

OPINION NO. 87-102

Syllabus:

1. R.C. 120.41, which provides for indemnification in the event of a malpractice claim, applies to "a state, county, or joint county public defender or assistant public defender" and does not apply to a nonprofit organization providing public defender services under contract pursuant to R.C. 120.14(F).
2. A contract made pursuant to R.C. 120.14(F), under which a nonprofit organization provides services that a county public defender is required or permitted to provide, is a contract with a political subdivision for purposes of R.C. Chapter 2744. (1979 Op. Att'y Gen. No. 79-084 questioned.)
3. When a contract made pursuant to R.C. 120.14(F) creates the relationship of independent contractor, then the defense and indemnification provisions of R.C. 2744.07 do not apply to the contracting nonprofit organization.
4. When a contract made pursuant to R.C. 120.14(F) creates an employment or agency relationship, then the defense and indemnification provisions of R.C. 2744.07 apply to the contracting nonprofit organization.

To: Randall M. Dana, State Public Defender, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1987

I have before me your request for an opinion concerning statutory indemnification provisions. You have asked the following question:

Does Ohio Revised Code Section 120.41, providing for indemnification in the event of a malpractice claim against a county public defender apply to contract county public defender offices established pursuant to Section 120.14(F) of the Ohio Revised Code?

Your question refers to contract county public defender offices established pursuant to R.C. 120.14(F). R.C. 120.14 governs counties that have county public defender commissions and provides that the commissions may obtain public defender services either by appointing a county public defender or by contracting with the State Public Defender or with one or more nonprofit organizations.¹ R.C. 120.14 states, in part:

(A)(1) Except as provided in division (A)(2) of this section, the county public defender commission shall appoint the county public defender and may remove him from office only for good cause.

(2) If a county public defender commission contracts with the state public defender or with one or more nonprofit organizations for the state public defender or the organizations to provide all of the services that the county public defender is required or permitted to provide by this chapter, the commission shall not appoint a county public defender.

....
(F) A county public defender commission, with the approval of the board of county commissioners regarding all provisions that pertain to the financing of defense counsel for indigent persons, may contract with the state public defender or with any nonprofit organization, the primary purpose of which is to provide legal representation to indigent persons, for the state public defender or the organization to provide all or any part of the services that a county public defender is required or permitted to provide by this chapter. A contract entered into pursuant to this division may provide for payment for the services provided on a per case, hourly, or fixed contract basis. The state public defender and any nonprofit organization that contracts with a county public defender commission pursuant to this division shall do all of the following:

- (1) Comply with all standards established by the rules of the Ohio public defender commission;
- (2) Comply with all standards established by the state public defender;
- (3) Comply with all statutory duties and other laws applicable to county public defenders. (Emphasis added.)

Your question is whether a nonprofit organization that contracts, pursuant to R.C. 120.14(F), to provide all or any part of the services that a county public defender is required or permitted to provide, is covered by statutory language providing for indemnification in the event of a malpractice claim. Your request references R.C. 120.41, which states:

In any malpractice action filed against a state, county, or joint county public defender or assistant public defender, the state, or the county or district in which the defender office is located, if the action

¹ Parallel provisions governing joint county public defender commissions appear in R.C. 120.24. You have not inquired about such commissions and I am not giving them separate consideration in this opinion. I note, however, that much of the analysis contained in this opinion is applicable also to joint county public defender commissions. But see note 2, infra.

is brought against a county or joint county public defender or assistant defender, shall, when the attorney has acted in good faith and in the scope of his employment, indemnify the attorney for any judgment awarded or amount negotiated in settlement, and for any court costs or legal fees incurred in defense of the claim. (Emphasis added.)

R.C. 120.41 states that it applies in the case of a malpractice action "filed against a state, county, or joint county public defender or assistant public defender." When a county public defender commission chooses to provide services by contracting with one or more nonprofit organizations, that county has no county public defender. R.C. 120.14(A)(2) states expressly that, in such circumstances, "the commission shall not appoint a county public defender." Even as there is no public defender in such a situation, there are no assistant public defenders. See R.C. 120.15(A)(4) (appointment by the county public defender of assistant county public defenders). The plain language of R.C. 120.41 thus does not encompass a situation in which public defender services are provided by a nonprofit organization pursuant to a contract under R.C. 120.14(F).

Attachments to your letter make specific reference to R.C. 120.14(F)(3), which requires a nonprofit organization contracting to provide services thereunder to "[c]omply with all statutory duties and other laws applicable to county public defenders." It is suggested that this language may be sufficient to bring the organization within the provisions of R.C. 120.41. I cannot accept that suggestion. The requirements of R.C. 120.14(F)(3), and of the related provisions of R.C. 120.14(F)(1) and (2), impose upon the contracting nonprofit organization the obligation to comply with standards, duties, and laws that apply to county public defenders. The evident legislative intent was to insure that defense services be provided in full compliance with the system established by law. The requirement that the contracting nonprofit organization comply with all statutory duties and other laws applicable to county public defenders imposes a duty upon the organization and establishes standards that it must meet in satisfying its contractual obligations. See generally Webster's New World Dictionary 291 (2d college ed. 1978) (defining "comply" as follows: "to act in accordance (with a request, order, rule, etc.)"). The requirement does not, however, bestow upon the nonprofit organization all benefits that county public defenders or their assistants may receive by virtue of their positions.

Your letter notes that, when R.C. 120.41 was enacted, all state and county public defenders were governmental employees, and that R.C. 120.14(F) was enacted subsequent to that time. See 1983-1984 Ohio Laws, Part I, 949, 956-57 (Am. Sub. S.B. 271, eff. Sept. 26, 1984) (enacting R.C. 120.14(F)); 1981-1982 Ohio Laws, Part II, 3460, 3498 (Am. Sub. H.B. 594, eff. Nov. 15, 1981) (enacting R.C. 120.41). The history of those provisions does not, however, justify the conclusion that R.C. 120.41 may be read to encompass nonprofit organizations that provide public defender services pursuant to contract under R.C. 120.14(F). The General Assembly, when it enacts legislation, must be presumed to have knowledge of statutory provisions then in existence. See generally Eggleston v. Harrison, 61 Ohio St. 397, 404, 55 N.E. 993, 996 (1900) ("[t]he presumption is that laws are passed with deliberation and with

knowledge of all existing ones on the subject. Therefore acts upon the same subject are to be construed as a whole with reference to an entire system of which all are parts"). Had the General Assembly wished to include under R.C. 120.41 nonprofit organizations that serve pursuant to contract under R.C. 120.14(F), it could easily have done so. It chose, instead, to retain in R.C. 120.41 the language "a state, county, or joint county public defender or assistant public defender," thereby excluding organizations or individuals who provide public defender services in other capacities or through other arrangements. See also R.C. 120.33 (county appointed counsel system).

I conclude, accordingly, that R.C. 120.41, which provides for indemnification in the event of a malpractice claim, applies to "a state, county, or joint county public defender or assistant public defender" and does not apply to a nonprofit organization providing public defender services under contract pursuant to R.C. 120.14(F). I note, however, that there are other indemnification provisions that should be considered in connection with your question.

R.C. 2744.07 states, in part:

(A)(1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision.

(2) Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities. (Emphasis added.)

R.C. 2744.07 thus requires a political subdivision to provide for the defense and indemnification of its employees in certain circumstances.

R.C. 2744.01(F) defines "political subdivision." for purposes of R.C. Chapter 2744, as follows:

"Political subdivision" or "subdivision" means a municipal corporation, township, county, school

district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes a county hospital commission appointed under section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, and regional councils of political subdivisions established pursuant to Chapter 167. of the Revised Code. (Emphasis added.)

This is a broad definition, as evidenced by the types of commissions and councils that are expressly included. The requirements for classification as a political subdivision are that an entity be a body corporate and politic and that it be responsible for governmental activities in a geographic area smaller than that of the state. R.C. 2744.01(F) specifically names as political subdivisions both entities that are designated by statute as bodies corporate and politic, see R.C. 4582.02 (stating that a port authority created pursuant to its provisions is a body corporate and politic); R.C. 4582.21(A) (for purposes of R.C. 4582.22-.59, "port authority" means a body corporate and politic created under R.C. 4582.22), and entities that are not so designated, see R.C. Chapter 167 (regional council of governments); R.C. 339.14 (county hospital commission); R.C. 713.21 (regional planning commission); R.C. 713.22 (county planning commission); R.C. 713.231 (joint planning council); R.C. 713.30 (interstate regional planning commission). Further, some of the entities designated as political subdivisions are not entirely independent in their operations. See, e.g., R.C. 339.14(B) and (F) (county hospital commission must have the consent of the board of county commissioners to accept certain conveyances or enter into certain agreements; the commission takes title to real estate in the name of the county); R.C. 713.22 (expenses of members of a county planning commission and compensation of employees of the commission are paid from appropriations made by the board of county commissioners). See generally Uricich v. Kolesar, 132 Ohio St. 115, 118, 5 N.E.2d 335, 337 (1936) ("[w]hat is a 'body politic'?...the phrase connotes simply a group or body of citizens organized for the purpose of exercising governmental functions. Such a group may be large or small, and it may be a group within a group"); Commissioners of the Canal Fund v. Perry, 5 Ohio 56 (1831) (finding that the commissioners of the canal fund acted as agents of the state and not as a corporate body with power to bring suit). See also 1983 Op. Att'y Gen. No. 83-021 (a regional planning commission is not a "subdivision," "taxing unit," or "district authority" for purposes of R.C. Chapter 5705).

It is clear that the provision of public defender services pursuant to R.C. Chapter 120 is a governmental activity. See, e.g., R.C. Chapter 120; R.C. 2744.01(C). It is, further, clear that such function is carried out under R.C. 120.14(F) by a political subdivision of the state. There may, however, be some question as to whether the county public defender commission itself constitutes a political subdivision for

purposes of R.C. Chapter 2744, or whether the county is the political subdivision with ultimate responsibility for a contract entered into under R.C. 120.14(F).

R.C. 120.14(F) indicates that the county public defender commission may itself enter into a contract to obtain public defender services, but that the board of county commissioners must approve all provisions that pertain to the financing of defense counsel for indigent persons. R.C. 120.14 authorizes the commission to make certain determinations, reports, and contracts without approval of the board of county commissioners, but does require county commissioner approval of the annual operating budget recommended by the commission. In 1979 Op. Att'y Gen. No. 79-084, it was concluded that county public defenders and members of a county public defender commission were county officers and that a board of county commissioners could not purchase liability insurance for them as it could for county employees, but that it could purchase malpractice or liability insurance covering the staff attorneys and other employees of the county public defender office. R.C. 307.441(H), enacted after the issuance of Op. No. 79-084, see 1979-1980 Ohio Laws, Part I, 1276, 1277 (Am. S.B. 397, eff. July 11, 1980) (enacting R.C. 307.441(H)), expressly authorizes a board of county commissioners to purchase liability insurance covering the county public defender and the members of the county public defender commission, thus recognizing a connection between the county and the county public defender commission. The continuing validity of Op. No. 79-084 must, therefore, be questioned.² See also R.C. 2744.08-.081. In light of the foregoing, it appears that the county public defender commission is a branch of county government, and that it does not constitute a distinct political subdivision for purposes of R.C. Chapter 2744. See also Ohio Ethics Commission, Advisory Op. No. 76-001 (concluding that a member of a county public defender commission holds a county office). But cf. R.C. 339.14 (county hospital commission, included as a

² 1979 Op. Att'y Gen. No. 79-084 also concluded that joint county public defenders and members of a joint county public defender commission were county officers and that a board of county commissioners could not purchase liability insurance for them as it could for county employees, but that a board of county commissioners could purchase malpractice or liability insurance covering the staff attorneys and other employees of a joint county public defender office. R.C. 307.441(H), enacted after the issuance of Op. No. 79-084, see 1979-1980 Ohio Laws, Part I, 1276, 1277 (Am. S.B. 397, eff. July 11, 1980) (enacting R.C. 307.441(H)), expressly authorizes a joint board of county commissioners formed pursuant to R.C. 120.23, in accordance with the agreement of the participating boards of county commissioners, to procure liability insurance covering the joint county public defender and members of the joint county public defender commission. See also R.C. 2744.08-.081. The validity of Op. No. 79-084 must be questioned in light of these statutory changes and also for its failure to consider the existence of a joint board of county commissioners formed pursuant to R.C. 120.23 and a district for the establishment of a joint county public defender commission as entities apart from the counties that create them. See R.C. 120.23; R.C. 120.41. See generally, e.g., 1986 Op. Att'y Gen. No. 86-048; 1983 Op. Att'y Gen. No. 83-021; 1982 Op. Att'y Gen. No. 82-056.

political subdivision under R.C. 2744.01(F), appears to act in some respects as an agent of the county); R.C. 713.22 (county planning commission, included as a political subdivision under R.C. 2744.02(F), may be viewed as a branch of county government); 1962 Op. Att'y Gen. No. 2763, p. 24 (a member of a county planning commission is a county officer); Ohio Ethics Commission, Advisory Op. No. 75-035 (a member of a county hospital commission holds a county office). See generally 1983 Op. Att'y Gen. No. 83-023.

Whether the county or the county public defender commission is the political subdivision with responsibility under R.C. 2744.07 is, in any event, of purely theoretical concern, since the board of county commissioners is responsible for assuring that funding is available for the provision of defense services within the county. See, e.g., R.C. 120.06; R.C. 120.34-.35; 1982 Op. Att'y Gen. No. 82-098. For purposes of this opinion I conclude, therefore, that a contract entered into under R.C. 120.14(F) is the contract of a "political subdivision" as that term is defined in R.C. 2744.01(F), and I turn to the question whether persons serving pursuant to such a contract are "employees" for purposes of R.C. Chapter 2744.

R.C. 2744.01(B) defines "employee," for purposes of R.C. Chapter 2744, as follows:

"Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of his employment for a political subdivision. "Employee" does not include an independent contractor. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2151.355 of the Revised Code to perform community service or community work in a political subdivision. (Emphasis added.)

The defense and indemnification provisions of R.C. 2744.07 are thus designed to protect only persons who are officers, agents, employees, or servants of political subdivisions, and not to extend to independent contractors.

The facts that you have provided suggest that the persons about whom you have inquired are not employees of a political subdivision for purposes of the definition set forth in R.C. 2744.01(B). Your request letter states: "The employees of the contracting organization are not county employees. They are employees of a private corporation." It appears, accordingly, that the nonprofit organization providing public defender services under contract pursuant to R.C. 120.14(F) is an independent contractor, and that an employee of that organization is not an "officer, agent, employee, or servant" of a political subdivision for purposes of R.C. Chapter 2744. See R.C. 2744.01(B).

I note, however, that it is possible for a private entity to be designated as an agent of a political subdivision, thereby bringing within the provisions of R.C. Chapter 2744

persons who manage or work for the private entity, if they perform functions on behalf of the political subdivision. I considered such a situation recently in 1987 Op. Att'y Gen. No. 87-024. That opinion concerned a community improvement corporation, which is a private nonprofit corporation. Specific statutory provisions authorize various political subdivisions to designate such a corporation as its agency for various purposes. Op. No. 87-024 states, in paragraph 2 of the syllabus:

When a county, township, or municipal corporation designates a community improvement corporation as its agency pursuant to R.C. 1724.10, both the corporation and the members of the governing board of the corporation are, for purposes of R.C. Chapter 2744., "employees" of the political subdivision that so designated the corporation. Members of the corporation who do not serve on the governing board are "employees" of the political subdivision for purposes of R.C. Chapter 2744. if, pursuant to the organization of the corporation and agreement under R.C. 1724.10, they perform functions on behalf of the political subdivision.

R.C. 120.14(F), which authorizes a contract between a county public defender commission and a nonprofit organization for the provision of public defender services, does not specify whether the nonprofit organization is to be an independent contractor or the agent of the commission. Whether an agency relationship exists is a question of fact that depends upon the terms of a particular contract and the nature of a specific arrangement.

The general standard for determining whether one is an independent contractor was discussed in 1987 Op. Att'y Gen. No. 87-073, slip op. at 5-6, as follows:

[T]he factor most often considered as controlling in determining whether a person who renders service to another is an employee thereof, or an independent contractor, is whether the purported employer retains control of, or the right to control, the mode and manner in which the services contracted for shall be performed. On this point, the following statement of the Ohio Supreme Court in Council v. Douglas, 163 Ohio St. 292, 295, 126 N.E.2d 597, 599 (1955) (quoting from Miller v. Metropolitan Life Insurance Co., 134 Ohio St. 289, 291, 16 N.E.2d 447, 448 (1938)) is often cited:

"The relation of principal and agent or master and servant is distinguished from the relation of employer and independent contractor by the following test: Did the employer retain control, or the right to control, the mode and manner of doing the work contracted for? If he did, the relation is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relation is that of employer and independent contractor."

See also Richardson v. Mehan, 69 Ohio St. 2d 52, 55, 430 N.E.2d 927, 929 (1982) (citing with approval Miller

v. Metropolitan Life Insurance Co. "as setting forth the basic legal principles for determining the employer-employee relationship"); Industrial Commission of Ohio v. Laird, 126 Ohio St. 617, 186 N.E. 718 (1933)(syllabus, paragraph four)("[t]he vital test, in determining whether a person employed to do a certain work is an independent contractor or a mere servant, is the right of control over the work reserved by the employer"); Newcomb v. Dredge, 105 Ohio App. 417, 152 N.E.2d 801 (Clark County 1957)(syllabus, paragraph one)("[t]he right of control is the distinguishing feature between an employer-independent contractor relationship and a master-servant relationship; and where such right relates to the result and not to the details of the work to be performed the relation of employer and independent contractor exists"); 1980 Op. Att'y Gen. No. 80-098 at 2-394 ("[t]he foremost characteristic of an independent contractor is the right to control the manner in which the work is performed. Generally, an independent contractor controls the manner in which the work is performed while an employee is directed to perform in a particular way by his employer"); 1979 Op. Att'y Gen. No. 79-015 at 2-48; Op. No. 76-040 at 2-138; Op. No. 75-075 at 2-298.

The rule is, thus, that an employer-employee or principal-agent relationship exists if the employer or principal retains control of, or the right to control, the mode and manner in which the services are performed, and the relationship of independent contractor exists if there is no such retention of the right of control. It is even possible for certain aspects of a relationship to constitute an employment or agency relationship while others constitute an independent contractor arrangement. See, e.g., Taylor v. Checkrite, Ltd., 627 F. Supp. 415 (S.D. Ohio 1986); Hughes v. Railway Co., 39 Ohio St. 461 (1883). See also 1987 Op. Att'y Gen. No. 87-082.

Whether a particular contract for the provision of legal services creates an agency or employment relationship or an independent contractor relationship is a question of fact to be determined in light of all the circumstances. As was stated in 1980 Op. Att'y Gen. No. 80-098, at 2-394:

In most instances an attorney is hired [by a township] to deal with a specific legal problem. He provides his own office and staff, and performs a particular job at a particular price. Therefore, an attorney will usually fall into the category of an independent contractor. There may be some instances, however, in which an attorney would be an employee of the township. If an individual is paid a yearly salary, has office space provided by the township, and has few, if any, other clients, such factors would be indicative of an employer-employee relationship between the township and the attorney.

See also 1978 Op. Att'y Gen. No. 78-026 at 2-64 (there may be some question as to whether a village solicitor is an officer or an independent contractor). Even in providing services to a client, an attorney's authority to act as agent for that client depends upon the nature of the particular agreement. See, e.g., Morr v. Crouch, 19 Ohio St. 2d 24, 249 N.E.2d 780 (1969) (without a specific grant of authority, an attorney is not

authorized to act as agent for his client to sell or convey his client's land or to settle his client's claim); Ottawa County Commissioners v. Mitchell, 17 Ohio App. 3d 208, 478 N.E.2d 1024 (Ottawa County 1984), motion to certify overruled, No. 84-1881 (Ohio Sup. Ct. Jan. 30, 1985).

It follows, accordingly, that if a nonprofit organization entering into a contract under R.C. 120.14(F) acts as an independent contractor, there is no employment or agency relationship for purposes of R.C. Chapter 2744 and the provisions of R.C. 2744.07 are not applicable to the contracting nonprofit organization. See generally Op. No. 87-073. If, however, the particular facts support the conclusion that a nonprofit organization entering into a contract under R.C. 120.14(F) is the employee or agent of the political subdivision with which it contracts, then the provisions of R.C. 2744.07 apply to the contracting nonprofit organization, and the political subdivision must provide for defense and indemnification as prescribed in R.C. 2744.07. See generally Op. No. 87-024.

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

1. R.C. 120.41, which provides for indemnification in the event of a malpractice claim, applies to "a state, county, or joint county public defender or assistant public defender" and does not apply to a nonprofit organization providing public defender services under contract pursuant to R.C. 120.14(F).
2. A contract made pursuant to R.C. 120.14(F), under which a nonprofit organization provides services that a county public defender is required or permitted to provide, is a contract with a political subdivision for purposes of R.C. Chapter 2744. (1979 Op. Att'y Gen. No. 79-084 questioned.)
3. When a contract made pursuant to R.C. 120.14(F) creates the relationship of independent contractor, then the defense and indemnification provisions of R.C. 2744.07 do not apply to the contracting nonprofit organization.
4. When a contract made pursuant to R.C. 120.14(F) creates an employment or agency relationship, then the defense and indemnification provisions of R.C. 2744.07 apply to the contracting nonprofit organization.