November 24, 2009

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
4th Floor Administration Building
160 High Street N.W.
Warren, Ohio 44481-1092

SYLLABUS: 2009-045

1. Neither a county prosecuting attorney nor the Ohio Attorney General has the authority or duty to serve as legal counsel for a multi-county court of appeals or its judges.

2. A multi-county court of appeals has the inherent authority to retain legal counsel to advise and represent the court and its judges.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

November 24, 2009

OPINION NO. 2009-045

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
4th Floor Administration Building
160 High Street N.W.
Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

You have asked whether a county prosecuting attorney has a duty to represent a court of appeals and its judges if the appellate district encompasses the county served by the prosecutor. If the county prosecutor is not the legal representative of the court of appeals and its judges, you have asked us to consider which official is responsible for providing them legal advice and representation.

We begin our analysis with a brief examination of the constitutional and statutory schemes that establish and govern appellate districts and appeals court judges. Section 3(A) of article IV of the Ohio Constitution requires that the State be divided into "compact appellate districts in each of which there shall be a court of appeals consisting of three judges," although "[l]aws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges." An appeals court must "hold sessions in each county of the district as the necessity arises." *Id.* *See also* R.C. 2501.05 (note 2, *infra*). The General Assembly has divided the State into twelve judicial court of appeals districts. R.C. 2501.01. All but three of the appellate districts are composed of more than one county. *Id.* Because Trumbull County is part of a multi-county appellate district,[1] R.C. 2501.01(K), this

[1] Trumbull County and four other counties constitute the eleventh appellate district. R.C. 2501.01(K). You have stated that the court of appeals has selected Trumbull County to remain as its principal seat although it is no longer the most populous county within the eleventh district. *See* R.C. 2501.181(A) (a "court of appeals may select one of the counties in its district as its principal seat"). The eleventh district has the three judges mandated by Ohio Const. art. IV, § 3(A) and two additional judges as provided under R.C. 2501.012(D). "In the eleventh district, any three judges shall comprise the court of appeals in the hearing and disposition of cases in

opinion will address only the representation of multi-county courts of appeals, and not single-county courts of appeals.

The judges of the courts of appeals are elected for terms of not less than six years "by the electors of their respective appellate districts." Ohio Const. art. IV, § 6(A)(2). *See also* R.C. 2501.02 (qualifications and term of office for appeals court judges). Under Ohio Const. art. IV, § 6(B), the "compensation of all judges of the courts of appeals shall be the same," and the judges "shall receive such compensation as may be provided by law." The General Assembly has fixed the salaries of appeals court judges and provided for the salaries to be paid from the state treasury. R.C. 141.04(A)(3) and (E)(1). An appeals court judge who holds court outside his county of residence is entitled to receive his "actual and necessary" expenses, which are also paid from the state treasury.[2] R.C. 141.10(A). The compensation of most appeals court employees is likewise paid from the state treasury. R.C. 2501.17. The operational expenses of the court, however, are paid by the counties that compose the appellate district in proportion to their respective populations. R.C. 2501.181. *See also* Ohio Const. art. IV, § 3(A) ("[t]he county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court"); R.C. 2501.18.

We turn now to the powers and duties of county prosecuting attorneys. A county prosecutor has only those powers conferred by statute, either expressly or by necessary implication. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981); *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940). A county prosecuting attorney is statutorily required to serve as "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." R.C. 309.09(A). Furthermore, the prosecutor "shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party." *Id*. The prosecuting attorney is also required to serve as the legal adviser for the officers, boards, and commissions of non-home rule townships (and may be retained by home-rule townships), R.C. 309.09(B), and various other public bodies as specified by statute. *See, e.g.*, R.C. 146.06; R.C. 343.01(E); R.C. 1515.11; R.C. 3313.35; R.C.

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accordance with any local rules of practice and procedure that may be adopted by the judges of the court." R.C. 2501.012(D).

[2] Under R.C. 2501.05, "[t]he court of appeals shall hear each cause in the county in which the cause originated, unless, for good cause shown, the court of appeals determines that the cause may be heard in another county of the district," and a "cause may be decided in any county of the district." *See also* R.C. 2501.04 ("[t]he court of appeals of each district shall hold sessions in each county of the district as the necessity arises"). *See generally State ex rel. Rosenberger v. Compher*, 62 Ohio App. 3d 51, 574 N.E.2d 560 (Pike County 1989) (distinguishing between a court of appeals' jurisdiction and the proper venue for filing with the court an original action in quo warranto).

3709.33. *See also* R.C. 309.09(D)-(H) (entities which a county prosecutor has the discretion to represent). A county prosecuting attorney has no power or obligation to serve as legal counsel to a public body or officers in the absence of express statutory authorization. *See* 2001 Op. Att'y Gen. No. 2001-028.

No statute explicitly authorizes or requires a county prosecuting attorney to serve as legal counsel for a court of appeals or its judges. *Cf.* R.C. 2501.181(B) (the auditor of the county selected as the principal seat of a court of appeals must "calculate the share of the court's expenses owed by each of the other counties in the district"); R.C. 2501.181(D) (if a court of appeals does not select a county as its principal seat, the auditor of the most populous county in the district must "calculate, based on the total expenses incurred by the district, the proportionate share owed by each county in the district"). Furthermore, numerous opinions of the Attorney General have concluded that a county prosecuting attorney has no obligation or authority under R.C. 309.09 to provide legal services to entities that are established on a multi-county basis or to the officers of multi-county entities. *See* 1989 Op. Att'y Gen. No. 89-102 (a prosecuting attorney is not required to serve as legal counsel to a joint solid waste management district board of directors, even though the boards of commissioners of the counties that establish the district constitute the waste management board);[3] 1983 Op. Att'y Gen. No. 83-064 (syllabus, paragraph 1) ("[w]here a joint board of county commissioners is created for the purpose of constructing and maintaining a multicounty detention and treatment facility for the training and treatment of juveniles, the county prosecuting attorneys of the participating counties have no duty to provide legal counsel for the joint board of county commissioners").[4]

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[3] *See* 2001 Op. Att'y Gen. No. 2001-028 at 2-163, n.3 (explaining that, after 1989 Op. Att'y Gen. No. 89-102 was issued, the General Assembly amended R.C. 343.01 to enable a joint solid waste management district board to designate the prosecuting attorney of one of the counties forming the district to serve as its legal adviser, and stating that such statutory amendment "demonstrates that, where the General Assembly has intended to authorize a county prosecuting attorney to act as legal adviser to a multi-county entity, it has expressly so provided"). *See also* 1995-1996 Ohio Laws, Part II, 3213 (Sub. H.B. 268, eff. May 8, 1996) (amending R.C. 309.09 and R.C. 1545.07 to authorize a board of park commissioners and county prosecutor to contract for the prosecutor to provide legal services to the park district after 1991 Op. Att'y Gen. No. 91-009 advised that a county prosecutor had no duty to advise the park board).

[4] *See also* 1993 Op. Att'y Gen. No. 93-001 at 2-5 ("'[w]hile the terms 'county board' and 'county officers' are not statutorily defined, it has been opined by several of my predecessors that, when a joint-county entity is created, by virtue of the fact that such board or officers may exercise authority over an area exceeding the territorial limits of any one county, such board or officers may not be considered a county board or county officers'"); 1985 Op. Att'y Gen. No. 85-012 at 2-45 (a regional organization for civil defense "is similar to other regional bodies created pursuant to statute which are not entitled to the general legal counsel of a prosecuting attorney"); 1981 Op. Att'y Gen. No. 81-059 at 2-237 ("a joint recreation district will not

Our examination of the nature of a multi-county appellate district and the office of appeals court judge leads us to likewise conclude that a county prosecutor serving one of the counties making up the district has no authority or obligation to represent the court of appeals or its judges. Not only are districts like the eleventh district composed of more than one county, the judges are elected by the electors in the district rather than by the electors in the county in which they reside, their compensation, and that of most court employees, is paid from the state treasury, and the operating expenses of the district are shared by all of the counties composing the district. *Cf. State ex rel. v. Brennan*, 49 Ohio St. 33, 38-39, 29 N.E. 593 (1892) ("where such duties [of a public office] are wholly performed within the limits of a county, and for the people of that county, the salary to be paid by the disbursing officer of the county, from the funds of the county, the office is a county office"). Judges of multi-county courts of appeals are not "county" officers for purposes of R.C. 309.09, and the General Assembly has not expressly required county prosecutors to represents appeals court judges or the courts of appeals. Thus, we conclude that a county prosecutor has no obligation or authority to represent a multi-county court of appeals or the judges of a multi-county appeals court.

You have also asked us to consider which official is responsible for providing advice and representation for a court of appeals and its judges if the county prosecutor is not their legal counsel. We address, therefore, whether the Attorney General has such responsibility.

The Attorney General is the "chief law officer for the state and all its departments," and "no state officer or board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. " R.C. 109.02. The Attorney General also has the duty, when requested, to "give legal advice to a state officer, board, [or] commission … in all matters relating to their official duties." R.C. 109.12. With certain exceptions, the Attorney General, "[u]pon the receipt of a written request by any officer or employee," must "represent and defend the officer or employee in any civil action instituted against the officer or employee." R.C. 109.361. For purposes of R.C. 109.361, an "officer or employee" is a "person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state," and the "state" means "the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio." R.C. 109.36(A)(1)(a), (B). In order to be entitled to legal services from the Attorney General, therefore, an appeals court judge must be a "state" officer.

As a matter of statutory interpretation, we find it significant that R.C. 109.36 includes the supreme court in the definition of "state," but names no other courts. From this we may infer

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necessarily have jurisdiction coextensive with the county," and therefore, "a joint recreation district is not a county board for purposes of R.C. 309.09, nor is it governed by county officers"); 1979 Op. Att'y Gen. No. 79-019 at 2-69 ("there is ample authority for the proposition that the term 'county board,' as used in R.C. 309.09, does not apply to any entity established on a multi-county basis").

that the General Assembly did not intend to include courts of appeals as entities whose officers and employees are entitled to representation by the Attorney General. The General Assembly certainly would have mentioned courts of appeal within the definition of "state," just as it mentioned the supreme court, if it had intended to extend the services of the Attorney General to appeals court judges. Although the definitions found in R.C. 109.36 are for purposes of R.C. 109.361, dealing with the representation and defense of state officers in civil actions, we find no basis for expanding the meaning of "state officer" for purposes of representation and advice by the Attorney General under R.C. 109.02 and 109.12. *See generally State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (syllabus, paragraph 2) ("[s]tatutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent").

Not only do appeals court judges fall outside of the statutory scheme of R.C. Chapter 109, they do not meet, under the judicially developed standards for determining the nature of a public office, most of the criteria for being a state officer. "The character of a public office is determined by the nature of the public service to be performed *in connection with the territorial limits of the authority to act* in an official capacity" (emphasis added). *State ex rel. Pogue v. Groom*, 91 Ohio St. 1, 9, 109 N.E. 477 (1914). In this instance, the geographical boundaries of an appellate district and the territorial jurisdiction of the appeals court encompass more than one county, but less than the entire state. A court of appeals does not have statewide jurisdiction. Ohio Const. art. IV, § 3(B)(2) ("[c]ourts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals *within the district*" (emphasis added)); R.C. 2501.02 ("[i]n addition to the original jurisdiction conferred by Section 3 of Article IV, Ohio Constitution, the court shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals *within the district*, including the finding, order, or judgment of a juvenile court that a child is delinquent, neglected, abused, or dependent, for prejudicial error committed by such lower court" (emphasis added)); *State v. Fawcett*, 91 Ohio St. 3d 1, 2, 740 N.E.2d 654 (2000) ("[b]oth the relevant constitutional and statutory provisions describe the jurisdiction of a court of appeals as dependent upon the location of the inferior court of record from which an order is being appealed," and thus, "courts of appeals have jurisdiction to review judgments entered by those inferior courts located within the territorial boundaries of their appellate districts"); *State v. Milo*, 28 Ohio App. 3d 60, 501 N.E.2d 682 (Franklin County 1986) (the court of appeals for Franklin County (the Tenth Appellate District) has no jurisdiction to rule on an order from the Summit County court of common pleas (in the Ninth Appellate District) overruling a motion for a new trial, even if the motion should have been filed in the Franklin County court of common pleas). Furthermore, judges of the courts of appeals are not elected on a state-wide basis, but by the electors in their respective districts. Ohio Const. art. IV, § 6(A)(2). *Cf.* Ohio Const. art. IV, § 6(A)(1) (the justices of the supreme court are elected "by the electors of the state at large").

In determining the nature of a public office, courts have also examined the sources of funding for the officer's compensation and the entity's operations. *See State ex rel. v. Brennan*, 49 Ohio St. at 39. As discussed above, the compensation of appeals court judges and most of the court's employees is paid from the state treasury—indicia that the judges may be state officers. The operational expenses of the court, however, are paid by the counties in the appellate district. On balance, considering the appeals courts' territorial and jurisdictional limitations, and the district-wide election of the judges, we conclude that appeals court judges are not state officers and an appeals court is not a state entity for purposes of counsel and representation by the Attorney General under R.C. Chapter 109.[5] We are unaware of any other official who would have the constitutional or statutory authority to advise and represent courts of appeals and appeals court judges.

We recognize that our conclusion that an appeals court and its judges are not entitled to advice and representation under R.C. 309.09 or R.C. Chapter 109 leaves the court and judges without a constitutionally or statutorily designated legal counsel. This may be a matter the courts wish to pursue with the General Assembly, where it appears that a reasonable resolution of the issue could be readily provided. *See, e.g.*, R.C. 343.01 (note 3, *supra*); R.C. 2501.181(B) and (D) (designating which county's auditor is responsible for calculating the share of an appeals court's expenses owed by each of the counties in the district). In the meantime, an appeals court enjoys the inherent authority to hire its own counsel when necessary for advice or representation, with the attendant cost to be paid in accordance with R.C. 2501.181 as any other operational expense of the court. *See State ex rel. Wilke v. Hamilton County Bd. of Commissioners*, 90 Ohio St. 3d 55, 65, 734 N.E.2d 811 (2000) (a probate court judge, who is entitled to representation by the county prosecutor under R.C. 309.09, has the inherent authority to hire private counsel at county expense to represent the court where the prosecutor has a conflict of interest). *See also State ex rel. Gains v. Maloney*, 102 Ohio St. 3d 254, 2004-Ohio-2658, 809 N.E.2d 24; *State ex rel. Donaldson v. Alfred*, 66 Ohio St. 3d 327, 612 N.E.2d 717 (1993). *Cf.* 2001 Op. Att'y Gen. No. 2001-028 (creatures of statute that have no statutorily designated legal counsel have the implied authority to employ legal counsel as necessarily incidental to the performance of their statutory duties).

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[5] In reaching this conclusion, we do not mean to foreclose the possibility that, for certain purposes or under a different statutory scheme, it may be appropriate to classify appeals courts as state bodies and appeals court judges as state officers. *See generally Barner v. Barner*, 19 Ohio App. 458, 463 (Lorain County 1925) ("the several Courts of Appeals are created by the Constitution of the state and are an integral part of the state government, to which a part of the administration of justice is delegated, they being corporate entities or organized bodies, existing only in contemplation of law").

In conclusion, it is my opinion, and you are advised that:

1. Neither a county prosecuting attorney nor the Ohio Attorney General has the authority or duty to serve as legal counsel for a multi-county court of appeals or its judges.

2. A multi-county court of appeals has the inherent authority to retain legal counsel to advise and represent the court and its judges.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General