

OPINION NO. 2000-008**Syllabus:**

1. A prosecuting attorney has no duty or authority to act as legal adviser or to provide written opinions to a private entity with whom a county officer or entity transacts business.
2. In the absence of a statutory requirement that the prosecuting attorney render to a county officer or entity particular services with respect to a particular type of transaction, the nature and extent of advice the prosecuting attorney includes in written opinions or instructions under R.C. 309.09(A) regarding matters connected with the official duties of the officer or entity is a matter within the prosecuting attorney's discretion.

To: William A. Bish, Williams County Prosecuting Attorney, Bryan, Ohio
By: Betty D. Montgomery, Attorney General, February 14, 2000

You have asked several questions regarding your duties as legal adviser for various county entities. You state that, on occasion, a county entity that is transacting business with a private entity will furnish your office with documents which "are part of a loan arrangement, or installment sale, or lease arrangement. Customarily, the Prosecutor reviews these documents for the purpose of general advice to the governmental entity as well as approving the documents 'as to form.'"¹ In connection with these transactions, the private lender, seller, or lessor may request that the governmental entity furnish an "opinion of counsel" as to various matters. You state that the requested opinions may concern such matters as whether the governmental entity legally exists under state law as a public, corporate body, whether the transaction has been duly authorized, executed, and delivered by the governmental entity, whether the transaction documents constitute a valid obligation of the governmental entity, enforceable in accordance with its terms, or whether the obligation is tax exempt and the interest paid by the governmental entity is non-taxable for federal income tax purposes.

With respect to these opinion letters you specifically ask:

1. Is the prosecuting attorney required to furnish such an opinion to the third party?

¹We will assume for purposes of discussion that the opinions you have been asked to provide are sought by county entities in connection with transactions that the entities are authorized by statute to undertake.

2. Is the prosecuting attorney authorized to furnish such an opinion to a third party?
3. What is the liability of the prosecuting attorney to the third party for errors in the opinion?

In order to address your questions, we must first examine the powers and duties of the prosecuting attorney. It is well established that, “[a] prosecuting attorney is a county officer whose election is provided for and whose duties are prescribed by statute.” *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 331, 29 N.E.2d 959, 960 (1940). Thus, whether a prosecuting attorney may or must provide advice to a third party that contemplates the transaction of business with a county entity depends upon whether such power or duty has been conferred by statute upon the prosecuting attorney.

The general powers and duties of the county prosecuting attorney are set forth in R.C. 309.08(A), which, among other things, authorizes the prosecuting attorney to “inquire into the commission of crimes within the county” and requires the prosecuting attorney to prosecute various complaints, suits, and controversies. Additional duties have been imposed upon the county prosecuting attorney with respect to various other matters. *See, e.g.*, R.C. 309.11 (stating in part: “The prosecuting attorney shall prepare, in legal form, the official bonds for all county officers, and shall see that the acceptance of such bonds by the proper authorities, the signing thereof, and all the indorsements thereon, are in conformity to law, and that they are deposited with the proper officer”); R.C. 927.73(B) (requiring county prosecuting attorney, upon request of the Director of Agriculture, to assist in “any investigation, prosecution, hearing, or trial had under [R.C. 927.51-.73 (regulation of nursery stock and nurserymen)], and [to] institute and prosecute such actions or proceedings for the enforcement of such sections and the punishment of all violations thereof as the director may request”).

The prosecuting attorney’s duties with regard to serving as legal adviser for county officers and entities are set forth primarily in R.C. 309.09(A), which states in pertinent part:

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 the prosecuting attorney in matters connected with their official duties*. The prosecuting attorney 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 [R.C. 305.14].² (Emphasis and footnote added.)

R.C. 309.09(A) thus requires the prosecuting attorney to act as legal adviser for the board of county commissioners, the board of elections, and all other county officers and boards, including all tax-supported public libraries.

²R.C. 305.14(A) provides a procedure whereby a court of common pleas, upon application by the board of county commissioners and the prosecuting attorney, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any county officer in various matters. R.C. 305.14(B) authorizes the board of county commissioners to employ legal counsel to represent it as provided in R.C. 309.09(C). R.C. 305.14(C) provides for the employment of legal counsel by county boards of mental retardation and developmental disabilities.

In addition, the General Assembly has provided separately for the prosecuting attorney to act as legal adviser of various other entities. *See, e.g.*, R.C. 309.09(B) (county prosecuting attorney's duties with respect to township officers, boards, and commissions); R.C. 3313.35 (stating in part, "[e]xcept in city, joint vocational, and cooperative education school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education and the governing board of an educational service center in the county in which the prosecuting attorney is serving"); R.C. 3709.33 (stating in part, "[i]n general health districts the prosecuting attorney of the county constituting all or a major part of such district shall act as the legal adviser of the board of health"). No statute of which we are aware, however, compels or authorizes the prosecuting attorney to act as legal adviser to a private entity with whom a county officer or entity transacts business. *See, e.g.*, 1989 Op. Att'y Gen. No. 89-074 at 2-339 ("a county prosecutor is under no duty to advise a non-profit corporation"); 1984 Op. Att'y Gen. No. 84-099 (syllabus) ("[a] prosecuting attorney has no statutory duty or authority to serve as legal adviser of a private industry council established for a service delivery area under the Federal Job Training Partnership Act, 29 U.S.C. § 1501-1781"); 1915 Op. Att'y Gen. No. 700, vol. II, p. 1459 (syllabus) (stating in part, "[t]he prosecuting attorney of a county is neither authorized nor required to act as the legal adviser of the directors of the agricultural society of such county and cannot accept employment from said directors"). We conclude, therefore, that the prosecuting attorney has no duty or authority to act as legal adviser to a private entity with whom a county officer or entity transacts business.

In order to fully address your concerns, however, we must examine more closely the prosecuting attorney's duties with respect to acting as legal adviser to county officers and entities as required by R.C. 309.09(A). The nature of the duties of a legal adviser are not defined by statute and do not appear to have precise boundaries.

In 1930 Op. Att'y Gen. No. 1814, vol. I, p. 679, at 680, the Attorney General was asked whether a prosecuting attorney's duties as legal adviser to a board of township trustees included "the drawing of necessary legal papers, such as contracts and the like, which may be necessary to have drawn in connection with the performing of the public duties of said township officers." In answering this question, the Attorney General considered the nature of "legal advice" and those things that constitute obligations of a "legal adviser," as follows:

Just what is included within the term "legal advice" is not fixed by statute, nor is the statute definite as to just what services of a prosecuting attorney township officers are entitled to in connection with the transaction of the public business of the township

The statute seems to contemplate providing for the township trustees a person to perform any and all legal services that such trustees may need to have performed, and I believe the drawing of legal papers such as contracts, leases and deeds and the like, are as much legal services as the giving of legal advice, and am therefore of the opinion that if the township trustees require the prosecuting attorney to prepare a lease for the leasing of a portion of the township hall not needed for township purposes, it becomes the duty of the prosecuting attorney to prepare such lease as a part of his official duties for which his salary is fixed, and that he cannot be paid any other or further compensation from the township treasury for the performing of those services.

...

The limits of what is included within the term ["legal adviser"] have never been fixed by the courts of Ohio nor has the term been positively defined by this office. In [1929 Op. Att'y Gen. No. 297, vol. I, p. 459], it was held to include the duty to prepare legislation for the construction of a township road. In common everyday usage, the term "legal adviser" is used as being practically synonymous with "attorney", and I am of the opinion that the Legislature meant by the use of the term in [G.C. 2917 (now R.C. 309.09)], wherein it provided that the Prosecuting Attorney should be the legal adviser for all township officers, to use the term as it is generally understood, that is, to mean that the Prosecuting Attorney should act for the township trustees in the capacity of an attorney with respect to all matters where the trustees needed an attorney, whether to advise them, prepare legal documents for them, or to conduct litigation.

1930 Op. Att'y Gen. No. 1814, vol. I, p. 679, at 681-82.

Although the precise duties required of the prosecuting attorney when acting in the capacity of "legal adviser" to county officers and entities are not expressly enumerated, R.C. 309.09(A) specifically provides that those clients for whom the prosecuting attorney serves as legal adviser under R.C. 309.09(A) "may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties." R.C. 309.09(A). The prosecuting attorney's duties as legal adviser to county officers and entities, therefore, clearly include the duty to provide such clients with written opinions "in matters connected with their official duties." Thus, even though the prosecuting attorney has no duty or authority to legally advise or provide written opinions to third parties with whom county officers or entities transact business, R.C. 309.09(A) requires the prosecuting attorney to provide written opinions or instructions to the county officers or entities themselves "in matters connected with their official duties."

Your questions include examples of the types of information that you have been requested to provide in written opinions. Assuming, for purposes of discussion, that the opinions you describe are being provided by way of advice to the county officers or entities as part of your duties as their legal adviser under R.C. 309.09(A), we note that the nature of the advice to be included in such advisory opinions is not generally dictated by statute or by case law.

There are certain statutes, however, that require specific actions of the prosecuting attorney with regard to particular types of transactions to which county entities are parties. *See, e.g.*, R.C. 153.44 ("[b]efore work is done or material furnished, all contracts that exceed one thousand dollars in amount shall be submitted by the board of county commissioners to the prosecuting attorney of the county. If found by him to be in accordance with [R.C. 153.01-.60 (public works)], and *his certificate to that effect is indorsed thereon, such contracts shall have full effect, otherwise they shall be void*" (emphasis added));³ R.C. 309.11 (stating

³*See generally Fornoff v. Nash*, 23 Ohio St. 335, 337-38 (1872) ("it is manifestly the duty of the prosecuting attorney, on the submission of the contract to him, to investigate and ascertain whether it is in accordance with the provisions of the act. If he finds that it is, he is bound to indorse thereon his certificate to that effect If he refuses to make the certificate, the ground of such refusal is peculiarly within his own knowledge, and can only be known to the parties to the extent he may see proper to disclose"); 1954 Op. Att'y Gen. No. 3743, p.

in part, “[t]he prosecuting attorney shall prepare, in legal form, the official bonds for all county officers, and shall see that the acceptance of such bonds by the proper authorities, the signing thereof, and all the indorsements thereon, are in conformity to law, and that they are deposited with the proper officer. No bond shall be accepted or approved for any county officer by the person or tribunal authorized to approve it, until the prosecuting attorney has inspected it, and certified thereon that such bond is sufficient” (emphasis added)); R.C. 5126.032(B) (“[t]he prosecuting attorney, at the request of the board [of mental retardation and developmental disabilities], shall prepare a legal review of any direct services contract that has been recommended, or recommended with revisions, by the [ethics] council [appointed for the board]. The board shall enter into only those contracts submitted for review that are determined by the prosecuting attorney to be in compliance with state law” (emphasis added)); R.C. 5155.31 (when county leases closed county home or county nursing home, “[t]he form of any such lease shall be approved by the prosecuting attorney” (emphasis added)). Thus, in certain instances, the prosecuting attorney must, by statute, render to a county officer or entity particular services with respect to a particular transaction.

In the absence of such statutory mandates, however, the nature and extent of advice the prosecuting attorney renders to county officers and entities under R.C. 309.09(A) is a matter to be determined by the prosecuting attorney in a reasonable exercise of discretion.⁴ See *State ex rel. Hodges v. Taft*, 64 Ohio St. 3d 1, 8, 591 N.E.2d 1186, 1191 (1992) (although the Secretary of State “is required to advise the boards [of elections], the content of his advice is discretionary. Mandamus will not issue to govern how discretion is exercised”); 1998 Op. Att’y Gen. No. 98-005 at 2-31 (“[a]s the legal adviser designated by statute, the prosecuting attorney may provide reasonable and necessary legal counsel to the juvenile court judge or seek pursuant to R.C. 305.14 to have the court of common pleas authorize the employment of private counsel to assist the judge”). See also *Warren v. Bd. of County Comm’rs*, 1995 Ohio App. Lexis 2301 at *9 (Ct. App. Portage County June 2, 1995) (“[a] county prosecutor’s opinion is merely advisory in nature, however, and is not legally binding nor can it be given authority as precedent in a jurisdiction”). See generally *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918) (“[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty”). We conclude, therefore, that absent a specifically defined statutory duty with respect to a particular transaction, it is within the discretion of the prosecuting attorney to determine the extent and nature of advice that will be included in written opinions or instructions required by R.C. 309.09(A).

Because we have concluded that a prosecuting attorney has no duty or authority to provide legal opinions to third parties who transact business with county officers or entities, we need not address your final question concerning your potential liability to such third parties in the event of a mistake in such opinion.

207, at 212 (“[t]he provision in [R.C. 153.44] requiring all contracts exceeding one thousand dollars to be submitted to the Prosecuting Attorney for his approval, ‘otherwise they shall be void,’ was held to invest such officer with discretionary power in that particular, as distinguished from a mere ministerial duty. He is not only required to ascertain whether the contract awarded is in legal form, but he must also determine whether the necessary steps which precede the awarding of a contract have been taken”).

⁴See generally 1983 Op. Att’y Gen. No. 83-027 at 2-94 n.2 (“[m]y authority as Attorney General to provide legal advice to county prosecutors does not encompass matters involving the exercise of discretion”).

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A prosecuting attorney has no duty or authority to act as legal adviser or to provide written opinions to a private entity with whom a county officer or entity transacts business.
2. In the absence of a statutory requirement that the prosecuting attorney render to a county officer or entity particular services with respect to a particular type of transaction, the nature and extent of advice the prosecuting attorney includes in written opinions or instructions under R.C. 309.09(A) regarding matters connected with the official duties of the officer or entity is a matter within the prosecuting attorney's discretion.