

OPINION NO. 77-039**Syllabus:**

1. The county prosecuting attorney is, pursuant to R.C. 309.09, the legal advisor of the board of trustees of a county tuberculosis hospital created pursuant to R.C. 339.33 and such board is without authority to employ other legal counsel.

2. The Board of County Commissioners, when joined by the Prosecuting Attorney, may apply, pursuant to the procedures set forth in R.C. 305.14, to the Court of Common Pleas for authorization to employ legal counsel to represent the current and former members of the board of trustees of a county tuberculosis hospital in a civil action filed against them by the Prosecuting Attorney.

3. The Board of County Commissioners, when joined by the Prosecuting Attorney, may apply pursuant to the procedure set forth in R.C. 305.14 to the Court of Common Pleas for authorization to employ legal counsel to represent the members of the board of trustees of a county tuberculosis hospital in a third party complaint brought against them by the employees of the hospital.

To: James R. Unger, Stark County Pros. Atty., Canton, Ohio
By: William J. Brown, Attorney General, July 22, 1977

Your office has requested my opinion on the following questions:

1. Does the Board of Trustees of the Molly Stark Hospital have authority to employ legal counsel to represent the past and present members of the Board of Trustees as to the complaints that I have filed for the recovery of monies alleged to have been illegally expended by the members of the Board of Trustees in their official capacity?

2. Does the Board of County Commissioners, when joined by the Prosecuting Attorney, have any authority to apply to the Court of Common Pleas for the employment of legal counsel to assist the present members of the Board of Trustees of Molly Stark Hospital against whom I have filed legal action to recover funds found to have been illegally expended in the report made by the Bureau of Inspection and Supervision of Public Offices as submitted to the Prosecuting Attorney?

3. Does the Board of County Commissioners, when joined by the Prosecuting Attorney have any authority to apply to the Court of Common Pleas for the employment of legal counsel to assist the past members of the Board of Trustees of Molly Stark Hospital against whom I have filed legal action to recover funds found to have been illegally expended in the report made by the Bureau of Inspection and Supervision of Public Offices as submitted to the Prosecuting Attorney?

4. What are my duties in regard to third party complaints filed against past and present members of the Board of Trustees of Molly Stark Hospital arising from civil actions that I have filed against past and

present employees of the hospital for the recovery of funds based upon the report of the Bureau of Inspection and Supervision of Public Offices under Section 117.10 of the Ohio Revised Code?

From the information you have supplied, it is my understanding that the Molly Stark County Hospital is a county tuberculosis hospital established by the Board of County Commissioners of Stark County pursuant to the provisions of R.C. 339.31. During the period in question, the hospital has been managed by a seven-member Board of Trustees appointed by the Board of Stark County Commissioners in accordance with R.C. 339.33. The operation of the Molly Stark Hospital is financed through a tax levy passed by the voters of Stark County and through supplemental appropriations made by the Board of County Commissioners from the general fund of the county.

You have indicated that on August 17, 1976, the Bureau of Inspection and Supervision of Public Offices of the State Auditor's Office filed a report of examination of the Molly Stark Hospital for a period covering portions of 1972 through 1974. The report indicated that public monies had been illegally expended for various purposes and that certain items of public property were missing. These findings were made against past and present employees of the hospital as well as against past and present members of the Board of Trustees of Molly Stark Hospital in an amount exceeding \$20,000.00. Some of the findings against the hospital employees also named the trustees of the hospital. The allegedly illegal expenditure of money by the members of the Board of Trustees took place during the course of their official acts.

Your office proceeded to file suit under the provisions of R.C. 117.10 on the basis of the report made by the Bureau of Inspection and Supervision of Public Offices. Legal proceedings were necessary because the individuals concerned failed to repay the amounts of the findings made against them. The Board of Stark County Commissioners has now inquired whether it or the Board of Trustees of the Molly Stark Hospital may hire private legal counsel to represent both former and current trustees of the hospital against whom you have filed complaints.

It is well settled in Ohio that public funds may be expended only by clear authority of law, and that all cases of doubt must be resolved against such an expenditure. See: The State, ex rel. Stanton v. Andrews, et al., 105 Ohio St. 489 (1922); State ex rel. Bentley and Sons Co. v. Pierce, 96 Ohio St. 44 (1917); 1977 Op. Att'y Gen. No. 77-003; 1976 Op. Att'y Gen. No. 76-015; 1976 Op. Att'y Gen. No. 76-017.

R.C. 339.33 deals with the management and control of a county tuberculosis hospital and states that the board of trustees "shall have all the powers conferred by sections 339.21 to 339.30, inclusive, of the Revised Code, upon the board of trustees of a district hospital for the care of persons suffering from tuberculosis." R.C. 339.23 addresses the issue of expenses incurred by members of the board of trustees and provides in relevant part as follows:

"The trustees shall serve without compensation, but their necessary expenses, when engaged in the business of the board of trustees, shall be paid."

The term "necessary expenses", however, does not apply to legal expenses incurred by the Board of Trustees since the latter are specifically provided for in R.C. 309.09.

R.C. 309.09, as set forth below, provides that the prosecuting attorney shall be the legal advisor to county boards and officers and shall prosecute and defend all suits and actions which such officer or board directs or to which such officer or board is a party and that no county officer may employ any other counsel at the expense of the county.

"The prosecuting attorney shall be the legal advisor 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 him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in § 305.14 of the Revised Code."

It is clear that a board of trustees of a county tuberculosis hospital established pursuant to R.C. 339.33 is a county board to which the provisions of R.C. 309.09 apply. It was the opinion of one of my predecessors that by virtue of Section 3917 of the General Code, [now R.C. 309.091], prosecuting attorneys are the legal advisors to boards of county hospital trustees as established pursuant to Section 3131 of the General Code, [now R.C. 339.02]. 1950 Op. Att'y Gen. No. 1981, p. 467. A board of county hospital trustees established pursuant to R.C. 309.02 and the board of trustees of a county tuberculosis hospital are closely analogous in terms of powers and duties and methods of operation. Thus, the county prosecuting attorney would be the statutory legal advisor for a board of trustees of a county tuberculosis hospital and such board is without authority to employ other legal counsel.

Having answered your first question in the negative, I find it necessary to proceed with an analysis of the issues raised in your second and third questions. In your letter you indicate that it would be difficult for your office to both prosecute and defend the same trustees in the same litigation and suggest that R.C. 305.14 may apply to such a situation. R.C. 305.14 reads as follows:

"If it deems it for the best interests of the county, 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 board or 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 county board or officer is a party or has an interest in its official capacity."

This procedure has been invoked in situations where the statutory legal authority refuses to act, lacks sufficient resources to act or has an adverse interest in the proceedings. See: Board of Education, ex rel. Bettman v. Board of Education, 17 O.N.P. (n.s.) 439 (1919); State, ex rel. Hunt v. County Commissioners, 8 O.N.P. (n.s.) 281 (1909); 1955 Op. Att'y Gen. No. 5666.

As a practical matter the importance of preserving the integrity of our adversarial system of justice would seem to dictate that the procedure be invoked to avoid the ethical conflict in a situation where the prosecuting attorney would be called upon to simultaneously prosecute and defend the same parties in the same suit. However, I am not satisfied that the answer to your question can be determined on this issue alone. It occurs to me that the real issue with which you are confronted is whether your office has in fact the duty or authority to provide the trustees with counsel in the present case.

I would call your attention to two recent opinions, 1971 Op. Att'y Gen. No. 71-080 and 1972 Op. Att'y Gen. No. 72-076, in which I had occasion to discuss at considerable length the circumstances under which a city solicitor or county prosecuting attorney would have a duty to defend a public officer accused of wrongful use of official powers. In the latter opinion I concluded that the duty to defend is discretionary and amounts to little more than an authorization to defend if and when an evaluation indicates its desirability.

The test to be used in determining whether a duty to defend exists was well stated by one of my predecessors in 1954 Op. Att'y Gen. No. 4567, p. 570, the syllabus of which provides as follows:

"In an action brought against a county coroner for damages for ordering an alleged illegal autopsy it is the duty of the prosecuting attorney to examine carefully all the facts and circumstances to 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. If the prosecuting attorney, following such evaluation concludes that there was such a well intentioned attempt to perform an official duty by the defendant he is authorized to defend such action."

The decision which confronts the prosecutor or solicitor in such a case is not an easy one and should be made with great care after a thorough analysis of the nature of the action and the specific charges and facts involved therein.

It will be noted that the situation under consideration in Opinion No. 71-080, supra did not involve an action initiated by the same legal authority called upon to defend the parties in question. I noted in that opinion that the conclusions therein might well differ where the office called upon to defend was also prosecuting the same individuals. Although such circumstances clearly accentuate the difficulty of the prosecutor's determination, this fact does not, in and of itself, preclude application of the test set forth in Opinion No. 4567, supra. The policy considerations underlying application of the test in other contexts apply with equal force to the situation at hand. The report of the Bureau of Inspection represents nothing more than prima facie evidence of the truth of the allegations contained therein. R.C. 117.10 It is quite possible, therefore, that the defendants were, in fact, acting at all times in the good faith performance of their official duties.

The facts in the present case also differ from those in my former opinions in that herein you are not required to make the final determination on whether or not to expend public funds for the defense of the trustees. The alternative provided by R.C. 305.14 thus becomes very significant to the resolution of this issue. Under the provisions of this statute, the county prosecutor and the board of county commissioners must jointly decide to petition the court for authorization to employ legal counsel. The participation of the county commissioners considerably alleviates the difficulties in the present case. Under the provisions of R.C. 339.33 the board of county commissioners is responsible for appointing the hospital trustees and the trustees must file a report on the operations of the hospital with the county commissioners on an annual basis. By virtue of this relationship, the county commissioners should have considerable knowledge relevant to the analysis of the trustees' conduct in light of the scope of their authority and duties. The commissioners would, for example, be in the best position to know whether the subject matter of the pending suit has been a continuing problem because of a lack of clarity in the law. If such is the case, the present litigation might be considered a "friendly suit" as discussed in 1955 Op. Att'y Gen. No. 5666, p. 366.

The difficulties are further minimized by the fact that the extent of your decision, under R.C. 305.14, is merely to raise the issue with the court, which will grant the request "if it deems it for the best interests of the county". In making this determination the court will in all likelihood further analyze the facts in light of the prohibitions on the use of public funds and the danger of discouraging the acceptance of public office.

If, on the basis of the analysis set forth above you and the board of county commissioners conclude that there is a public duty to defend the trustees, then it is my opinion that you may apply to the Court of Common Pleas under the provisions of R.C. 305.14 for the employment of legal counsel to assist the present and past members of the Board of Trustees of the Molly Stark Hospital in both the civil action filed against them and in regard to third party complaints arising from civil actions filed against past and present employees of the hospital.

Upon the facts you have provided, I find no compelling reason to distinguish between the past and present members of the board of trustees. The report of the Bureau of Inspection

and Supervision of Public Offices covers the time during which the former trustees were in office and the allegations specifically flow from actions taken or decisions made during their tenure of office. Thus, the true cause of action arose during their tenure of office, though the report was filed after the expiration of their term. It is a well settled principle that the rights and liabilities of the parties to a suit are determined by the time the cause of action arose and that a cause of action accrues at the time of the wrong by the defendant and the injury to the plaintiff, although the actual damage resulting therefrom may not be discovered until some time afterward. Archer v. Huntington National Bank, 92 Ohio App. 229 (1952).

Similarly, I find no reason to distinguish, for the purpose of determining the trustees' right to have their defense provided through public funds, between the original suit filed against the trustees and the situation of a third party complaint brought against the trustees by their employees. In the latter case it is also your duty to first decide if there is a public duty to defend the trustees because of a well intentioned attempt on their part to discharge their official duties. If you decide this issue affirmatively, it would then be prudent to make use of the alternative provided in R.C. 305.14 in order to fully safeguard the adversary system.

Please note, however, that this opinion is given with full knowledge on my part that the final decision to authorize the employment of legal counsel rests with the discretion of the Court of Common Pleas, which will so decide if it deems it for the best interest of the county. Nothing in this opinion should be construed as interfering with or precluding the judgment of the Court of Common Pleas in this matter.

In answer to your specific questions, it is my opinion and you are so advised that:

1. The county prosecuting attorney is, pursuant to R.C. 309.09, the legal advisor of the board of trustees of a county tuberculosis hospital created pursuant to R.C. 339.33 and such board is without authority to employ other legal counsel.
2. The Board of County Commissioners, when joined by the Prosecuting Attorney, may apply, pursuant to the procedure set forth in R.C. 305.14, to the Court of Common Pleas for authorization to employ legal counsel to represent the current and former members of the board of trustees of a county tuberculosis hospital in a civil action filed against them by the Prosecuting Attorney.
3. The Board of County Commissioners, when joined by the Prosecuting Attorney, may apply pursuant to the procedure set forth in R.C. 305.14 to the Court of Common Pleas for authorization to employ legal counsel to represent the members of the board of trustees of a county tuberculosis hospital in a third party complaint brought against them by the employees of the hospital.