

OPINION NO. 90-096**Syllabus:**

Neither a board of county commissioners nor a county children services board may pay, directly or by way of reimbursement, legal fees incurred by the county children services board's executive secretary in retaining the services of private legal counsel when such counsel has been hired other than in accordance with the specific terms and procedures set forth in R.C. 305.14(A) and R.C. 309.09(A). (1988 Op. Att'y Gen. No. 88-055, followed.)

To: Michael G. Spahr, Washington County Prosecuting Attorney, Marietta, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 28, 1990

You have requested my opinion regarding the authority of the county children services board to reimburse its executive secretary for legal fees incurred when he retained private legal counsel to represent him in connection with a criminal investigation of his activities as the board's executive secretary. According to your letter, the board of county commissioners appointed a citizens committee in 1989 to investigate the provision of juvenile services by various county departments and agencies, and make recommendations for any changes or reforms it deemed necessary in that regard. One of the affected agencies was the county children services board. During its review of the children services board's operations, the citizens committee was presented with allegations from confidential sources, which, if true, could have resulted in criminal charges being filed against the board's executive secretary. A special prosecutor was appointed to determine the sufficiency of those allegations, and he subsequently concluded that there was insufficient evidence to support the filing of criminal charges against the executive secretary.

The president of the children services board, with the concurrence of the other board members, advised the executive secretary to hire legal counsel to represent him during the pendency of the special prosecutor's investigation. Accordingly, the executive secretary retained private legal counsel and subsequently paid such counsel for his services. The board now wishes to know whether it may reimburse the executive secretary the amounts he expended for those legal services.

Resolution of the foregoing question requires a consideration of R.C. 305.14 and R.C. 309.09, which address the legal representation of county boards and officers. R.C. 309.09 confers upon the prosecuting attorney the responsibility to serve as legal adviser of all county boards and county officers, stating, in pertinent part, as follows:

(A) 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 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 section 305.14 of the Revised Code.* (Emphasis added.)

R.C. 305.14, to which R.C. 309.09(A) refers, sets forth, *inter alia*, the procedure by which legal counsel other than the prosecuting attorney may be hired to represent a particular county board or officer. R.C. 305.14 thus states, in pertinent part, as follows:

(A) 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. (Emphasis added.)

Pursuant to R.C. 305.14(A), therefore, the board of county commissioners, when so authorized by the court of common pleas, may employ legal counsel at county expense to represent a county officer in the defense of any action or proceeding in which such officer is a party or has an interest in his official capacity, in lieu of having such representation conducted by the prosecuting attorney. Application for such authorization is to be made by both the prosecuting attorney and the board of county commissioners. *Id.* 1977 Op. Att'y Gen. No. 77-039 at 2-140 ("[u]nder the provisions of [R.C. 305.14], the county prosecutor and the board of county commissioners must jointly decide to petition the court for authorization to employ legal counsel").¹

A county children services board is created pursuant to R.C. 5153.07, and is a county board to which the provisions of R.C. 305.14 and R.C. 309.09 apply. 1986 Op. Att'y Gen. No. 86-036 at 2-189; 1963 Op. Att'y Gen. No. 18, p. 94, at 97 (pursuant to R.C. 309.09, the prosecuting attorney is the proper party to represent a child welfare board in an action to compel a board of education to make a payment required by R.C. 5127.04 (since repealed)); 1959 Op. Att'y Gen. No. 172, p. 85 (syllabus, paragraph three) ("[u]nder the provision of Section 309.09, Revised Code, the prosecuting attorney is required to act as legal counsel for the county child welfare board").² Pursuant to R.C. 309.09(A), therefore, the prosecuting attorney is legal adviser to the county children services board and the officers thereof. However, an attorney other than the prosecuting attorney may be employed as counsel to the children services board, or the board's executive secretary, but only in accordance with the specific procedures set forth in R.C. 305.14(A). Op. No. 86-036 at 2-189; 1968 Op. Att'y Gen. No. 68-036 (the prosecuting attorney is required to represent the executive secretary of the child welfare board, except as provided in R.C. 305.14). See R.C. 5153.10 (designation of an executive officer as "executive secretary" of the county children services board).

With regard to the present matter, you have informed a member of my staff that neither yourself nor the board of county commissioners submitted an application to the court of common pleas requesting approval to hire legal counsel to represent the children services board's executive secretary during the special prosecutor's criminal investigation. Rather, the board's president, with the board's concurrence, advised the executive secretary to retain the services of a private attorney, and did not further consult with you or the board of county commissioners regarding such hiring. The children services board now wishes to know whether it may reimburse its executive secretary the fees he paid his private attorney.

In 1988 Op. Att'y Gen. No. 88-055 I had occasion to review and discuss the procedures set forth in R.C. 305.14 and R.C. 309.09 for hiring, and paying at the

¹ In *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981), however, the court stated that the failure of the prosecuting attorney to join in such an application when he is confronted with a potential conflict of interest as a result of having to bring a lawsuit against a county board or officer does not deprive the court of common pleas of jurisdiction to enter an order authorizing the board of county commissioners to hire other legal counsel for the affected board or officer. *Accord State ex rel. Jefferson County Children Services Board v. Hallock*, 28 Ohio St. 3d 179, 181-82, 502 N.E.2d 1036, 1038-39 (1986); 1986 Op. Att'y Gen. No. 86-036.

² In 1969-1970 Ohio Laws, Part I, 72 (Am. S.B. 49, eff. Aug. 13, 1969) the General Assembly amended the provisions of R.C. Chapter 5153 for the purpose, *inter alia*, of redesignating the county child welfare board as the county children services board.

county's expense, private legal counsel to represent a county officer. In that opinion I was asked whether a board of county commissioners could reimburse a judge of the court of common pleas the legal fees he incurred as a defendant in two separate legal proceedings. The judge did not request representation by the prosecuting attorney in either of those actions, and did not ask the prosecuting attorney or the board of county commissioners to retain private counsel to represent him. Instead, the individual in question hired a private attorney and subsequently requested reimbursement from the board of county commissioners for the legal fees and expenses he thus incurred. I concluded that neither R.C. 305.14 nor R.C. 309.09 could be construed to permit reimbursement to a county officer who retains private legal counsel without the participation of the prosecuting attorney and the board of county commissioners. In reaching that conclusion I noted that both R.C. 305.14 and R.C. 309.09 use the word "employ" with respect to legal counsel that is retained by the board of county commissioners to represent a county board or county officer, and that the dictionary definition of that word "suggests present or prospective action." Op. No. 88-055 at 2-253. The word "reimburse," on the other hand, commonly means to pay back money that has been spent or to repay or compensate a person for expenses or losses already incurred. I further noted that the General Assembly "has often used the words 'reimburse' or 'reimbursement' to express its intention that moneys previously advanced may be repaid," and proceeded to enumerate several examples of provisions within R.C. Title 3 (counties) where the General Assembly has explicitly used those two terms in connection with particular financial matters and transactions. *Id.* at 2-253. Thus,

[h]ad the General Assembly intended to allow a county officer to hire his own attorney without the approval or prior consent of the prosecuting attorney, board of county commissioners, or the court of common pleas, and then seek *reimbursement* of those fees at the conclusion of a lawsuit, the General Assembly would not have had any difficulty in expressing that intention having used the word "reimburse" freely elsewhere in R.C. Title 3. (Emphasis in original.)

Id. I also observed that to permit reimbursement of legal fees when the board of county commissioners had not given prior approval to a county officer to hire private legal counsel would effectively "defeat the cost-controlling procedure established in R.C. 305.17 under which the board of county commissioners is to 'fix the compensation of all persons appointed or employed under [R.C. 305.13-.16].'" Op. No. 88-055 at 2-254. I concluded, therefore, that because R.C. 305.14 and R.C. 309.09 authorize only the "employment" of legal counsel, the General Assembly did not intend to authorize the reimbursement of county officers who have, on their own initiative, employed private legal counsel.

Similarly, in this instance I conclude that the county children services board may not reimburse its executive secretary the fees he paid his legal counsel because such action is not authorized by the terms of R.C. 305.14(A) and R.C. 309.09(A). According to the information you have provided to me, the executive secretary retained private legal counsel upon the recommendation of the board's president and other board members, but did not make a formal request of you and the board of county commissioners that private counsel be hired at county expense to represent him during the special prosecutor's criminal investigation. Consequently, no application was filed with the court of common pleas, as required by R.C. 305.14(A), for an order authorizing the board of county commissioners to hire and pay such legal counsel. Absent such an order, neither the board of county commissioners nor the county children services board may assume the responsibility of paying such counsel's fees, whether directly, or by way of reimbursement to the executive secretary.

In reaching this conclusion I wish to emphasize that I am not expressing the opinion that the situation here presented is one in which the prosecuting attorney and the board of county commissioners should have filed an application pursuant to R.C. 305.14(A) for authorization to hire private legal counsel to represent the executive secretary, or that the court of common pleas would have approved such application had it been properly submitted to the court. As the language of R.C. 305.14(A) makes clear, the decision of a prosecuting attorney and a board of county

commissioners to file an application for authorization to hire private legal counsel to defend a county officer depends, *inter alia*, upon the extent to which the action or proceeding is one in which the officer "is a party or has an interest, in [his] official capacity." (Emphasis added.) In 1985 Op. Att'y Gen. No. 85-014 I had occasion to discuss this aspect of R.C. 305.14(A) within the context of the prosecuting attorney's responsibility under R.C. 309.09(A) to provide legal advice or representation to all county officers, and to review the type of examination that must ensue in that regard:

The standard for determining whether a county officer is entitled to representation [under R.C. 305.14(A)] in a particular instance is whether he has an involvement in his official capacity.... State ex rel. Corrigan v. Seminatore, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981),...supports the proposition that a prosecuting attorney has a duty to provide representation to a county officer whenever that officer, in his official capacity, requires legal representation. See generally Board of Education ex rel. Bettman v. Board of Education, 17 Ohio N.P. (n.s.) 439 (C.P. Hamilton County 1914), *aff'd*, 4 Ohio App. 165 (Hamilton County 1915) (public officers acting in good faith to carry out official duties are entitled to have legal representation provided at public expense).

In determining when a prosecuting attorney has a duty to represent a county officer, my predecessors have applied essentially the same standard as that applied in the Seminatore case—that the duty exists whenever the facts and circumstances show that the officer has engaged in a well-intended attempt to perform his official duties. See, 1980 Op. Att'y Gen. No. 80-076; 1977 Op. Att'y Gen. No. 77-039; 1954 Op. Att'y Gen. No. 4567, p. 570; 1933 Op. Att'y Gen. No. 1750, vol. II, p. 1603; 1912 Op. Att'y Gen. No. 40, vol. II, p. 1107. See generally 1972 Op. Att'y Gen. No. 72-076 (clarified and amplified by 1973 Op. Att'y Gen. No. 73-029). It has, thus, been recognized that the prosecuting attorney's duty to provide representation in a particular instance is conditioned upon his making the appropriate findings:

It cannot be said, therefore, that there is ever found, in a case of this sort [a civil action against the county coroner], a duty to defend as we normally understand that term. It would be more appropriate to say that the prosecuting attorney in such a case is under a duty to make a careful evaluation of such facts and circumstances and is then authorized to defend the officer concerned if such evaluation indicates that there is involved a well intentioned attempt to perform an official duty on the part of the defendant.

1954 Op. No. 4567 at 574 (emphasis in original). The decision as to whether to provide representation in a particular instance may be a difficult one, see Op. No. 77-039, depending upon the facts involved. Further, 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. See Op. No. 80-076. See generally Op. No. 72-076; 1971 Op. Att'y Gen. No. 71-080. Thus, the determination as to whether to provide representation in a particular instance must be made by the county prosecutor, in light of all the circumstances, rather than by this office.

Op. No. 85-014 at 2-56 and 2-57 (footnote omitted).

Thus, a county officer is entitled to legal representation at county expense, under R.C. 305.14(A) or R.C. 309.09(A), 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. See, e.g., 1980 Op. Att'y Gen. No. 80-076 (overruled, in part, on other grounds in Op. No. 88-055) at 2-301 ("[i]t is probable that the legislature, in using the terms 'officer' and 'board,' meant for [R.C. 309.09] to apply only to situations which arose with regard to, or as a result of, the official duties of such officer or board"); 1933 Op. Att'y Gen. No. 1750, vol. II, p. 1603 (syllabus) (it is the duty of a prosecuting attorney to defend a county sheriff and deputy sheriff in actions brought against them for damages for false arrest if the facts and circumstances on which the actions are based show that the suits arise out of a well intended attempt on the part of such sheriff and deputy sheriff to perform duties attending their official positions); 1912 Op. Att'y Gen. No. 40, vol. II, p. 1107, at 1108 ("whenever the circumstances would indicate to the prosecutor...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"). Moreover, the foregoing test for determining whether a county officer's conduct has occurred in an official capacity applies in any action or proceeding in which the officer is a party, whether civil or criminal. Op. No. 80-076 at 2-302 and 2-303 ("R.C. 309.09, which sets forth the duty of the prosecutor to represent county officers and boards, does not limit this duty to civil actions only; rather, the language of R.C. 309.09 provides in part that the prosecutor 'shall prosecute and defend all suits and actions' (emphasis added). A recent opinion has concluded that the authority to defend an accused officer is the same whether the alleged violation is civil or criminal. 1971 Op. Att'y Gen. No. 71-080").³ Finally, the determination of whether the county officer's conduct has occurred in conjunction with the good faith performance of official duties or responsibilities requires close consideration of the specific factual circumstances of such conduct. See, e.g., 1977 Op. Att'y Gen. No. 77-039 at 2-139 ("[t]he decision which confronts the prosecutor...in [a case where a county officer is accused of the wrongful use of official powers] 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"). Only if such examination discloses a reasonable basis for concluding that the conduct in question did, in fact, occur in conjunction with a good faith, well-intended attempt to carry out official duties or responsibilities may one further conclude that such officer is entitled to legal representation at county expense, pursuant to either R.C. 309.09(A) or R.C. 305.14(A).

Based upon the foregoing, it is my opinion, and you are advised that neither a board of county commissioners nor a county children services board may pay,

³ It is, of course, true that "Public money may be used only for public purposes", *Kohler v. Powell*, 115 Ohio St. 418, 425 (1926), and it may be argued that the defense of a criminal charge brought against a public officer is always a purely private affair. This view seems to have been prevalent some years ago. See *Lunkenheimer v. Hewitt*, 10 Ohio Dec. Reprint 798, 23 W.L.B. 433 (1890); Annotation, 130 A.L.R. 736, 739-740; 42 Am. Jur. 765-766; 43 Am. Jur. 100. However, these same citations indicate that the climate has changed and that the expenditure of public funds in defense of a public officer is justified if his superiors are convinced that the alleged act was committed in the course of good faith performances of official duties. Recent Supreme Court decisions have indicated a broadening of the concept of "public purpose." See *State ex rel. v. Rich*, 159 Ohio St. 13, 26-27 (1953). The solicitor's duty with respect to the defense of the accused officers is, therefore, the same, whether the alleged violation be civil or criminal. (The situation would, of course, be entirely different if the solicitor were required to prosecute the charge.)

1971 Op. Att'y Gen. No. 71-080 at 2-275. See also 1977 Op. Att'y Gen. No. 77-039 at 2-139 and 2-140.

directly or by way of reimbursement, legal fees incurred by the county children services board's executive secretary in retaining the services of private legal counsel when such counsel has been hired other than in accordance with the specific terms and procedures set forth in R.C. 305.14(A) and R.C. 309.09(A). (1988 Op. Att'y Gen. No. 88-055, followed.)