

OPINION NO. 86-036

Syllabus:

1. A board of county commissioners may not assign legal counsel it has hired pursuant to R.C. 309.09(B) to act as the legal representative of the county children services board or any other county officer or board other than the board of county commissioners.
2. A board of county commissioners may hire legal counsel other than the county prosecuting attorney to represent the county children services board only where the court of common pleas has approved a joint application submitted by the board of county commissioners and the county prosecuting attorney pursuant to R.C. 305.14.
3. Where the duty of the county prosecuting attorney to represent a county officer or board and his duty to prosecute alleged wrongdoing subject the county prosecuting attorney to a conflict of interest, the failure of the county prosecuting attorney to submit an application to the court of common pleas pursuant to R.C. 305.14 for the employment of other legal counsel to represent such officer or board will not deprive the court of common pleas of jurisdiction to authorize the board of county commissioners to employ other legal counsel when the court deems that such employment is in the best interests of the county.

To: Stephen M. Stern, Jefferson County Prosecuting Attorney, Steubenville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 28, 1986

I have before me your request for my opinion concerning the authority of the board of county commissioners to obtain legal assistance other than that provided by the county prosecutor. Specifically, you have asked whether a board of county commissioners has the authority under R.C. 309.09(B) "to hire an attorney to represent the board and then assign said attorney out to another county board or agency, and to further require that board or agency to pay the amounts charged by the attorney by deduction of that board or agency's budget?"

Before I may respond to your precise questions, I must examine the statutory scheme governing the provision of legal assistance for the board of county commissioners and other county boards and officers.

Pursuant to R.C. 309.09, the prosecuting attorney is legal counsel for the board of county commissioners and all other county officers and boards. This section states in 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.)

The exception provided for in R.C. 309.09(A), R.C. 305.14, states:

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.

The board of county commissioners may also employ legal counsel, as provided in section 309.09 of the Revised Code, to represent it in any matter of public business coming before such board, and in the prosecution or defense of any action or proceeding in which such board is a party or has an interest, in its official capacity. (Emphasis added.)

Pursuant to R.C. 309.09(B), a board of county commissioners may employ an attorney other than the prosecuting attorney without court approval as is required by the method for hiring legal counsel set forth in the first paragraph of R.C. 305.14. An attorney who is employed pursuant to R.C. 309.09(B) is limited, however, to representing and advising only the board of county commissioners. See 1983 Op. Att'y Gen. No. 83-078.

Thus, the first procedure set forth above, whereby a board of county commissioners may employ legal counsel, is established in R.C. 305.14 and requires that a joint application from the board of county commissioners and the prosecuting attorney be approved by the court of common pleas before the board of county commissioners may employ legal counsel other than the prosecuting attorney to assist the board or any other county officer. See State ex rel. Corrigan v. Seminatore, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981)(syllabus, paragraph one) ("[a]pplication by both the prosecuting attorney and the board of county commissioners is a prerequisite to authorization by a court of common pleas pursuant to R.C. 305.14 of appointment of other counsel to represent a county officer"); 1980 Op. Att'y Gen. No. 80-076 at 2-304 (concluding that "[t]he language of R.C. 305.14 states that the court may authorize the employment of private legal counsel 'upon the application' of the prosecuting attorney and the board of commissioners"); 1977 Op. Att'y Gen. No. 77-039 at 2-140 (stating that "[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"). The second procedure whereby a board of county commissioners may obtain legal counsel is contained in R.C. 309.09(B), which provides that a board of county commissioners may employ an attorney other than the prosecuting attorney without the participation of the prosecuting attorney or the approval of the court of common pleas, but that such attorney may advise or represent only the board of county commissioners. See Op. No. 83-078 at 2-318 n. 1.

Your first concern is whether a board of county commissioners has the authority to employ legal counsel, without approval of the court of common pleas, to represent the board of county commissioners and then assign the attorney to

act as the legal representative of the county children services board. You have informed me that the board of county commissioners involved employed an attorney to represent the board, as provided for in 309.09(B), and subsequently assigned the attorney to act as the legal representative of the Jefferson County Children Services Board without seeking the approval of the court of common pleas.

As set forth above, R.C. 309.09(B) authorizes a board of county commissioners to hire legal counsel other than the prosecuting attorney without obtaining the approval of the court of common pleas, but only to advise or represent the board itself. See Op. No. 83-078. Thus, since the board of county commissioners has hired legal counsel pursuant to R.C. 309.09(B), the board is without authority to assign such counsel to advise or represent any county board or officer, other than the board of county commissioners.

I note that 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. See 1968 Op. Att'y Gen. No. 68-036 (the county prosecuting attorney is required to represent the executive secretary of the county child welfare board, except as provided in R.C. 305.14); 1963 Op. Att'y Gen. No. 18, p. 94 (the county prosecuting attorney is the legal adviser of a child welfare board); 1959 Op. Att'y Gen. No. 172, p. 85 (syllabus, paragraph three)(stating that "[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").¹ Thus, pursuant to R.C. 309.09, the county prosecuting attorney is the legal adviser for a county children services board. The only instance in which an attorney other than the prosecuting attorney may be employed as counsel to the children services board is pursuant to R.C. 305.14.

You have indicated that you have not submitted an application with the board of county commissioners to the court of common pleas for approval of the employment of other legal counsel for the county children services board. It is clear from the foregoing that before other legal counsel may be employed to represent the county children services board, an application must be submitted to the court of common pleas by both the board of county commissioners and the county prosecutor. Therefore, although R.C. 309.09(B) permits the board of county commissioners, without action by the prosecuting attorney or approval of the court of common pleas, to hire an attorney to advise and represent the board of county commissioners, the board may not assign such attorney to act as the legal representative of the county children services board. Such action would be a clear circumvention of R.C. 305.14. See City of Parma Heights v. Schroeder, 26 Ohio Op. 2d 119, 122, 196 N.E.2d 813, 816 (C.P. Cuyahoga County 1963)("one cannot do indirectly what he cannot lawfully do directly"). Counsel other than the prosecuting attorney may be obtained for the county children services board only pursuant to R.C. 305.14.

I note, however, that pursuant to a telephone conversation you had with a member of my staff, you have also expressed

¹ In 1969-1970 Ohio Laws, Part I, 72 (Am. S.B. 49, eff. Aug. 13, 1969), the legislature changed the name of the county child welfare board to the county children services board.

concern that as the legal representative of the county children services board, you may be confronted with a conflict of interest. You have informed me that the county children services board is undergoing an investigation involving possible criminal violations. The potential conflict would arise if, as the county prosecutor, you were called upon to prosecute alleged criminal violations involving the county children services board pursuant to R.C. 309.08 and at the same time you were required to represent the county children services board pursuant to R.C. 309.09. You have indicated that as a result of this possible conflict of interest the board of county commissioners has submitted an application to the court of common pleas requesting the court to authorize the employment of other legal counsel to represent the county children services board pursuant to R.C. 305.14. You have also indicated that you did not, nor do you intend, to join in such application to the court. See generally Op. No. 77-039 (prosecuting attorney should evaluate whether a public official made a well-intentioned attempt to perform his official duties before petitioning the court of common pleas under R.C. 305.14 to have legal counsel appointed to defend such public official, even where the prosecutor is prosecuting an action against the public official); 1955 Op. Att'y Gen. No. 5666, p. 366 (concluding that the prosecuting attorney does not have a mandatory duty to submit an application to the court of common pleas for other legal assistance).

In State ex rel. Corrigan v. Seminatore, the Supreme Court of Ohio was faced with a situation where "the prosecuting attorney not only failed to make the application [to the court of common pleas] but vigorously opposed appointment of other counsel, although admitting a conflict of interest exists." 66 Ohio St. 2d at 465-66, 423 N.E.2d at 110. The court stated that:

Where the prosecuting attorney brings an action against [a] county board or officer in his official capacity, it is ordinarily in the best interests of the county that separate, independent counsel be appointed to defend such county officer or board in order to assure that there be no conflict of interests and that the county receive proper representation on both sides of the issue involved.

66 Ohio St. 2d at 465, 423 N.E.2d at 110. The court went on to conclude that R.C. 305.14 does not "[confer] upon the prosecuting attorney the power to defeat the jurisdiction otherwise vested in the common pleas court to authorize appointment of counsel." Id. Therefore, the failure of the prosecuting attorney to submit an application to the court of common pleas for other legal counsel pursuant to R.C. 305.14 will not deprive the court of common pleas from approving the employment of other legal counsel when the court deems that such employment is in the best interest of the county. Consequently, if there appears to be a conflict of interest between the county prosecutor's duty to represent the county children services board and his duty to prosecute certain criminal violations, then other legal counsel may be employed to represent said board pursuant to R.C. 305.14, even though the prosecuting attorney does not join the county commissioners in submitting an application to the court of common pleas pursuant to that section. However, I note 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." Op. No. 77-039 at 2-141. See also State ex rel. Corrigan v. Seminatore; 1955 Op. No. 5666.

The last part of your question concerns whether the board of county commissioners may require that a county board pay, from its budget, the fees for an attorney whom the board of county commissioners has employed in the manner set forth in R.C. 309.09(B) and subsequently assigned to act as a legal representative of said county board. In light of my answer to the first part of your question, it is unnecessary for me to address this issue.

It is, therefore, my opinion, and you are hereby advised, that:

1. A board of county commissioners may not assign legal counsel it has hired pursuant to R.C. 309.09(B) to act as the legal representative of the county children services board or any other county officer or board other than the board of county commissioners.
2. A board of county commissioners may hire legal counsel other than the county prosecuting attorney to represent the county children services board only where the court of common pleas has approved a joint application submitted by the board of county commissioners and the county prosecuting attorney pursuant to R.C. 305.14.
3. Where the duty of the county prosecuting attorney to represent a county officer or board and his duty to prosecute alleged wrongdoing subject the county prosecuting attorney to a conflict of interest, the failure of the county prosecuting attorney to submit an application to the court of common pleas pursuant to R.C. 305.14 for the employment of other legal counsel to represent such officer or board will not deprive the court of common pleas of jurisdiction to authorize the board of county commissioners to employ other legal counsel when the court deems that such employment is in the best interests of the county.