



Michael C. O'Malley
CUYAHOGA COUNTY PROSECUTOR

January 9, 2025

The Honorable Dave Yost
Ohio Attorney General
Opinions Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

Re: Request for Attorney General Opinion

Dear Attorney General Yost:

I am the Prosecuting Attorney for Cuyahoga County, Ohio. As you may know, pursuant to Section 3, Article X of the Ohio Constitution, Cuyahoga County adopted a charter form of government that became effective on January 1, 2010. The Charter of Cuyahoga County (hereinafter the "Charter," attached hereto as Exhibit "A") provided that the offices of certain previously elected county officers were to be converted into appointed positions, which were to be filled by appointment by the holder of the newly created office of the County Executive.

At the same time, the Charter expressly provided for the retention of an elected County Prosecutor. The Prosecutor's duties were to remain unchanged. Specifically, Article IV, Section 4.01 of the Charter provided that the office of the elected prosecuting attorney was to continue, and that "duties of that office * * * [were to] continue to be determined in the manner provided by general law."

While this Charter provision made it clear that the elected prosecuting attorney was to continue with the same powers and duties as had previously been delineated by Ohio general law, the Charter also provided for the creation of a single appointed Law Director, who was to "be the legal advisor and representative of the County Executive and County Council." Charter, Art. V, Section 5.06. This position was not based on any statutory authority; rather, the Law Director's existence derives from the quoted provision of the Charter, which also specifies that he or she shall serve "at the pleasure of the County Executive." See Charter, Art. V, Section 5.01. Although the Charter speaks only of a single Law Director, soon after his appointment the Law Director proceeded to hire more than a dozen attorneys to staff a newly created "Law Department." This Law Department was created through a resolution of County Council, which resolution purports to extend the powers of the Law Director and the Law Department beyond that which is authorized

OFFICE OF THE PROSECUTING ATTORNEY

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under the Charter, and thus is in conflict with, the Charter. See Cuy. Co. Code Section 202.05 (attached hereto as Exhibit “B”).

Subsequently, various disagreements arose between the then-County Executive and my predecessor in office concerning the respective duties of the Prosecutor and Law Director, as well as the Law Director’s refusal to comply with the Charter and general law. To resolve these questions, on April 1, 2011, the then-County Prosecutor requested an opinion from your predecessor concerning the proper roles of both the County Prosecutor and the Law Director as relates to the handling of civil matters. Both the County Prosecutor and the Law Director filed legal memoranda in support of their differing views on their respective roles. On May 9, 2011, you issued *2011 Op. Att’y Gen. No. 2011-013* (attached hereto as Exhibit “C”).

That opinion reviewed both Ohio general law and the relevant provisions of the Charter and spelled out in detail the various powers and duties of the two offices under Ohio law. Notwithstanding the clarity of the opinion, the then-County Executive continued to insist upon an allocation of duties that differed from what was provided in the opinion. Consequently, on August 27, 2013, my immediate predecessor in office entered into a memorandum of understanding entitled, “Agreement Governing the Duties, Powers and Responsibilities of the Cuyahoga County Prosecutor’s Office and Department of Law” (the “2013 Agreement,” attached hereto as Exhibit “D”). The 2013 Agreement purported to allocate legal duties between the County Prosecutor and the Director of Law. This document was executed by the then-County Prosecutor, the County Law Director, the County Executive, and the President of County Council.

In November of 2016, I was elected the County Prosecutor of Cuyahoga County. I took office in January of 2017. Upon assuming office, I proceeded on the assumption that, consistent with 2011 Op. Att’y Gen. No. 2011-013, assistant county prosecutors from my civil division would again perform those civil duties imposed upon me under Ohio law and the Charter. I soon discovered, though, that many of those duties were being performed by attorneys employed by the County Law Department under the leadership of the County Law Director in contravention of the Charter and general law. The then-County Law Director explained the arrangement by reference to and reliance upon the 2013 Agreement between the prior law director and my predecessor.

At that time, I informed the County Executive that I intended to reclaim the full scope duties of the Prosecutor as set forth under Ohio law as delineated in 2011 Op. Att’y Gen. No. 2011-013. However, after discussions with the County Law Director at the time in which he urged me to permit attorneys working under his directions to continue to handle certain types of legal matters, and in an effort to compromise and work with the County Law Director, he and I entered into a Memorandum of Understanding that purported to clarify the prior 2013 Agreement. That Memorandum of Understanding (“MOU,” attached hereto as Exhibit “E”) provided that the Prosecutor would handle all litigation for Cuyahoga County, while providing that the Law Department would continue to handle labor negotiations and advising of the County Council, County Executive and certain departments that were deemed to be “under” the Executive.

At the time I took office, the 2013 Agreement was raised as a justification for the County Law Department’s performance of duties delegated to me under Ohio law. Although I had serious reservations at the time regarding the validity of such Agreement as a method to delegate the duties

of the Prosecutor based on 2011 Op. Att’y Gen. No. 2011-013, I attempted to compromise by working within the framework of the Agreement that I inherited upon taking office in a spirit of collaboration.

Foremost among my concerns was not merely that the arrangement was contrary to Ohio law, but that the Charter removed all independence from the office of the Law Director, thereby limiting one of the fundamental checks and balances enjoyed by counties of having an independent legal advisor for county officers and boards through the office of an elected prosecuting attorney. See R.C. 309.09.

Under the Charter of Cuyahoga County, an appointed Law Director is appointed by and serves at the pleasure of the County Executive. He can be terminated by the County Executive at any time, with or without cause. This fact deprives both county officers and the citizens of Cuyahoga County of the benefit of a truly independent and impartial legal advisor, and creating a system whereby the objectivity of the legal advice provided by the Law Director can be questioned given the possibility that his independent judgment may be by clouded by the need to please the County Officer to whom he must answer. This arrangement has proven to be unworkable and a detriment to the County.

My experience has convinced me that permitting the Law Department to perform representations which are delegated to the Prosecutor by law runs contrary to the intentions of both the Charter and Ohio general law. It simply does not serve and protect the public’s interests, and thus is no longer a workable arrangement for this County.

Consequently, I am seeking an opinion from you as to whether the Agreement entered into by my predecessor, as well as the MOU I signed, are valid and enforceable agreements under Ohio law. I have come to view these agreements as inconsistent in many significant ways with both the Charter and Ohio general law, all as set forth by your office in 2011 Op. Att’y Gen. No. 2011-013. I now believe that these agreements improperly transfer or bargain away nondelegable duties, statutorily imposed upon me, to the County Director of Law or the “Law Department.” Those duties are clearly assigned to me under Ohio general law, and I believe that it is not within my power as a public official, nor was it within my predecessor’s power, to delegate, trade or bargain away the performance of those statutorily imposed duties to persons or entities not under my authority. As the current arrangement effects just such a delegation, I question its legality and enforceability. Accordingly, I respectfully request that your office render its legal opinion on the following specific question:

May a prosecuting attorney relinquish legal duties that are specifically imposed upon him by both Ohio general law and a county charter by delegating such duties to an entity not under the prosecutor’s authority and control, such as the County Director of Law and Law Department, by agreement?

FACTUAL BACKGROUND

The Cuyahoga County Charter includes two sections dealing with the provision of legal advice to, and the legal representation of, county government. One section concerns the Prosecuting Attorney and another the Director of Law. While the Charter changed the elective nature of some county officers (such as the auditor, sheriff, treasurer, engineer, coroner and the sheriff), it preserved intact both the elective nature *and the duties* of the office of the prosecuting attorney. Specifically, it provided that the prosecuting attorney was to continue to be elected and serve as provided in the general law of Ohio, expressly stating that the prosecutor's duties would "continue to be determined in the manner provided by general law." Article IV, Section 4.01 of the Charter addresses those duties as follows:

The Prosecuting Attorney shall be elected, and the duties of that office and the compensation therefor, including provision for the employment of outside counsel, shall continue to be determined in the manner provided by general law.

Among the pertinent provisions of *general law* applicable to the prosecuting attorney is R.C. 309.09, which sets forth the duties and responsibilities of the prosecuting attorney with respect to civil matters. It provides in pertinent part as follows:

(A) The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, all other county officers and boards, and 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 that any such officer, board, or tax-supported public library 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.

While Article IV, Section 4.01 provided for the retention of both the officer and the duties of the county prosecuting attorney, Article V, Section 5.06 of the Charter created the new county position of director of law, and set forth the powers and duties of that office. It provides as follows:

The Director of Law shall be the legal advisor to and representative of the County Executive and County Council. The Director of Law shall have at least five years' experience in advising or representing political subdivisions in Ohio.

Shortly after the Charter took effect, questions arose as to the proper reading of these two provisions, and the then-County Executive and the then-County Prosecutor agreed to submit the question of the proper roles of the Prosecutor and the Law Director to the Attorney General for an opinion. On May 9, 2011, the then-Attorney General issued *2011 Ohio Atty. Gen. Ops. No. 2011-013*. In a lengthy and detailed opinion based upon a reading of the charter and Ohio law, it was held that the role of the Law Director was limited to advising the Executive and Council. It was

further held that the remaining duties of prosecuting and defending lawsuits and administrative proceedings, as well as providing legal advice to county officers, departments, boards, commissions, and other authorities, were the sole responsibility of the prosecuting attorney. The syllabus of the opinion provides a concise resume of the opinion, and reads in pertinent part as follows:

1. [Omitted.]
2. The Cuyahoga County Prosecuting Attorney, rather than the Cuyahoga County Director of Law, is responsible for prosecuting or defending a civil lawsuit or administrative action in which the County Executive or County Council is a party.
3. The Cuyahoga County Prosecuting Attorney, rather than the Cuyahoga County Director of Law, is responsible for prosecuting or defending a civil lawsuit or administrative action in which a county officer, department, board, commission, or other authority appointed by, or under the jurisdiction of, the County Executive or County Council is a party.
4. The Cuyahoga County Prosecuting Attorney, rather than the Cuyahoga County Director of Law, is responsible for prosecuting or defending a civil lawsuit or administrative action in which a political subdivision other than the county is a party.
5. On the basis of Article IV, § 4.01 and Article V, § 5.06 of the Cuyahoga County Charter, both the Cuyahoga County Prosecuting attorney and Cuyahoga County Director of Law may provide legal advice and opinions to the County Executive and County Council.
6. The Cuyahoga County Prosecuting Attorney, rather than the Cuyahoga County Director of Law, is responsible for providing legal advice and opinions to County officers, department, boards, commissions, and other authorities appointed by, or under the jurisdiction of, the County Executive or County Council.
7. The Cuyahoga County Prosecuting Attorney, rather than the Cuyahoga county Director of Law, is responsible for providing legal advice and opinions to a political subdivision other than the county.
8. Neither the Cuyahoga County Director of Law nor the County Council may employ legal counsel for a county officer, office, department, board, commission, or agency.

The provisions of the Charter concerning the Prosecuting Attorney and the Director of Law are unchanged since the issuance of your 2011 opinion.

The Agreement entered into by the former Prosecuting Attorney and the former County Executive

After your office issued its opinion in May 2011, the Prosecuting Attorney's Civil Division and the County's Law Department attempted to work cooperatively by dividing legal responsibilities in a manner generally consistent with that opinion. However, despite the clear findings of the 2011 Opinion, for reasons best known to himself, on August 27, 2013, my predecessor in office and the County Director of Law negotiated and entered into the 2013 Agreement.

The 2013 Agreement purported to define the respective roles of the Cuyahoga County Prosecutor's Office and the Department of Law contrary to general law and the Charter. It did so either by enumerating various county offices or departments as clients and "assigning" the client to one or another of the parties, or by enumerating and assigning various legal functions to either the County Prosecutor or the Department of Law.

While certain provisions of the 2013 Agreement are consistent with Ohio law as set forth in *2011 Op. Att'y Gen. No. 2011-013*, many were not. For example, while *2011 Op. Att'y Gen. No. 2011-013* recognized that the Law Director could provide legal advice and opinions to the County Executive and County Council, it specifically limited that duty to those two entities. The Opinion did not provide broad-ranging authority for the Law Director to advise any other county official, board, agency, employees and/or other office within the county government. Nevertheless, the 2013 Agreement specifically provided that the Law Director, to the exclusion of the County Prosecutor, was not only to advise the County Executive and County Council, but also advise the great majority of other county officials, boards, agencies, and other offices making up county government. In addition, paragraph seven of the Agreement gave exclusive authority of all contract drafting and review to the Law Director:

7. Contracts:

The Law Department shall be responsible for the drafting and legal approval, including final approval as to form and correctness, of all contracts, including all debt issuance documents, for the County, County Executive, Council, departments, agencies, offices, and employees.

(Agreement, para 7.)

Moreover, even though it was clearly set forth in *2011 Op. Att'y Gen. No. 2011-013* that both the Charter and general law dictate that only the Prosecuting Attorney may serve as litigation counsel for all county entities, including the County Executive and County Council, the 2013 Agreement purported to authorize the Director of Law and his assistants to engage in such litigation on behalf of the overwhelming majority of county offices.

Finally, the Agreement provided for the county prosecutor to relinquish his primary role in selecting and retaining outside counsel. As you know, R.C. 305.14 assigns the duty of applying to the common pleas court for the appointment of outside counsel to the county prosecutor (along with the board of county commissioners). The County Charter expressly provides for the retention of that practice as follows:

Section 4.01 PROSECUTING ATTORNEY: ELECTION, DUTIES AND QUALIFICATIONS.

The Prosecuting Attorney shall be elected, and **the duties of that office**, and the compensation therefor, **including provision for the employment of outside counsel, shall continue to be determined in the manner provided by general law.**

(Emphasis added.) Notwithstanding state law and this clear Charter provision, the Agreement purported to hand over primary authority for retention of outside counsel for the county to the Law Director, the County Council, and the Executive.

In sum, the 2013 Agreement purported to require the Prosecuting Attorney to discontinue his historical and statutory role of advising and representing many county officers and boards that, under the general law of Ohio, specifically, R.C. 309.09(A), are to be served by the Prosecuting Attorney. In violation of that general law, the 2013 Agreement handed all of those legal duties over to the Department of Law.

Whatever the motivation of the parties to the 2013 Agreement, and however well-intentioned they may have been in entering that agreement, I questioned whether the 2013 Agreement was lawful or enforceable, as it seems to contravene both the general law of this state and certain provisions of the Charter. Specifically, and seemingly by design, the 2013 Agreement effected an unlawful delegation of significant duties of my office to another government entity, a delegation that is wholly unauthorized by Ohio law. Even were such an agreement valid, I also questioned whether it is enforceable against me.

When I took office, I raised these concerns with the Law Director at the time with the intention of seeking a legal opinion on the nondelegability of the duties of the Prosecutor. Based upon my concerns, after negotiations at that time, the Law Director agreed to modify the 2013 Agreement substantially via the 2017 MOU (Exhibit E). This subsequent agreement purported to reestablish the Prosecutor as the legal counsel for the County in all litigation. In addition, it sought to reiterate the authority of the Prosecutor to determine legal representation for the County.

Over the past several years, however, issues arising within the County have demonstrated that this arrangement runs contrary to Ohio law and the Charter, and does not serve the best interests of the citizens of Cuyahoga County. Moreover, I have come to believe that the law does not support an interpretation of the Charter that removes the duties of the Prosecutor pursuant to general law.

It is for these reasons that I now request your legal opinion to address these issues as set forth below.

LEGAL QUESTION PRESENTED:

With that factual background, I respectfully request your opinion on the following legal issue:

May a prosecuting attorney relinquish legal duties that are specifically imposed upon him by both Ohio general law and a county charter by delegating such duties to an entity not under his authority and control, such as the County Director of Law, by agreement?

As you know, the county office of Prosecuting Attorney was established by the General Assembly pursuant to its authority under Article X, Section 1 of the Ohio Constitution to provide by general law for county offices. *See State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 57, 128 N.E. 173 (1920). The prosecuting attorney's duties are as prescribed by Ohio general law under Chapter 309 of the Ohio Revised Code. *See State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940).¹

It is axiomatic that county officers are creatures of statute who may exercise only those powers that are provided expressly by statute or necessarily implied therefrom. *See State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84, 197 N.E. 112 (1935), syllabus at paragraph one ("The county auditor and county treasurer of a county are creatures of statute. They can exercise only such powers as are expressly delegated by statute and only such implied powers as are necessary to carry into effect the powers expressly delegated.") *See also* 1994 Ohio Atty. Gen. Ops. No. 94-081 (county sheriff may exercise only those powers expressly provided by statute or necessarily implied therefrom); 1988 Ohio Atty. Gen. Ops. No. 88-77 (county recorder may exercise only those powers expressly provided by statute or necessarily implied therefrom).

As I have indicated previously, my predecessor entered into the 2013 Agreement that, while purporting to allocate legal responsibilities between the offices of the Prosecuting Attorney and the Director of Law, in truth delegated legal responsibilities of my office to the Director of Law. Ohio law, as codified at R.C. 309.09(A), is unmistakably clear as to my duties:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, all other county officers and boards, and 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 that any such officer, board, or tax-supported public library 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.

¹ Other specific legal duties are scattered throughout the Ohio Revised Code. Although that is an important issue, it likely is not one that requires extensive consideration for purposes of this requested legal opinion.

R.C. 309.09(A).

R.C. 309.09(A) prescribes the general rule that the prosecuting attorney shall be the legal adviser of all county officers and boards and shall prosecute and defend all suits and actions that any such officer or board directs to which it is a party, and no other counsel may be employed to represent such county officers or boards except as provided in R.C. 305.14. *See State ex rel. Hamilton County Bd. of Commrs. v. Hamilton County Court of Common Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 21; *State ex rel. Sartini v. Yost*, 96 Ohio St.3d 37, 2002-Ohio-3317, 770 N.E.2d 584; *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 462, 423 N.E.2d 105 (1981). The legal authority to employ counsel other than the prosecuting attorney is strictly limited. *See State ex rel. O'Connor v. Davis*, 139 Ohio App.3d 701, 745 N.E.2d 494 (9th Dist. 2000).

Moreover, the Charter expressly sets forth the limited powers of the Director of Law, which cannot be expanded by an Agreement or by any ordinance that is in conflict with the Charter. Specifically, Article V, Section 5.06 of the Charter sets forth the powers, duties and qualifications of the Director of Law as follows: "The Director of Law shall be the legal advisor to and representative of the County Executive and County Council." The creation of the County Law Department through the County Code does not permit the County to expand the carefully circumscribed powers of the Law Director or to extend additional powers to the Law Department, which are limited to assisting the Law Director in carrying out his powers and duties as established by the Charter. It is well-settled that no ordinance can conflict with the provisions of a charter and be effective. *Reed v. Youngstown*, 173 Ohio St. 265, 181 N.E.2d 700 (1962), paragraph two of the syllabus. Moreover, "when the provisions of an ordinance are prohibited by it, the charter will prevail." *Morris v. City of Brook Park*, 8th Dist. No. 49630, 1985 Ohio App. LEXIS 8994 (Oct. 24, 1985).

Indeed, the Attorney General previously found in *2011 Ohio Atty.Gen.Ops. No. 2011-013* that while the Prosecuting Attorney and the Director of Law were each authorized to provide legal advice and opinions to the County Executive and County Council, virtually every other legal duty to advise and represent county officers and boards rested exclusively with the Prosecuting Attorney rather than the Director of Law.

Except in those instances in which the procedures of R.C. 305.14 are complied with, I am not aware of any provision in Ohio law that permits a prosecuting attorney to "outsource" the legal duties of his office that require the exercise of judgment and discretion. In *2005 Ohio Atty. Gen. Ops. No. 2005-33*, it was stated:

The general rule regarding the delegation of authority by a public body is that, in the absence of specific statutory authority, a public body may delegate ministerial duties, but may not delegate duties that require the exercise of judgment and discretion. See, e.g., 1997 Op. Att'y Gen. No. 97-054 at 2-332; 1994 Op. Att'y Gen. No. 94-030 at 2-135; 1993 Op. Att'y Gen. No. 93-026 at 2-135; 1987 Op. Att'y Gen. No. 87-083 at 2-558 to 2-559 n.1; 1987 Op. Att'y Gen. No. 87-034 at 2-237; 1979 Op. Att'y Gen. No. 79-067 at 2-223. There is a presumption that "the board or officer whose judgment and discretion is required, was chosen because they were

deemed fit and competent to exercise that judgment and discretion and unless power to substitute another in their place has been given, such board or officer cannot delegate these duties to another." *CB Transp., Inc. v. Butler County Bd. of Mental Retardation*, 60 Ohio Misc. 71, 82, 397 N.E.2d 781 (C.P. Butler County 1979); *see also, e.g., Burkholder v. Lauber*, 6 Ohio Misc. 152, 216 N.E.2d 909 (C.P. Fulton County 1965); *Kelley v. City of Cincinnati*, 7 Ohio N.P. 360, 362 (C.P. Hamilton County 1899); 1991 Op. Att'y Gen. No. 91-048 at 2-251; 1979 Op. Att'y Gen. No. 79-067 at 2-223 ("it would contravene the legislative intent . . . to allow a judgmental and discretionary act to be delegated to an entity other than the entity originally entrusted with the duty by statute").

Id. at * 18. As stated by the Attorney General in *1990 Ohio Atty. Gen. Ops. No. 90-41* at * 17:

When power or authority is granted to a governmental agency, such agency may exercise only that authority which is expressly conferred on it by statute. *New Bremen v. Public Utilities Commission*, 103 Ohio St. 23, 132 N.E. 162 (1921). It follows that the power to delegate authority, if not expressly conferred, is excluded.

There can be little doubt that the legal duties to advise and represent county officers and boards are matters that involve the exercise of judgment and discretion. Providing legal advice to county officers and boards, as well as prosecuting and defending civil lawsuits involving them, involve a high degree of just such judgment and discretion. Such duties are certainly not mere "ministerial tasks" that can be delegated away to another public officer without specific statutory authorization, and no such authorization exists. The wholesale transfer via agreement of enumerated, critically important legal duties to legal counsel other than the prosecuting attorney, except when done in accordance with R.C. 305.14, violates this fundamental principal of Ohio law. While the MOU undid some of these improper delegations, significant portions of the Prosecutor's duties continue to be improperly delegated. I believe that these facts render the 2013 Agreement and MOU both illegal and unenforceable.

It has long been recognized that an illegal contract is unenforceable in Ohio. As the Ohio Supreme Court held in *Bell v. Northern Ohio Tel. Co.*, 149 Ohio St. 157 (1948): "It is elementary that no valid contract may be made contrary to statute, and that valid, applicable statutory provisions are parts of every contract." In the leading case of *The Buchanan Bridge Co. v. Campbell, et al.*, 60 Ohio St. 406, a contract for sale and purchase bridge material was made by county commissioners in disregard of the statutory requirements. The material had been furnished to completion, accepted by the commissioners and in use by the public. Notwithstanding the delivery, acceptance and use of such materials, the Supreme Court refused to enforce the contract for payment against the county. The Court held as follows:

A contract made by the county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on the subject, is **void**, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transactions where they have placed themselves, and will refuse to grant relief to either party.

60 Ohio St. 406 (syllabus). Likewise in *Am. Family Ins. Co. v. Hoop*, 2014-Ohio-3773; 2014 Ohio App. LEXIS 3738 (Court of Appeals of Ohio, Fourth Appellate District, Adams County) (August 26, 2014), the Court of Appeals set forth the law on illegal contracts as follows:

An illegal contract is "[a] promise that is prohibited because the performance, formation, or object of the agreement is against the law." *Snyder v. Snyder*, 170 Ohio App.3d 26, 2007-Ohio-122, 865 N.E.2d 944, ¶ 32 (11th Dist.), quoting *Black's Law Dictionary* (8th Ed. Rev. 2004) 345; see also *Bell v. N. Ohio Tel. Co.*, 149 Ohio St. 157, 158, 78 N.E.2d 42 (1948) ("It is elementary that no valid contract may be made contrary to statute, and that valid, applicable statutory provisions are parts of every contract.").

The *Hoop* court went on to describe the consequences to the parties of entering into an illegal contract:

The Ohio Supreme Court has long held that "a court will not lend its aid to any illegal contract, but, on the contrary, will leave the parties where it finds them and where they have placed themselves." *C.A. King & Co. v. Horton*, 116 Ohio St. 205, 211, 5 Ohio Law Abs. 174, 156 N.E. 124 (1927); see also *Massillon Sav. & Loan Co. v. Imperial Fin. Co.*, 114 Ohio St. 523, 4 Ohio Law Abs. 239, 151 N.E. 645 (1926), syllabus ("A party, who enters into a contract despite a statute prohibiting it, cannot thereafter claim the fruits of its performance in a court of justice."). Moreover, this Court has previously declared that "[c]ourts may not enforce illegal agreements." *Fulton v. Chapman*, 4th Dist. Adams No. 96CA621, 1996 Ohio App. LEXIS 5838, 1996 WL 737589, *3 (Dec. 20, 1996). Other Ohio appellate courts have reached similar conclusions. See *Allied Delivery Sys. Co. v. Hamilton*, 10th Dist. Franklin No. 81AP-727, 1982 Ohio App. LEXIS 13095, 1982 WL 4078, * 3 (Apr. 1, 1982) (an illegal contract is "void ab initio and unenforceable from the date of its inception"); *Chatfield v. Blue Cross-Blue Shield of Southwestern Ohio*, 1st Dist. Hamilton No. C-810161, 1993 Ohio App. LEXIS 6568, 1983 WL 5032, *3 (Jan. 12, 1993) (courts will not aid in the further execution of an illegal contract, even when the parties have partially performed under the contract).

Certainly, under the standard enunciated by the Ohio Supreme Court in *Bell v. Northern Ohio Tel. Co.* both the 2013 Agreement and the MOU were "made contrary to statute," to wit, R.C. 309.09. Accordingly, Ohio law seems to strongly suggest that both agreements are void, or at a minimum, voidable by me at my option.

It is important to emphasize that the agreements cannot be equated with agreements for the retention of outside counsel, which are authorized under R.C. 305.14(A). That section provides as follows:

The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the

prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

R.C. 305.14(A).² A retention of outside counsel under R.C. 305.14(A) is typically for a separate and discrete legal matter or assignment and, more importantly, requires the observance of certain procedural formalities: primarily that of a joint application (of the prosecuting attorney and the board of county commissioners) to the common pleas court, and the subsequent entry of the court's order approving the retention. *See State ex rel. Hamilton County Bd. of Commrs. v. Hamilton County Court of Common Pleas*, 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 21; *State ex rel. Sartini v. Yost*, 96 Ohio St.3d 37, 2002-Ohio-3317, 770 N.E.2d 584; *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 462, 423. The purported wholesale transfer of legal duties set forth in both the 2013 Agreement and the Memorandum of Understanding are in no way consistent with the procedure required under R.C. 305.14(A).

In *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 423 N.E.2d 105 (1981), the Supreme Court of Ohio explained the rationale for requiring a joint application by the prosecuting attorney and board of county commissioners prior to appointing outside counsel:

Application by the prosecuting attorney ordinarily is necessary because the counsel being appointed will fulfill a duty otherwise imposed by law upon the prosecuting attorney. Application by the board of county commissioners is necessary because it is that board which not only must fix the compensation to be paid for the person so appointed but also must provide the necessary funds for that purpose.

Id. at 463, 423 N.E.2d 105.

The Ohio Supreme Court has held that unless there is a conflict of interest that prevents the prosecuting attorney from serving as legal counsel to a county officer, the employment of outside counsel for such county officer without a joint application and a court order is contrary to Ohio law. *See State ex rel. Gains v. Maloney*, 102 Ohio St.3d 254, 2004-Ohio-2658, 809 N.E.2d 24. As no such joint application has ever occurred relating to the Agreement, there can be no claim that R.C. 305.14(A) would provide authorization for the transfer of legal duties effected by the agreements in question.

Finally, a review of the law regarding the position of a prosecuting attorney further establishes that the duties and powers of this office cannot be delegated by agreement or otherwise. In *State ex rel. O'Connor v. Davis*, 139 Ohio App.3d 701, 713-714, 745 N.E.2d 494 (9th Dist.2000), the court examined the position of prosecuting attorney and its unique role, finding it to be a matter of general and statewide concern to which local self-government must yield. The court stated that:

Even in a properly established charter form of county government, the General Assembly continues to provide by general law for the "government of counties."

² Common pleas court authorization is not required when the board of county commissioners employs outside legal counsel to represent it pursuant to R.C. 305.14(B), but the compensation to such counsel cannot exceed the total annual compensation of the prosecuting attorney. *See* R.C. 309.09(C).

Section 1, Article X, Ohio Constitution; *see Blacker*, 16 Ohio St. 2d at paragraph three of the syllabus. The Ohio Supreme Court has observed that even “cities’ powers of local self-government are not completely unfettered.” *Kettering v. State Emp. Relations Bd.* (1986), 26 Ohio St. 3d 50, 53, 496 N.E.2d 983. Indeed, the powers of local self-government must yield to statewide concerns where there is “legislative intent to provide a comprehensive, uniform framework.” *State ex rel. Evans v. Moore* (1982), 69 Ohio St. 2d 88, 91, 431 N.E.2d 311, or where a “comprehensive statutory plan is *** necessary to promote the safety and welfare of all the citizens of the state ***[,]” *Kettering*, 26 Ohio St. 3d at 55 (holding that the maintenance of stable employment relations between police officers and their employers was a matter of statewide concern). Similarly, the administration and operation of a system of courts has been found to be a matter of state sovereignty. *State ex rel. Ramey v. Davis* (1929), 119 Ohio St. 596, 165 N.E. 298, paragraph one of the syllabus; *see, also, Cupps v. City of Toledo* (1959), 170 Ohio St. 144, 163 N.E.2d 384, paragraph one of the syllabus. (concluding that municipal powers of local self-government do not extend to regulation of the jurisdiction of courts established by the Ohio Constitution or the General Assembly). Certainly, the prosecuting attorney has a unique position in the statewide system of the administration of justice. The general laws evidence a legislative intent to provide a comprehensive, uniform framework for the role of the prosecuting attorney.

We find that the duties of a prosecuting attorney extend to matters of general and statewide concern. See, e.g., R.C. 309.08. They do not relate solely to the internal affairs of the county.

State ex rel. O'Connor v. Davis, 139 Ohio App.3d 701, 713-714, 745 N.E.2d 494 (9th Dist.2000) (emphasis added). Based on this precedent, it is my position that the powers and duties of the Prosecutor are not delegable and as a matter of general and statewide concern cannot be altered through an agreement such as has been the practice in Cuyahoga County following its transition to a charter form of government up until this time. I am asking your opinion on the effectiveness and legality of such an agreement.

In conclusion, I look forward to receiving your office’s thoughtful consideration of the question I have presented. If you require any additional information from me in order to enable you to render such an opinion, please do not hesitate to contact me.

Very truly yours,



Michael C. O'Malley
Cuyahoga County Prosecuting Attorney