal adviser to a joint fire district. *See* 1989 Op. Att'y Gen. No. 89-021 at 2-97 n.1; 1988 Op. Att'y Gen. No. 88-074; 1987 Op. Att'y Gen. No. 87-003.

Authority of county prosecuting attorney to provide legal counsel to Council for Older Adults

You are also interested in the authority of the county prosecuting attorney to provide legal counsel to the Council for Older Adults of Delaware County. You have asked if the county prosecuting attorney has an obligation or duty to provide legal counsel to the Council for Older Adults and, if not, whether the prosecuting attorney may voluntarily provide such legal counsel and still retain civil immunity protections.

The entity that is known as the Council for Older Adults was incorporated as a nonprofit corporation in 1992, for the purpose of improving the quality of life of the older population of Delaware County "by being a catalyst to develop, sustain and continually improve a comprehensive, coordinated community-based system of effective services and opportunities." http://www.growingolder.org/about.htm. The Council for Older Adults of Delaware County "is responsible for planning, coordinating, developing resources and funding services for the older population in Delaware County." *Id*. The Council manages a variety of programs for older adults and purchases services from a wide range of entities, both nonprofit and for profit. The Council's income in 2003 was approximately three million dollars. About seventy-six percent came from the local aging services tax levy, and the remainder came from local, state, and federal grants, fees, donations and investment income. *Id*.

The Council for Older Adults is governed by a Board of Directors consisting of more than twenty members appointed by various senior citizens groups and public bodies, including the board of county commissioners, the township trustees' association, and municipal corporations within the county. The board employs an executive director to supervise staff, implement policy, and manage day-to-day operations. The Council serves as an advisory body to the Delaware County Commissioners on public issues affecting senior citizens. It is audited annually by an outside certified public accountant, under the oversight of the Auditor of State. *Id.*; http://www.growingolder.org/board.htm; http://www.growingolder.org/services.htm.

As a nonprofit corporation, the Council for Older Adults is a private entity, rather than a governmental entity. *See* http://www.guidestar.org/controller/searchResults.gs?action_gsReport=1&npold=41772 (Council for Older Adults is a 501(c)(3) public charity). A private nonprofit corporation may interact with public bodies in various ways. For example, a private nonprofit corporation may perform services that benefit the public, may receive public moneys through grants or contracts, and may be subject to financial standards imposed by public bodies. *See*

R.C. 117.10 (the Auditor of State "may audit the accounts of private institutions, associations, boards, and corporations receiving public money for their use and may require of them annual reports in such form as the auditor of state prescribes").

The Council for Older Adults, as a private nonprofit corporation, does not receive tax moneys directly. Rather, it may receive money from the county levy for aging services by grant or by contract with the county or its agents in exchange for services rendered. *See* R.C. 5705.19(Y) (authorizing certain subdivisions, including counties, with the approval of the electorate, to levy a tax "[f]or providing or maintaining senior citizens services or facilities" as authorized by R.C. 307.694, R.C. 505.706, and R.C. 717.01(EE) (board of county commissioners, board of township trustees, or municipal corporation may spend money for the support of senior citizens services or facilities) or R.C. 307.85 and R.C. 505.70 (board of county commissioners or township trustees may give financial assistance to public and nonprofit private agencies and organizations to meet needs of older persons); recipients must comply with accounting and reporting requirements of R.C. Chapter 117).

Although the Council for Older Adults is connected with Delaware County because it operates throughout the territory of Delaware County and receives grants or contracts paid with county funds, it is clear that, as a private nonprofit corporation, the Council is separate and distinct from Delaware County. As discussed above, a private nonprofit corporation cannot be a county board or a township board or commission for purposes of R.C. 309.09 and, therefore, is not entitled to receive legal services from the county prosecuting attorney pursuant to R.C. 309.09(A) or (B). *See* 2000 Op. Att'y Gen. No. 2000-008; 1989 Op. Att'y Gen. No. 89-074 at 2-339. Further, the county prosecuting attorney has no power to enlarge the scope of the duties of the office by providing legal services without statutory authority. *See, e.g.,* 1998 Op. Att'y Gen. No. 98-025 at 2-135. Accordingly, a county prosecuting attorney is without authority to provide legal services to a private nonprofit corporation such as the Council for Older Adults.

We conclude, therefore, that a county prosecuting attorney has no statutory duty, obligation, or authority to act as legal counsel of a private nonprofit corporation such as the Council for Older Adults.

Entitlement of county prosecuting attorney to civil immunities

You have asked, with respect to circumstances in which the county prosecuting attorney has no express statutory obligation, duty, or authority to provide legal services to particular entities, whether the county prosecuting attorney may provide legal services to these entities without rendering void the county prosecuting attorney's entitlement to civil immunities. R.C. Chapter 2744 addresses political subdivision liability in tort actions and establishes civil immunities for political subdivisions and their officers and employees.

The immunity of political subdivisions is established by R.C. 2744.02(A), which provides generally that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the

political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function," except as provided in R.C. 2744.02(B).[11] If a civil action is brought against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by an act or omission in connection with a governmental or proprietary function and the exceptions of R.C. 2744.02(B) apply to permit liability, the defenses and immunities set forth in R.C. 2744.03 may be asserted to establish nonliability.[12]

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[11] Governmental and propriety functions are defined in R.C. 2744.01(C) and (G). Governmental functions include functions that are imposed upon the state as an obligation of sovereignty and that are performed by a political subdivision voluntarily or pursuant to legislative requirements; judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions; the enforcement or nonperformance of any law; and any function that the General Assembly mandates a political subdivision to perform. R.C. 2744.01(C)(1)(a) and 2744.01(C)(2)(f), (i), and (x); *see also Wilson v. Stark County Dep't of Human Servs.*, 70 Ohio St. 3d 450, 452, 639 N.E.2d 105 (1994) (subject to limited exceptions, "with respect to governmental functions, political subdivisions retain their cloak of immunity from lawsuits stemming from employees' negligent or reckless acts"); *Wooden v. Kentner*, 153 Ohio App. 3d 24, 2003-Ohio-2695, 790 N.E.2d 813 (Franklin County 2003) (a county public defender's office is engaged in a governmental function). Actions taken by a prosecuting attorney in providing legal counsel or determining whether to provide legal counsel are governmental functions. *See Abdalla v. Olexia*, No. 97-JE-43, 1999 Ohio App. LEXIS 4806, * 24-25 (Jefferson County Oct. 6, 1999).

The exceptions set forth in R.C. 2744.02(B) permit a political subdivision to be found liable for acts or omissions relating to the operation of motor vehicles, the performance of proprietary functions, the repair and maintenance of roads and bridges, negligence in maintaining certain public buildings and grounds, and statutes expressly imposing civil liability. *See Ziegler v. Mahoning County Sheriff's Dep't*, 137 Ohio App. 3d 831, 836, 739 N.E.2d 1237 (Mahoning County 2000).

[12] The defenses set forth in R.C. 2744.03(A) provide a political subdivision with immunity in a civil action: (1) if the employee was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function; (2) if the employee's nonnegligent conduct was authorized or required by law or necessary to the exercise of powers of the political subdivision or employee; (3) if the employee's action or failure to act was within the employee's discretion with respect to policy-making, planning, or enforcement powers; (4) in certain circumstances involving community service work by offenders or delinquent children; or (5) in the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner. *See Cater v. City of Cleveland*, 83 Ohio St. 3d 24, 28, 697 N.E.2d 610 (1998); *Ziegler v. Mahoning County Sheriff's Dep't*, 137 Ohio App. 3d at 835. It has been found that the defense

The immunity of individuals is established by R.C. 2744.03(A)(6), which provides that an employee of a political subdivision is immune from liability in a civil action unless: (a) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (b) the employee's acts or omissions were performed with malicious purpose, in bad faith, or in a wanton or reckless manner; or (c) civil liability is expressly imposed by a section of the Revised Code. *See, e.g., Wooden v. Kentner,* 153 Ohio App. 3d 24, 2003-Ohio-2695, 790 N.E.2d 813 (Franklin County 2003) (employees of a county public defender's office are immune from liability for negligence and legal malpractice); *Wooten v. Vogele,* 147 Ohio App. 3d 216, 221, 769 N.E.2d 889 (Hamilton County 2001) ("an employee of a political subdivision is presumed immune unless one of these exceptions [in R.C. 2744.03(A)(6)] to immunity is established"), *discretionary appeal not allowed*, 95 Ohio St. 3d 1437, 2002-Ohio-2084, 766 N.E.2d 1002 (2002); *see also Fabrey v. McDonald Village Police Dep't*, 70 Ohio St. 3d 351, 356, 639 N.E.2d 31 (1994) ("individual employees may be held liable for their malicious, bad faith, wanton or reckless acts"); *Cook v. City of Cincinnati*, 103 Ohio App. 3d 80, 90-91, 658 N.E.2d 814 (Hamilton County 1995); *Railroad Ventures, Inc. v. Drake*, 138 Ohio App. 3d 315, 324, 741 N.E.2d 206 (Columbiana County 2000) (an employee of a political subdivision "could have been precluded from using the governmental immunity defense if he acted outside the scope of his employment or official responsibilities"); *Gentile v. Mill Creek Metro. Park Dist.*, No. 98 C.A. 254, 2000 Ohio App. LEXIS 2786, * 8 (Mahoning County June 20, 2000) (an employee is granted immunity in performing a governmental or proprietary function unless one of the conditions in R.C. 2744.03(A)(6) is established). In addition, a county prosecuting attorney or assistant county prosecuting attorney is entitled to any defense or immunity available at common law or established by the Revised Code. R.C. 2744.03(A)(7).[13]

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for exercising discretion with respect to policy-making, planning, or enforcement powers applies to actions by attorneys because they must have discretion to determine the manner in which to carry out their duties and responsibilities. *See Wooden v. Kentner*, 2003-Ohio-2695 at ¶10.

[13] Prior to the initial enactment of R.C. Chapter 2744, *see* 1985-1986 Ohio Laws, Part I, 1699 (Am. Sub. H.B. 176, eff. Nov. 20, 1985), the Ohio Supreme Court discussed the immunity granted to prosecutors in these words:

> [P]rosecutors are considered "quasi-judicial officers" entitled to absolute immunity granted judges, when their activities are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman* (1976), 424 U.S. 409, 430. *Imbler* held that a prosecutor has absolute immunity "* * * in initiating a prosecution and in presenting the State's case * * *." *Id*. at 431. However, "absolute immunity does not extend to a prosecutor engaged in essentially investigative or administrative functions." *Dellums* v. *Powell* (C.A.D.C. 1981), 660 F. 2d 802, 805, and cases cited therein. While performing these functions, he is entitled to only a qualified immunity.

A political subdivision is required to provide for the defense of an employee in a civil action for damages caused by an act or omission of the employee in connection with a governmental or proprietary function, provided that the act or omission occurred "while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities." R.C. 2744.07(A)(1). A political subdivision is required to indemnify and hold harmless an employee in the amount of any judgment (except a judgment for punitive or exemplary damages) for damages caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee "was acting in good faith and within the scope of employment or official responsibilities." R.C. 2744.07(A)(2); *see* 1993 Op. Att'y Gen. No. 93-001 at 2-7 to 2-8. [14]

For purposes of R.C. Chapter 2744, the term "[e]mployee" means "an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision." R.C. 2744.01(B). "'Employee' includes any elected or appointed official of a political subdivision." *Id.* Therefore, a county prosecuting attorney is an employee for purposes of R.C. Chapter 2744, provided that the prosecuting attorney is authorized to act and is acting within the scope of employment. *Id.* To be entitled to immunity in a civil action pursuant to R.C. 2744.03(A)(6), an employee must not be acting manifestly outside the scope of employment or official responsibilities, or with malicious purpose, in bad faith, or in a wanton or reckless manner. Standards of good faith and activity within (or not manifestly outside) the scope of employment or official responsibilities also apply to the provision of defense and indemnification by the employing political subdivision under R.C. 2744.07. *See generally* 1985 Op. Att'y Gen. No. 85-014 at 2-57 ("there may be some risk of liability in an action to recover public funds expended for a private purpose if the prosecuting attorney provides representation where there is a clear lack of good faith on the part of the public official"); *accord* 1980 Op. Att'y Gen. No. 80-076 at 2-303 (overruled in part on other grounds by 1988 Op. Att'y Gen. No. 88-055); 1972 Op. Att'y Gen. No. 72-076 at 2-305 to 2-306.

A court must ultimately determine whether a person was acting within (or not manifestly outside) the scope of employment for a political subdivision, and whether the action was performed without malicious purpose, bad faith, wantonness or recklessness, so as to leave the person entitled to immunity, defense, or indemnification under R.C. Chapter 2744. *See Fabrey v. McDonald Village Police Dep't*, 70 Ohio St. 3d at 356 ("the issue of wanton misconduct is normally a jury question"); *Hunter v. City of Columbus,* 139 Ohio App. 3d 962, 968-71, 746

Willitzer v. McCloud, 6 Ohio St. 3d 447, 449, 453 N.E.2d 693 (1983); *see also Jarvis v. Slaby*, No. 12116, 1985 Ohio App. LEXIS 9317 (Summit County Nov. 13, 1985).

[14] A political subdivision is authorized to procure insurance, establish a self-insurance program, or enter into a joint self-insurance pool to cover the potential liability of the subdivision and its employees. R.C. 9.83; R.C. 2744.08; R.C. 2744.081.

N.E.2d 246 (Franklin County 2000) (whether acts were performed in a wanton or reckless manner so as to void immunity from liability under R.C. 2744.03(A)(6) was question for the jury, to be evaluated on unique facts of the situation); *Irving v. Austin,* 138 Ohio App. 3d 552, 556, 741 N.E.2d 931 (Lucas County 2000); *Railroad Ventures, Inc. v. Drake*. *See generally Osborne v. Lyles,* 63 Ohio St. 3d 326, 330, 587 N.E.2d 825 (1992) ("whether an employee is acting within the scope of his employment in a question of fact to be decided by the jury"); *Caruso v. State,* 136 Ohio App. 3d 616, 620, 737 N.E.2d 563 (Franklin County 2000) (the question whether an individual "acted within the scope of his employment is a question of fact"). The analysis set forth in this opinion does not attempt to determine whether particular actions are within (or not manifestly outside) the scope of employment, or whether the actions are performed without malicious purpose, bad faith, wantonness or recklessness, so as to leave the actor entitled to immunity, defense, or indemnification under R.C. Chapter 2744. Rather, we simply discuss the statutes, cases, and prior opinions that address the general authority of a prosecuting attorney to provide officials and entities with legal representation.

Civil immunity protection when prosecuting attorney chooses to represent a nonprofit corporation such as the Council for Older Adults

We turn now to consideration of the circumstances in which a county prosecuting attorney chooses to act as legal counsel for an entity that the prosecutor is not expressly authorized to advise or represent. You have asked, if a prosecuting attorney decides, within his or her discretion, to act as legal counsel for such an entity concerning matters necessary for the performance of the entity's functions, whether the prosecuting attorney will retain civil immunity protections. As discussed above, opinions of Ohio Attorneys General have generally concluded that, when there is no statutory authority for a county prosecuting attorney to act as legal counsel for a particular entity, the prosecuting attorney is not empowered to expand the authority of the prosecutor's office and provide legal counsel to that entity. This conclusion is based on the principle that the office of prosecuting attorney is created by statute and the prosecuting attorney has only the powers granted by statute.

However, it is not clear whether the lack of statutory authority for the prosecuting attorney to act as legal counsel for a particular entity is sufficient to void the prosecutor's civil immunities if the prosecutor offers legal counsel to that entity. Our research has disclosed no cases directly addressing this question. *See* 1993 Op. Att'y Gen. No. 93-036 at 2-187 (questions concerning the manner and extent to which liability, immunity, defense, and indemnification provisions, including those of R.C. Chapter 2744, may affect particular individuals are complex, are not directly addressed by statute, and have not been clearly determined by the courts).

As discussed above, the standards for applying civil immunity, defense, and indemnification provisions are set forth in R.C. Chapter 2744. Determinations regarding scope of employment, malicious purpose, bad faith, and wantonness or recklessness are made on a case-by-case basis. *See* 1987 Op. Att'y Gen. No. 87-024 at 2-171. In general, a person is considered to be acting within the scope of employment or official authority if action occurred or was prompted as part of a good faith, well-intended effort to perform official duties and

responsibilities. Action taken for one's personal benefit would generally be outside the scope of employment. *See* 1993 Op. Att'y Gen. No. 93-001 at 2-10 ("the action of a particular public entity or public officer is generally considered undertaken in an official capacity if the facts and circumstances of that action clearly demonstrate that it occurred or was prompted as part of a good faith, well-intended attempt to perform official duties and responsibilities"). However, action may be considered within the scope of employment even if it is not clearly authorized. *See Irving v. Austin,* 138 Ohio App. 3d at 555 (actions by public agency caseworker were not outside the scope of authority even though he identified the wrong individual in attempting to determine the paternity of a child); Restatement (Second) of Agency § 229 (1958) (stating that, "[t]o be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized" and indicating that conduct that is not authorized may be "so similar to or incidental to the conduct authorized as to be within the scope of employment"). *See generally Osborne v. Lyles,* 63 Ohio St. 3d at 330 ("[t]he willful and malicious character of an employee's act does not always, as a matter of law, remove the act from the scope of employment"); *State ex rel. Corrigan v. Seminatore,* 66 Ohio St. 2d 459, 464-65, 423 N.E.2d 105 (1981) (board members were serving in official capacity for purposes of receiving representation under R.C. 309.09 when "they performed in their official capacity as members of the board of mental retardation in furtherance of the public functions of said board, rather than personally for their own benefit," even if the expenditure they made may have been unauthorized); *Abdalla v. Olexia,* No. 97-JE-43, 1999 Ohio App. LEXIS 4806, * 32 (Jefferson County Oct. 6, 1999) (under R.C. 309.09 "the 'duty' of representation is not absolute and the language of the statute allows for discretionary decision-making in a county prosecutor; [in determining whether to provide representation] he must determine whether the official is seeking representation in connection with his or her 'official duties'"). [15]

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[15] R.C. 309.09 and R.C. 305.14 authorize the public provision of legal representation for matters in which a county or township board or officer has a connection with official duties or an interest in an official capacity. The standard used under R.C. 309.09 and R.C. 305.14 is similar to that established under R.C. Chapter 2744 and has been expressed as requiring a determination that the facts and circumstances show a well-intended attempt to perform official duties. *See, e.g.,* 1990 Op. Att'y Gen. No. 90-096; 1989 Op. Att'y Gen. No. 89-083 at 2-393 (quoting 1954 Op. Att'y Gen. No. 4567, p. 570 (syllabus) as follows: in determining whether to provide an officer with a legal defense, "it is the duty of the prosecuting attorney to examine carefully all the facts and circumstances on which the action is based and to determine whether such facts and circumstances indicate a well intentioned attempt on the part of the defendant to perform duties attending his official position"); 1985 Op. Att'y Gen. No. 85-014 at 2-57 (the duty to provide representation "exists whenever the facts and circumstances show that the officer has engaged in a well-intended attempt to perform his official duties"); 1980 Op. Att'y Gen. No. 80-076 (overruled in part on other grounds by 1988 Op. Att'y Gen. No. 88-055); 1954 Op. Att'y Gen. No. 4567, p. 570 at 572-73 ("[t]he very issue to be decided is whether the coroner acted wholly outside of the scope of his authority, so that it could be said that he committed a purely personal tort…. It is entirely possible, for example, that the circumstances might reveal that … any …

The "scope" of authority thus may be broader than a strict statutory reading of the grant of authority. A person may be found to be acting within (or not manifestly outside) the scope of authority even in undertaking actions that are not clearly authorized by statute, provided that the actions are performed in good faith and for the apparent intent of carrying out official powers or duties, rather than for personal benefit. *See* 1987 Op. Att'y Gen. No. 87-024 at 2-171 (as used in R.C. 2744.07(A)(1) for purposes of defense and indemnification, the words "not manifestly outside the scope of his employment or official responsibilities" indicate "that a defense should be provided for an employee who acted in good faith even if there may be some question as to whether his acts were strictly within the scope of his responsibility"). *See generally Caruso v. State,* 136 Ohio App. 3d at 620 ("[i]t is only where the acts of state employees are motivated by actual malice or other such reasons giving rise to punitive damages that their conduct may be outside the scope of their state employment"); *Elliott v. Ohio Dep't of Rehab. & Corr.,* 92 Ohio App. 3d 772, 775, 637 N.E.2d 106 (Franklin County 1994) ("[a]n employee's wrongful act, even if it is unnecessary, unjustified, excessive or improper, does not automatically take the act manifestly outside the scope of employment. The act must be so divergent that it severs the employer-employee relationship" (citations omitted)); *Colley v. Dep't of Rehab. & Corr.*, No. 99-14858, 2003-Ohio-7369, 2004 Ohio Misc. LEXIS 373, ¶ 10 (Ct. Cl. June 23, 2004) (rejecting opinion of assistant attorney general that corrections officer was not entitled to public defense because his conduct included use of excessive force and was "at the very least, malicious," and finding that the conduct was not manifestly outside the scope of employment or performed with malicious purpose, in bad faith, or in a wanton or reckless manner); *Matlock v. Ohio Dep't of Liquor Control,* 77 Ohio Misc. 2d 13, 17, 665 N.E.2d 771 (Ct. Cl. 1996) ("[i]n order to prove that [an individual] was acting outside the scope of his employment, plaintiff must show that the employee's act has no relationship to the conduct of the state's business or that the conduct is so divergent that its very character severs the employer-employee relationship…. State employees can act unreasonably and still be within the scope of their duty so as to permit the doctrine of *respondeat superior* to subject their employer, the state, to potential liability").

Our research has disclosed no authority for the county prosecuting attorney to provide legal counsel to a private nonprofit corporation such as the Council for Older Adults, either pursuant to statute or voluntarily as a matter of discretion, and we cannot advise a county prosecuting attorney to undertake the provision of legal services to a private nonprofit corporation. However, we cannot say with certainty that a court would conclude that the provision of such counsel is an act that voids civil immunity protections.[16] If a prosecuting

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county officer … committed a purely personal tort arising out of an act so totally unrelated to the officer's official duties that it could not reasonably be said to have been committed in the furtherance or performance of those official duties"); 1933 Op. Att'y Gen. No. 1750, vol. II, p. 1603; 1912 Op. Att'y Gen. No. 40, vol. II, p. 1107.

[16] We note that the fact that an officer has consulted with legal counsel and has acted in accordance with the advice of that counsel has been cited as support for the conclusion that the officer is acting in good faith in an official capacity. 1912 Op. Att'y Gen. No. 40, vol. II, p. 1107

attorney were to take such action, it appears that the prosecutor would be acting beyond the scope of statutory authority, both in counseling an entity without statutory authority and in counseling a private body. It might, however, be argued, nonetheless, that the prosecutor's actions are within (or not manifestly outside) the scope of the prosecutor's functions and do not demonstrate malicious purpose, bad faith, wantonness or recklessness, especially if the prosecutor provides legal services with regard to such matters as the quasi-public operations of a nonprofit corporation or the expenditure of funds received from public sources. The question whether particular actions would be sufficiently beyond the range of authorized activities to remove the prosecutor's civil immunity protections cannot be answered by means of this opinion.

Ultimately, the question whether a county prosecuting attorney who, notwithstanding the lack of statutory authority, acts as legal counsel to a private nonprofit corporation with respect to matters necessary for the performance of that corporation's functions would retain civil immunity protections under R.C. Chapter 2744 must be determined by the courts on a case-by-case basis. *See, e.g.,* 2003 Op. Att'y Gen. No. 2003-037 at 2-311 ("[q]uestions of liability are decided by the courts, in particular contexts and with consideration of specific facts…. We cannot with any certainty predict what liability or judgment a court might impose in a particular instance"); 2003 Op. Att'y Gen. No. 2003-029 at 2-247 ("we cannot predict what a court might do in any particular case"); 2001 Op. Att'y Gen. No. 2001-037 at 2-223 n.2 ("[w]hether a state officer or employee who is operating his personal motor vehicle is engaged in the course of his employment or official responsibilities for the State of Ohio is a question of fact that must be addressed on a case-by-case basis"); 2000 Op. Att'y Gen. No. 2000-021 at 2-136 ("[q]uestions of liability are resolved by the courts and cannot be determined by means of an opinion of the Attorney General"); 1999 Op. Att'y Gen. No. 99-047; 1993 Op. Att'y Gen. No. 93-080 at 2-404 (whether an employee of the Department of Rehabilitation and Correction is entitled to civil

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at 1108 ("[i]n general, whenever the circumstances would indicate to the prosecutor, the solicitor or the attorney general, as the case might be, that the officer against whom the action has been brought in committing the official act complained of has proceeded with due caution and in good faith and has consulted with his official legal adviser under circumstances under which he ought to consult with him, he ought to serve the officer in his official capacity"); *accord* 1933 Op. Att'y Gen. No. 1750, vol. II, p. 1603 at 1605-06. The fact that a prosecuting attorney has been advised that there is no authority to provide legal counsel to a particular officer or entity might, correspondingly, be cited in support of the conclusion that the prosecuting attorney is not acting in good faith in an official capacity in providing legal counsel to that officer or entity. *See generally* 1913 Op. Att'y Gen. No. 231, vol. II, p. 1222 at 1223 (explaining that an Attorney General or prosecuting attorney might be in error in giving legal advice and an official might in good faith disregard official legal advice, but that if an official does not follow advice from the Attorney General or a prosecutor there is a presumption that the official is not acting from good motives, especially if the official acts arbitrarily and without any reasonable grounds; no hard and fast rule can be laid down, and each case should stand upon its own foundation and be decided in accordance with conscience).

immunity in a particular case "presents issues of fact that are more appropriately decided on a case-by-case basis").

We conclude, therefore, that the question whether a county prosecuting attorney who, notwithstanding the lack of statutory authority, acts as legal counsel of a private nonprofit corporation such as the Council for Older Adults with respect to matters necessary for the performance of that entity's functions would retain civil immunity protections under R.C. Chapter 2744 must be determined on a case-by-case basis.

Conclusions

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

1. Pursuant to R.C. 309.09(A), the county prosecuting attorney has the duty of acting for the county veterans service commission in the capacity of an attorney with respect to all matters for which the commission needs an attorney. The county prosecuting attorney may exercise reasonable discretion in determining the manner of performing this duty.

2. A county prosecuting attorney is not authorized by R.C. 309.09(A) or (B) to act as legal counsel of a joint fire district created under R.C. 505.371; however, pursuant to R.C. 309.09(E), the county prosecuting attorney may, in the prosecuting attorney's discretion, choose to act as legal adviser of a joint fire district at no cost to the district. A county prosecuting attorney who chooses to act as legal adviser of a joint fire district may serve in the capacity of an attorney with respect to all matters for which the joint fire district needs an attorney and may exercise reasonable discretion in determining the manner of providing legal services. (1989 Op. Att'y Gen. No. 89-021 at 2-97 n.1, 1988 Op. Att'y Gen. No. 88-074, 1987 Op. Att'y Gen. No. 87-003, and 1985 Op. Att'y Gen. No. 85-071, overruled in relevant part on the basis of statutory amendment).

3. A county prosecuting attorney has no statutory duty, obligation, or authority to act as legal counsel of a private nonprofit corporation such as the Council for Older Adults. Whether a county prosecuting attorney who, notwithstanding the lack of statutory authority, acts as legal counsel

of a private nonprofit corporation such as the Council for Older Adults with respect to matters necessary for the performance of that entity's functions would retain civil immunity protections under R.C. Chapter 2744 must be determined on a case-by-case basis.

Respectfully,

JIM PETRO
Attorney General