

OPINION NO. 88-055**Syllabus:**

1. A common pleas court judge is a county officer for purposes of R.C. 305.14 and R.C. 309.09.
2. A common pleas court judge is an employee of the county in which he serves for purposes of R.C. 2744.07.
3. R.C. 309.09 and R.C. 305.14 do not authorize a board of county commissioners to reimburse a county officer for expenses incurred in a legal action which is no longer pending. (1980 Op. Att'y Gen. No. 80-076, syllabus, paragraph three, overruled.)
4. R.C. 2744.07(A)(1) does not authorize a political subdivision to reimburse an employee for or indemnify an employee against costs incurred in retaining private counsel in an action in which the political subdivision did not participate and the employee's request for reimbursement was not made until after the case was dismissed.

To: Jill R. Heck, Medina County Prosecuting Attorney, Medina, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 25, 1988

I have before me your request for my opinion regarding whether the board of county commissioners must pay the legal fees incurred by a Medina County Common Pleas Court judge in two separate legal proceedings. The first of these proceedings was a defamation action in which the judge was named as defendant. He was found not liable. The second was a proceeding before the Ohio Supreme Court disciplinary committee. The charges against the judge were dismissed. A member of your staff has indicated that the judge did not ask you to represent him in these actions, nor did he ask you or the board of county commissioners to retain private counsel to represent him. Instead, the judge retained private counsel and now seeks reimbursement for the expenses incurred.

Your question requires construction of R.C. 309.09, R.C. 305.14, and R.C. 2744.07. R.C. 309.09 requires the county prosecutor to represent county officers, and provides in pertinent 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.

R.C. 305.14 describes the procedure that must be followed for a county officer to receive representation from someone other than the county prosecutor:

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.

R.C. 2744.07(A)(1) requires all political subdivisions to "provide for the defense" of all county employees who are sued as a result of acts or omissions that occurred while the employee was acting in good faith and within the scope of his employment:

(A)(1) Except as otherwise provided in this division, a political subdivision¹ 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 (Footnotes added.)

Thus, under R.C. 309.09 and R.C. 305.14, counties are obligated to defend certain county *officers*; under R.C. 2744.07, they are obligated to defend certain county *employees*. Accordingly, the first issue to be addressed is whether a judge of the court of common pleas is a county officer for purposes of R.C. 305.14 and 309.09 and whether he is a county employee for purposes of R.C. 2744.07.

In 1985 Op. Att'y Gen. No. 85-014, I examined the issue of whether a common pleas judge is a county officer for purposes of R.C. 309.09. In that opinion, I recognized that a common pleas judge is a state officer for certain purposes. See *Tymcio v. State*, 52 Ohio App. 2d 298, 369 N.E.2d 1063 (Franklin County 1977). However, I noted the close connection between the court of common pleas and the county which it serves and concluded that a common pleas judge is a county officer for purposes of obtaining legal representation under R.C. 309.09. R.C. 305.14 is clearly intended to allow the hiring of private counsel to represent any county officer or board otherwise entitled to be represented by the prosecuting attorney under R.C. 309.09. Both sections refer to "county officer," and it is apparent that the term was intended to have the same meaning in both sections. Thus, I conclude that a common pleas judge is a county officer for purposes of both R.C. 309.09 and R.C. 305.14.

¹ R.C. 2744.01(F) includes "county" within the definition of "political subdivision."

² R.C. 2744.07 became effective November 20, 1985. 1985 Ohio Laws 1699 (Am. Sub. H.B. 176, eff. Nov. 20, 1985). Although the actions against the judge were apparently both completed by this date, R.C. 2744.07 may still apply. Uncodified section 4 of H.B. 176 provides in pertinent part that "[t]he provisions of section 2744.07 of the Revised Code shall be used by and inure to the benefit of a political subdivision and its employees in connection with judgments rendered prior to as well as on or after the effective date of this act...."

A slightly different analysis is necessary to determine if a common pleas judge is a county employee for purposes of R.C. 2744.07. R.C. 2744.01 defines "employee" for purposes of R.C. Chapter 2744 and provides in pertinent part:

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated on 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. (Emphasis added.)

A common pleas judge is an elected official. See Ohio Const. art. IV, §6. The question thus becomes whether a common pleas judge is an elected official of the county. As mentioned above, a common pleas judge is considered a state officer for certain purposes. However, the same factors which support my conclusion that a common pleas judge is an officer of the county for purposes of R.C. 309.09 and R.C. 305.14 also lead me to conclude that he may be considered an elected official of the county for purposes of R.C. 2744.01(B) and therefore an employee of the county for purposes of R.C. 2744.07. See Op. No. 85-014.

Thus, pursuant to R.C. 309.09, a county prosecutor may be required to represent a common pleas judge under certain circumstances,³ and, pursuant to R.C. 2744.07, the county may be required to "provide a defense" for a common pleas judge under certain circumstances.⁴ It must be determined, however, whether R.C. 309.09, R.C. 305.14, or R.C. 2744.07 require a county to reimburse a common pleas judge for legal expenses incurred by a judge who hired private counsel to defend him in an action in which the county was not given the opportunity to provide a defense for the judge while the case was pending.

R.C. 309.09 provides that a county officer may not employ counsel other than the prosecuting attorney "at the expense of the county except as provided in section 305.14 of the Revised Code." R.C. 305.14 provides that the court of common pleas may authorize the board of county commissioners "to employ legal counsel to assist...any...county officer in...the...defense of any action or proceeding in which such...officer is a party...in [his] official capacity." (Emphasis added.) My predecessor considered this language and noted that it "seems to contemplate action occurring prior to hiring of counsel." Op. No. 80-076 at 2-304. He concluded, however, that the language "does not...clearly preclude an application [for employment of counsel] made subsequent to the time counsel is hired." *Id.* See also 1980 Op. No. 80-076 (Syllabus, paragraph 3) ("R.C. 305.14 permits a court of common pleas to authorize the board of county commissioners to employ legal counsel to assist the prosecuting attorney 'upon the application of the prosecuting attorney and board of county commissioners'; it does not specifically require application to be made before counsel has been hired and work has commenced. A determination as to whether to grant such an application rests in the discretion of the court").⁵

³ The Ohio Supreme Court has stated that "R.C. 309.09 is clear—it is the duty of the prosecuting attorney to defend all actions to which any county officer or board is a party." *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 465, 423 N.E.2d 105, 110 (1981). Under R.C. 309.09 the prosecuting attorney's duty to defend a county officer arises when there is a well-intended attempt to perform an official duty on the part of the officer. See Op. No. 85-014; 1954 Op. Att'y Gen. No. 4567, p. 570.

⁴ Where R.C. Chapter 2744 is applicable, the duty to defend a county employee arises if the employee's alleged act or omission occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. R.C. 2744.07(A)(1).

⁵ The Ohio Supreme Court identified an exception to the application requirement of R.C. 305.14 in *State ex rel. Corrigan v. Seminatore*, (syllabus, paragraph one) ("Application by both the prosecuting attorney and

I disagree with my predecessor's conclusion. R.C. 1.42 provides that "[w]ords and phrases [in the Revised Code] shall be read in context and construed according to the rules of grammar and common usage." The language used in R.C. 305.14 indicates that a county may employ legal counsel only to assist in the defense of a county officer in a *pending* case. The statute provides that the county may employ counsel to represent a county officer in any action in which the officer "is a party." In addition, the statute clearly provides that the county may "employ" legal counsel; nowhere does the statute provide for the payment or reimbursement of legal counsel employed by another. The General Assembly can be presumed to have chosen its words advisedly. R.C. 309.09 and R.C. 305.14 use the word "employ." *Webster's New World Dictionary* 459 (2d college ed. 1972) defines "employ" as "to engage the services or labor of for pay; hire...." See also *Black's Law Dictionary* 471 (5th ed. 1979) (defining "employ" as "[t]o engage one's service; to hire...."). The word "employ" suggests present or prospective action. In contrast, the term "reimburse" has a different meaning. The common dictionary definition of the term is to "pay back (money spent)...to repay or compensate (a person) for expenses, damages, losses, etc." *Webster's New World Dictionary* at 1197. The law dictionary has a similar definition for the term. See *Black's Law Dictionary* at 1157 ("[t]o pay back, to make restoration, to repay that expended"). Based upon the foregoing definitions it is clear that the judge does not seek to have the county employ counsel, but instead seeks that the county reimburse him for the legal fees he has already expended. In Op. No. 80-076 my predecessor simply equated reimbursement with employment without further analysis. I note, however, that the General Assembly has often used the words "reimburse" or "reimbursement" to express its intention that moneys previously advanced may be repaid. R.C. Title 3 is rife with examples. See, e.g., R.C. 311.07(B) (requiring a county receiving emergency aid from another political subdivision to "reimburse the political subdivision furnishing it the cost of furnishing such aid...") (emphasis added); R.C. 311.29(D) (allowing the county sheriff to enter contracts with other political subdivisions to provide police services and requiring that "[c]ontracts entered into...shall provide for the reimbursement of the county for costs incurred by the sheriff...") (emphasis added); R.C. 324.05 (requiring utilities supplying service subject to tax under R.C. 324.02 to file a return reflecting taxes collected, less a percentage of the tax collected "which amount shall be retained by the utility as reimbursement for its expenses of billing and collecting the tax") (emphasis added); R.C. 351.04(C) (establishing the board of directors of a convention facilities authority and providing that "[e]ach director shall be entitled to receive from the authority reimbursement for reasonable expenses in the performance of his duties") (emphasis added). In light of the repeated use of the terms "reimburse" and "reimbursement" in R.C. Title 3, I am constrained to view the use of the word "employ" in R.C. 305.14 and R.C. 309.09 in a more limited way than did my predecessor in Op. No. 80-076. Had 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. See *Lake Shore Electric Railway Co. v. Public Utilities Commission of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (had the legislature intended a term to have a particular meaning, "it would not have been difficult [for it] to find language which would express that purpose," the legislature having used that language in other connections). I also note that prior to Op. No. 80-076, two of my predecessors had concluded that:

In the employment of legal counsel to assist the prosecuting attorney under authority of Section 2412 of the General Code [predecessor of R.C. 305.14], it is necessary to secure the authority of the common pleas court upon application of the prosecuting attorney

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, except where the prosecuting attorney has a conflict of interest and refuses to make application").

and the board of county commissioners in office *at the time such counsel is to be employed.* (Emphasis added.)

1927 Op. Att'y Gen. No. 364, p. 622 (syllabus). See also 1932 Op. Att'y Gen. No. 4255, p. 581 (citing 1927 Op. No. 364 with approval). Similarly, the Ohio Supreme Court implicitly required, as a general rule, that counsel appointed pursuant to R.C. 305.14 be hired while the action is still pending. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 465, 423 N.E.2d 105, 110 (1981) ("R.C. 305.14 confers power upon the common pleas court to authorize the appointment of legal counsel other than the prosecuting attorney to represent a county board or officer in a pending action where to do so is in the best interest of the county") (emphasis added). Finally, I observe that to allow reimbursement of the judge's legal fees in the circumstances described in your letter would 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 sections 305.13 to 305.16...of the Revised Code...." Accordingly, because R.C. 305.14 authorizes the "employment" of legal counsel, I conclude that the General Assembly did not intend to authorize the reimbursement of county officers who have privately employed legal counsel. (Op. No. 80-076, syllabus, paragraph three, overruled.)

I turn now to the question whether R.C. 2744.07 authorizes a county to reimburse a county employee for legal expenses he has incurred in retaining private counsel to represent him when the employee did not request that the county provide him with a defense while the action was pending. As I have already noted, R.C. 2744.07(A)(1) provides in pertinent part:

[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. (Emphasis added.)

You indicate in your letter that one of the legal actions for which the judge seeks reimbursement was a disciplinary action against the judge. A disciplinary action is clearly not a "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...." Accordingly, I conclude that R.C. 2744.07(A)(1) does not require a county to reimburse a judge for legal expenses incurred in defending a disciplinary action.

In contrast, the defamation action filed against the judge does fall within the ambit of R.C. 2744.07(A)(1), and I must therefore determine whether or not that section requires or allows a county to reimburse a judge for legal expenses incurred in defending that case. R.C. 2744.07(A)(1) provides that a political subdivision shall "provide for the defense" of one of its employees in certain circumstances. Although the phrase "provide for the defense" might arguably include reimbursement for defense expenses already incurred, I conclude that it does not for two reasons. First, I note that R.C. 2744.01(A)(2) provides that a political subdivision shall "indemnify and hold harmless" its employees from paying certain types of judgments; if the General Assembly had intended that political subdivisions "indemnify and hold harmless" its employees from paying fees for hiring private legal counsel, it could easily have included such a provision in R.C. 2744.01. See *Lake Shore Electric Railway Co. v. Public Utilities Commission of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) ("[i]f the Legislature...[had intended a certain result] it would not have been difficult to find language which would express that purpose," the legislature having used that language in other connections). Second, I note that R.C. 2744.07(B) restricts the decision-making power of employees in actions in which a political subdivision provides for an employee's defense:

(1) A political subdivision may enter into a consent judgment or settlement and may secure releases from liability for itself or an employee, with respect to any claim for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function.

(2) *No action or appeal of any kind* shall be brought by any person, including *any employee* or a taxpayer, with respect to the decision of a political subdivision pursuant to divisions (B)(1) of this section whether to enter into a consent judgment or settlement or to secure releases, or concerning the amount and circumstances of a consent judgment or settlement. Amounts expended for any settlement shall be from funds appropriated for this purpose. (Emphasis added.)

Thus, the General Assembly apparently intended that R.C. 2744.07 give a political subdivision the authority not only to *provide* a defense to an employee under certain circumstances, but also to *decide*, within certain limits, what type of defense will be offered. An interpretation of R.C. 2744.07 that would allow a county employee to be reimbursed for legal expenses incurred in an action in which the county had no opportunity to participate would directly contradict this intention. See R.C. 1.47(B) ("[i]n enacting a statute, it is presumed that...[t]he entire statute is intended to be effective"). Cf. *Sullivan v. Ohio Rehabilitation Services Commission*, 31 Ohio App. 3d 144, 508 N.E.2d 1025 (Franklin County 1986) (holding that before bringing an action for reimbursement of attorney fees incurred to defend a civil damage claim, a state employee must show that he requested representation from the Attorney General under R.C. 109.361 and was denied, and generally discussing the policy supporting the discretion vested in the Attorney General to make the determination of whether or not special counsel should be hired in a particular case). I am also mindful of the well-recognized rule that public money may be spent only on the basis of clear and unequivocal statutory authority. See generally *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917) (syllabus, paragraph three) ("[i]n the case of doubt as to the right of any administrative board [such as a board of county commissioners] to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power"). Thus, I conclude that the language in R.C. 2744.07(A)(1) that authorizes a political subdivision to "provide for a defense" for an employee does not authorize the subdivision to reimburse the employee for costs incurred in retaining private counsel to defend a case in which the political subdivision did not participate and the employee's request for reimbursement was not made until after the case was dismissed.

Accordingly, it is my opinion and you are advised:

1. A common pleas court judge is a county officer for purposes of R.C. 305.14 and R.C. 309.09.
2. A common pleas court judge is an employee of the county in which he serves for purposes of R.C. 2744.07.
3. R.C. 309.09 and R.C. 305.14 do not authorize a board of county commissioners to reimburse a county officer for expenses incurred in a legal action which is no longer pending. (1980 Op. Att'y Gen. No. 80-076, syllabus, paragraph three, overruled.)
4. R.C. 2744.07(A)(1) does not authorize a political subdivision to reimburse an employee for or indemnify an employee against costs incurred in retaining private counsel in an action in which the political subdivision did not participate and the employee's request for reimbursement was not made until after the case was dismissed.