

Note from the Attorney General's Office:

1985 Op. Att'y Gen. No. 85-071 was overruled in part by
2004 Op. Att'y Gen. No. 2004-032.

OPINION NO. 85-071**Syllabus:**

1. A county prosecuting attorney is not, under R.C. 309.09, legal adviser to a joint fire district organized pursuant to R.C. 505.37 and R.C. 505.371.
2. A county prosecuting attorney has a duty to act as legal adviser to a township trustee who serves as a representative to a board of fire district trustees on matters relating to the activities of the joint fire district which arise from such individual's position as township trustee.

3. The board of fire district trustees of a joint fire district may employ such legal counsel as is necessary for the performance of its functions.

To: Jeffrey M. Welbaum, Miami County Prosecuting Attorney, Troy, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 29, 1985

You have requested an opinion on the question whether a county prosecuting attorney is, under R.C. 309.09, the legal adviser of a joint fire district organized under R.C. 505.37 and R.C. 505.371.

R.C. 309.09 sets forth the duty of the county prosecuting attorney to act as legal adviser of various officers and boards. It states, in part:

(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.

Such prosecuting attorney shall be the legal adviser for all township officers. (Emphasis added.)

Pursuant to R.C. 309.09, the prosecuting attorney is designated as legal adviser of county officers and boards and township officers. To answer your question, it is necessary to determine whether a joint fire district is a county board, and whether the members of the governing body of such a board are county or township officers, for purposes of R.C. 309.09.

R.C. 505.371 authorizes townships and municipal corporations to establish joint fire districts, as follows:

The boards of township trustees of one or more townships and the legislative authorities of any one or more municipal corporations within or adjoining such townships, or the boards of township trustees of two or more townships, may, by adoption of a joint resolution by a majority of the members of each board of township trustees and by a majority of the members of the legislative authority of each municipal corporation, create a joint fire district comprising the municipal corporations and all or any portions of the townships as are mutually agreed upon. A joint fire district so created shall be given a name different from the name of any participating township or municipal corporation.

The governing body of the joint fire district shall be a board of fire district trustees, which shall include one representative from each board of township trustees and one representative from the legislative authority of each municipal corporation in the district. The board of fire district trustees may exercise the same powers as are granted to a board of township trustees in sections 505.37 to 505.45, inclusive, of the Revised Code, including, but not limited to, the power to levy a tax upon all taxable property in the fire district, as provided in section 505.39 of the Revised Code. (Emphasis added.)

R.C. 505.37 authorizes the board of fire district trustees of a fire district created under R.C. 505.371 to purchase equipment and to construct or purchase buildings, to issue notes covering deferred payment for such equipment and buildings, and to purchase liability insurance for its officers, employees, and appointees.

It is clear that a joint fire district created pursuant to R.C. 505.371 constitutes a legal entity, separate and distinct both from the bodies which join in its creation and from the county or counties within which it is located. See 1981

Op. Att'y Gen. No. 81-027. The joint fire district must, by statute, be given a name different from that of any participating township or municipal corporation. It is governed by a board of fire district trustees, which includes representatives from the participating bodies and which has the power to issue notes and to levy a tax. R.C. 505.37; R.C. 505.371; see R.C. 5705.01(A), (C) (classifying a joint fire district as a "[s]ubdivision" and the board of fire district trustees as a "[t]axing authority" or "bond issuing authority" for purposes of R.C. Chapter 5705). In re Termeer, 52 Ohio Misc. 101, 103, 369 N.E.2d 819, 820 (C.P. Franklin County 1977), states expressly: "R.C. 505.371 provides for the board of trustees of the joint fire district to act as a separate legal entity."

The term "county board," as used in R.C. 309.09, is generally considered to be "limited to boards which are essentially a subdivision of a county or a subordinate department of the county." 1981 Op. Att'y Gen. No. 81-059 at 2-237. See, e.g., 1975 Op. Att'y Gen. No. 75-014; 1961 Op. Att'y Gen. No. 2383, p. 366. A joint fire district, as a separate legal entity created by participating townships and municipalities, is neither a subdivision nor a subordinate department of a county. See Op. No. 81-027; 1979 Op. Att'y Gen. No. 79-039 at 2-128 (concluding that the board of trustees of a joint ambulance district, created under statutes largely analogous to those governing a joint fire district, is not a county board for purposes of R.C. 309.09 on the basis that "[t]he county has absolutely no involvement in the organization, funding, or operation of the [joint ambulance] district and the functions of the board of trustees do not relate to county matters"). It follows that the county prosecutor has no duty under R.C. 309.09 to act as legal adviser to a joint fire district.

Even as a joint fire district is not a county board, it is clear that members of a board of fire district trustees are not county officers for purposes of R.C. 309.09. See Op. No. 81-059; Op. No. 79-039. There remains the question whether the members of a board of fire district trustees are township officers who are themselves entitled, under R.C. 309.09, to have the county prosecutor serve as their legal adviser. My predecessor considered a similar question in Op. No. 79-039, in connection with a joint ambulance district, and concluded that the prosecuting attorney had no duty to advise members of the governing board of that body. Op. No. 79-039 states, at 2-128:

The status of the [joint ambulance] district as a separate legal entity also indicates that its board members are not "township officers." The mere fact that some of its members are representatives from the townships involved is not a basis for classifying them as township officers.

. . . .
 . . . The members [of the board of trustees of a joint ambulance district] are not township trustees but rather are appointed by the township trustees and municipal legislative [authorities], and, although they are appointed to represent the township or municipality, their duties are performed for the ambulance district. They are not township officers and are, therefore, not entitled to be represented by the county prosecutors.

Both a joint ambulance district and a joint fire district are separate legal entities governed by a board consisting of representatives of participating political subdivisions. It may be stated as a general rule that any individual who represents a township on the governing board of such an entity is not, by virtue of holding such position, a township officer for purposes of R.C. 309.09. See Op. No. 81-059. See generally 1964 Op. Att'y Gen. No. 1297, p. 2-322.

Op. No. 79-039 did not, however, consider the situation in which an individual serves as a representative to the governing board of a joint district by virtue of the fact that he holds a particular office within the township. Pursuant to R.C. 505.371, the "governing body of the joint fire district shall be a board of fire district trustees, which shall include one representative from each board of township trustees and one representative from the legislative authority of each municipal corporation in the district." It has been concluded that this language requires that a board of fire district trustees include at least one township trustee

from each participating township. See 1979 Op. Att'y Gen. No. 79-082. Compare R.C. 505.371 (providing that the governing board of a joint fire district shall include one representative from each participating board of township trustees) with R.C. 505.71 (considered in Op. No. 79-039 and providing that the governing body of a joint ambulance district shall include "one representative appointed by each board of township trustees"). A township trustee is clearly a township officer for purposes of R.C. 309.09, see generally R.C. Chapter 505, and a township trustee who serves as a representative to a board of fire district trustees will, as township trustee, be entitled to the legal advice and representation of the county prosecutor with respect to any township duties that he may have, including township duties that relate to the activities of the joint fire district. See generally 1983 Op. Att'y Gen. No. 83-064; Op. No. 81-027. The duty of the county prosecutor to serve as legal adviser of township trustees who serve on a board of fire district trustees extends, however, only to matters arising from their positions as township trustees, and not to all matters before the joint fire district. See generally Op. No. 81-059.

I am aware that R.C. 505.371 permits the establishment of a joint fire district which is created only by boards of trustees of two or more townships and consists only of territory within those townships. See In re Termeer. If such a district is created, the board of fire district trustees shall include (and may consist solely of) trustees of those townships. See Op. No. 79-082. It might be argued that, under such circumstances, the trustees, as township officers, would be entitled to the legal advice and representation of the prosecuting attorney in all matters involving the district. A conclusion adopting a similar argument was reached in 1960 Op. Att'y Gen. No. 1234, p. 205, with respect to a joint township district hospital board formed, pursuant to R.C. 513.07, of the trustees of any two or more contiguous townships in a county. I do not, however, believe that the conclusion reached in 1960 Op. No. 1234 may appropriately be reached in this instance because of the statutory differences between a joint township district hospital board and a board of fire district trustees. R.C. 513.07 provides that "[t]he boards of township trustees of any two or more contiguous townships. . . may. . . form themselves into a joint township district hospital board." In contrast, R.C. 505.371 permits the legislative authorities of municipal corporations to join with boards of township trustees in the creation of a joint fire district, and allows persons other than township trustees to serve on a board of fire district trustees. See Op. No. 79-082. Further, a joint township district hospital board has as one of its basic duties the formation of a board of hospital governors, including representatives from participating townships, to erect and equip a hospital and control hospital operations, see R.C. 513.16-.17; members of the board of governors are considered to serve the district, rather than their respective townships, and are not entitled to legal representation of the county prosecuting attorney. See 1960 Op. No. 1234. See generally Op. No. 79-039. Like a board of hospital governors, a board of fire district trustees provides service primarily to the district as an entity, rather than to the participating political subdivisions. I find, therefore, that the governing board of a joint fire district is distinguishable from a joint township hospital board, and that, even if a particular board of fire district trustees is composed entirely of township trustees, the board is not, as such, entitled to have the county prosecutor serve as its legal adviser.

Apart from the limited involvement of the county prosecutor as legal adviser to township trustees who serve on a board of fire district trustees, in matters arising from their positions as township trustees, the Revised Code makes no express provision for a joint fire district to obtain legal advice. A board of fire district trustees is, however, vested with a number of powers which may, in their exercise, create a need for legal advice, as, for example, the power to own, lease, and maintain property, the power to employ firefighters, and the power to levy a tax. See R.C. 505.37; R.C. 505.371. It is a general rule that public officials have both such powers as are expressly conferred by statute and such powers as may be reasonably and necessarily inferred from the statutory powers. See State ex rel. Finley v. Lodwich, 137 Ohio St. 329, 29 N.E.2d 959 (1940). It follows that when a board of fire district trustees is in need of legal advice in order to carry out its statutory functions, it may employ legal counsel to provide such advice. See Op. No. 83-064 (concluding that a joint board of county commissioners created for the purpose of constructing and maintaining a multicounty detention and treatment

facility for the training and treatment of juveniles has implied authority to employ legal counsel); 1979 Op. Att'y Gen. No. 79-019 at 2-69 to 2-70) ("[a]s the General Assembly has not made provision for [legal representation for a multicounty felony] bureau, it must be presumed that such an organization is free to seek private representation. Payment for such representation must be made from the Bureau's own funds. . . . Since there is no legal obligation upon the prosecuting attorney to represent the Bureau, it would not be improper for the county prosecutor or his assistants to undertake such representation on a private basis, provided, of course, that such representation does not conflict with the duties imposed by statute upon the office of prosecuting attorney"); 1960 Op. No. 1234 at 210 ("the authority of the board of [hospital] governors to employ legal counsel would be necessarily implied from the duties imposed on the board to erect, furnish, and equip necessary buildings for a joint township general hospital, as the services of legal counsel would appear to be necessarily incident to such duties").

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

1. A county prosecuting attorney is not, under R.C. 309.09, legal adviser to a joint fire district organized pursuant to R.C. 505.37 and R.C. 505.371.
2. A county prosecuting attorney has a duty to act as legal adviser to a township trustee who serves as a representative to a board of fire district trustees on matters relating to the activities of the joint fire district which arise from such individual's position as township trustee.
3. The board of fire district trustees of a joint fire district may employ such legal counsel as is necessary for the performance of its functions.