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LOCAL BOARD OF EDUCATION MAY EMPLOY LEGAL COUNSEL OTHER THAN PROSECUTING ATTORNEY AND SUCH EMPLOYMENT MAY BE ON A CONTINGENT FEE BASIS. § 309.10, R.C.

SYLLABUS:

Pursuant to Section 309.10, Revised Code, a local board of education may employ legal counsel other than the county prosecuting attorney to represent it in a legal matter, and such employment may be on a contingent fee basis.

Columbus, Ohio, December 8, 1961

Hon. Robert H. Huffer, Prosecuting Attorney
Pickaway County, Circleville, Ohio

Dear Sir :

I have your request for my opinion reading as follows :

“May a local school board hire legal counsel to represent it in an action for damages against a contractor on a contingent fee basis?”

Section 3313.35, Revised Code, relating to the duty of the county prosecuting attorney to represent school boards, reads in part as follows :

“Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards in the same county, the prosecuting attorney shall not be required to act for either of them. * * *”

Section 309.09, Revised Code, pertaining generally to the duties of the county prosecuting attorney, reads in part as follows :

“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.

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Section 309.10, Revised Code, specifically authorizes a school board to hire private counsel to represent it, reading in part :

“Sections 309.08 and 309.09 of the Revised Code do not prevent a school board from employing counsel to represent it,

but such counsel, when so employed, shall be paid by such school board from the school fund.

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In the case of *Knepper v. French, County Auditor*, 125 Ohio State 613, the Supreme Court considered the effect of the above statutes as allowing a school board to hire private counsel, the opinion of the court stating at pages 615 and 616 as follows:

“This controversy presents no question of convenience, or expediency, or economy. It is purely a question of power and authority on the part of the board of education to employ counsel other than the prosecuting attorney to represent it in litigation or matters involving legal controversy. This must be determined by the construction of the statutes in such cases made and provided. It has been urged that a board of education is a body corporate with power to sue and defend in actions at law and in equity, and that it therefore has inherent and implied powers to employ counsel.

“If Section 2918 had never been enacted, we might be driven to consider all these questions. It is not necessary to give them any consideration in Ohio in the present state of the Code provisions. Standing alone it would be readily conceded that Section 2918 gives full authority to the board. We have no difficulty in determining that the two preceding sections, 2916 and 2917, were particularly eliminated, so far as school boards are concerned in the employment of counsel, provided such counsel is paid not from county funds but from the school funds.

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(Sections 2916, 2917 and 2918, General Code, are now Sections 309.08, 309.09 and 309.10, Revised Code.)

In Opinion No. 2685, Opinions of the Attorney General for 1958, page 537, in referring to Sections 309.08, 309.09, 309.10 and 3313.35, Revised Code, it is stated, at page 539, as follows:

“These provisions of the law make it clear that the prosecuting attorney is the attorney for all boards of education and their officers, except in the case of city school districts, which by other provisions of the law receive that service from the city solicitor.

“In spite of these provisions of the law, which place the duty of acting as attorney for school districts such as those mentioned in your letter upon the prosecuting attorney, it seems well settled that the board of education is authorized to employ additional counsel either to assist or act in place of the prosecuting attorney,

or to take his place in case for any reason he fails or refuses to represent the board. This was made clear in the case of *Knepper v. French*, 125 Ohio St., 613. In this case the members of the county board of education were made defendants in an action by an attorney to recover attorney's fees. It appeared that the board had elected to employ an outside attorney rather than to avail itself of the services of the prosecuting attorney. The court referred to Sections of the General Code then in force which were the predecessors of the sections from which I have quoted, and held that all of the statutes referred to were *in pari materia*, and held that the action of the board in employing counsel other than the prosecuting attorney was lawful and that the plaintiff had a right to recover for his services. The above case of *Knepper v. French, supra*, was cited in support of Opinion No. 1392, Opinions of the Attorney General for 1933, p. 1250; also in Opinion No. 3644, Opinions of the Attorney General for 1954, p. 135."

Thus, it appears to be well settled that Section 309.10, *supra*, is governing as to the right of a school board to hire private counsel; and since that section places no restriction upon employment of counsel except that payment shall be paid from the school fund, I can see no objection to the employment of counsel on a contingent fee basis. In this regard, since any damages collected would be a part of the school fund, the payment of a contingent fee would be from that fund.

Accordingly, it is my opinion and you are advised that pursuant to Section 309.10, Revised Code, a local board of education may employ legal counsel other than the county prosecuting attorney to represent it in a legal matter, and such employment may be on a contingent fee basis.

Respectfully,

MARK McELROY

Attorney General