

December 8, 2009

The Honorable Stephen A. Schumaker
Clark County Prosecuting Attorney
50 E. Columbia Street
P.O. Box 1608
Springfield, Ohio 45501

SYLLABUS:

2009-050

1. A county prosecuting attorney has no authority to act as legal counsel for an organization or person seeking guardianship of an adult with developmental disabilities, and a county board of developmental disabilities has no authority under R.C. 5126.31(C) or elsewhere to request or require the county prosecuting attorney to do so.
2. A county prosecuting attorney has no authority to provide legal services to an adult served by the county board of developmental disabilities, and a county board of developmental disabilities has no authority under R.C. 5126.31(C) or elsewhere to request or require the county prosecuting attorney to do so.



RICHARD CORDRAY
OHIO ATTORNEY GENERAL

December 8, 2009

OPINION NO. 2009-050

The Honorable Stephen A. Schumaker
Clark County Prosecuting Attorney
50 E. Columbia Street
P.O. Box 1608
Springfield, Ohio 45501

Dear Prosecutor Schumaker:

You have asked whether a county prosecuting attorney is required or authorized, at the request of the county board of developmental disabilities, to represent a family member of an adult who is developmentally disabled, or an agency under contract with the Ohio Department of Developmental Disabilities, in seeking guardianship of the adult. You have also asked whether the board of developmental disabilities is authorized to request the county prosecutor to provide legal services to a person served by the board. We will begin with a brief discussion of the process by which guardians are appointed, and then turn to the respective powers and duties of a county prosecuting attorney and county board of developmental disabilities.¹

Application for Guardianship

A probate court, “on its own motion or on application by any interested party” must appoint, “[w]hen found necessary,” “a guardian of the person, the estate, or both, of a minor or incompetent.” R.C. 2111.02(A). *See* R.C. 2111.01(D) (“[i]ncompetent’ means any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper

¹ The General Assembly has recently enacted legislation changing the name of the state Department of Mental Retardation and Developmental Disabilities to the Department of Developmental Disabilities and the name of the county boards of mental retardation and developmental disabilities to county boards of developmental disabilities, and making corresponding changes throughout the Revised Code. Sub. S.B. 79, 128th Gen. A. (2009) (eff. Oct. 6, 2009). The term, “mental retardation,” will be used in this opinion only to the extent that it appears in citations to, or quotations from, earlier authorities, or if it is still used in a quoted statute.

care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state"). A person who applies for appointment as a guardian must file with the probate court an application containing the information prescribed by statute, R.C. 2111.03, and the probate court must conduct a hearing before appointing a guardian, R.C. 2111.02(C). *See also* R.C. 2111.04 (the probate court must give seven days notice prior to the hearing).

The state Department of Developmental Disabilities has the authority to contract with an agency to provide protective services to an adult with developmental disabilities, *see* R.C. 5123.56, and that agency may be appointed guardian by the probate court "to have the care and management of the person of an incompetent." R.C. 2111.01(A). *See* R.C. 2111.10; R.C. 5123.58; 15 Ohio Admin. Code 5123-15-01(D)-(F). *See generally* 1984 Op. Att'y Gen. No. 84-015 (describing the duties that the state Department of Mental Retardation and Developmental Disabilities may delegate to the agency it contracts with to provide protective services). A county board of developmental disabilities is not eligible to serve as a guardian. R.C. 5126.31(C). In this instance, however, the board of developmental disabilities seeks to have the county prosecutor file applications on behalf of family members, or the agency under contract with the state Department of Developmental Disabilities (contract agency), who wish to be appointed guardian of an adult with developmental disabilities.

Duties of the County Prosecutor

We turn now to the powers and duties of prosecuting attorneys. A county prosecutor has only those powers conferred by statute, either expressly or by necessary implication. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981); *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940). A county prosecuting attorney is statutorily required to serve as "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." R.C. 309.09(A).² Furthermore, the prosecutor "shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party." *Id.*

² The prosecuting attorney is also required to serve as the legal adviser for non-home rule townships (and may be retained by home-rule townships), R.C. 309.09(B), and various other public bodies as specified by statute. *See, e.g.*, R.C. 309.09(D)-(H); R.C. 3313.35; R.C. 3709.33. *See also, e.g.*, R.C. 309.08(A) ("[t]he prosecuting attorney may inquire into the commission of crimes within the county," and "shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party"); R.C. 309.11 ("[t]he prosecuting attorney shall prepare, in legal form, the official bonds for all county officers"); R.C. 309.12 (the prosecuting attorney may bring a civil action to restrain the possible misapplication or illegal expenditure of county funds).

A single-county board of developmental disabilities, such as the board in Clark County, is a county entity that is entitled to the services of the county prosecutor under R.C. 309.09(A). *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d at 462. See generally R.C. Chapter 5126; 2007 Op. Att’y Gen. No. 2007-041 at 2-414 (“a single-county MR/DD board has always been considered part of county government”). The General Assembly has also prescribed specific duties a county prosecutor must perform on behalf of a county board of developmental disabilities. See R.C. 5126.023(B) (questions relating to the existence of a particular conflict of interest that would prevent an individual from serving on a county board of developmental disabilities “shall be submitted to the local prosecuting attorney for resolution”); R.C. 5126.032(A) (the ethics council for a county board of developmental disabilities “shall develop, in consultation with the prosecuting attorney, and recommend to the board ethical standards, contract audit procedures, and grievance procedures with respect to the award and reconciliation of direct services contracts”); R.C. 5126.032(B) (“[t]he prosecuting attorney, at the request of the board [of developmental disabilities], shall prepare a legal review of any direct services contract that has been recommended, or recommended with revisions, by the council. 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”); R.C. 5126.33(C) (the county prosecutor must represent a board of developmental disabilities in a probate court hearing to secure protective services for an adult with developmental disabilities, unless the board designates another attorney to do so).³ Although a county prosecutor has the statutory duty to represent and act as legal counsel to a county board of developmental disabilities, no statute of which we are aware expressly or by implication requires or authorizes the county prosecuting attorney to represent, or otherwise provide legal services to, an agency or person seeking guardianship of an adult who is developmentally disabled.

The duty or authority of a county prosecutor to represent private individuals and entities has been examined in earlier opinions. For example, 1959 Op. Att’y Gen. No. 172, p. 85 addressed whether the prosecuting attorney had a duty to defend in a tort action a person with whom a county department of welfare (now county department of job and family services) had

³ As a general matter, “no county officer may employ any other counsel or attorney at the expense of the county.” R.C. 309.09(A). A county board of developmental disabilities has the power, however to “employ legal counsel to advise it or to represent it or any of its members or employees in any matter of public business coming before the board ... or in the prosecution or defense of any action or proceeding in which the board ... in its official capacity, or a board ... member or employee in the member’s or employee’s official capacity, is a party or has an interest.” R.C. 305.14(C). If, however, the county prosecutor is “fully able to perform” his statutory duty to represent the county board in a legal proceeding without a conflict of interest, the board may employ other counsel only with the written consent of the prosecutor. R.C. 305.14(D)(1). If the prosecutor is unable to represent the board in a legal proceeding, he must notify the board, which “may then employ counsel for the proceeding without further permission from any authority.” *Id.* See also R.C. 309.10; R.C. 5126.038(A)(2) and (B)(2); R.C. 5126.05(A)(7).

contracted for the care of a child in its custody. Neither the department nor its managing director (now executive director) was a party to the suit. The Attorney General stated: “On the face of it I find it hard to understand how a question could even be raised as to the duty of the prosecuting attorney to defend a civil suit for damages brought against the individuals who are under contract with the county welfare department to care for these children. The householder in question is not a public officer; he is not an employee of the county welfare department; *he is plainly an independent contractor.*” *Id.* at 89.

In the situation addressed by the 1959 opinion, the department of welfare and its manager were “insisting” that the prosecutor’s office undertake the contractor’s defense; thus, the opinion carefully parsed the language in R.C. 309.09 that requires the prosecutor to “prosecute and defend *all suits and actions which any such [county] officer or board directs* or to which it is a party” (emphasis added). The opinion advised that to interpret this language as requiring the county prosecutor to undertake the defense of a “non-official person,” whenever directed by a county board or officer, would be “the height of absurdity”; that the statute does not refer “to the arbitrary imposition on the prosecutor, by the director of child welfare ... a duty to defend an action which the statute itself does not directly impose upon him.” *Id.* at 90. Subsequent opinions have been consistent with the advice provided in 1959 Op. Att’y Gen. No. 172, p. 85. *See* 2004 Op. Att’y Gen. No. 2004-032 (syllabus, paragraph 3) (“[a] county prosecuting attorney has no statutory duty, obligation, or authority to act as legal counsel of a private nonprofit corporation such as the Council for Older Adults”); 2000 Op. Att’y Gen. No. 2000-008 (syllabus, paragraph 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”).

County Board of Developmental Disabilities

Like a county prosecutor, a county board of developmental disabilities has only those powers that are provided by statute, either expressly or by necessary implication. *State ex rel. Corrigan v. Seminatore; Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). You have identified R.C. 5126.31(C) as a possible source of authority for the board to require or request the county prosecuting attorney to file a guardianship action on behalf of the contract agency or a family member. R.C. 5126.31 relates to the duty of a county board of developmental disabilities to provide protective services to adults with developmental disabilities who are reported to be victims of abuse or neglect.

By way of background, a board of developmental disabilities must review reports of abuse or neglect of adults with developmental disabilities and determine whether an adult is in need of services to deal with the abuse or neglect. R.C. 5126.31(A) and (B)(6).⁴ The board must “arrange for the provision of services for the prevention, correction or discontinuance of abuse or

⁴ *See* R.C. 5101.611 and R.C. 5123.61 (persons and entities required to file reports of abuse and neglect).

neglect or of a condition resulting from abuse or neglect for any adult who has been determined to need the services and consents to receive them.” R.C. 5126.31(C). “These services may include, but are not limited to, service and support administration, fiscal management, medical, mental health, home health care, homemaker, *legal*, and residential *services* and the provision of temporary accommodations and necessities such as food and clothing” (emphasis added). *Id.* To arrange services, the board must “[d]evelop an individualized service plan identifying the types of services required for the adult, the goals for the services, and the persons or agencies that will provide them,” and secure the consent of the adult or his guardian to the provision of the services. R.C. 5126.31(C)(1) and (2).⁵ The board must “ensure that the adult receives the services arranged by the board from the provider,” and must “have the services terminated if the adult withdraws consent.” R.C. 5126.31(D).

R.C. 5126.31(C) has no application, however, to the provision of legal or other services to anyone other than adults with developmental disabilities who, as determined by the board, are in need of services to prevent, correct, or discontinue abuse or neglect or a condition resulting from abuse or neglect. It does not encompass the provision of legal services to the contract agency or a family member of an adult served by the board. Therefore, it cannot stand as authority for a county board of developmental disabilities to direct the county prosecutor to represent a family member or the contract agency in guardianship proceedings.

You have also asked whether R.C. 5126.31(C) authorizes a board of developmental disabilities to direct the county prosecutor to provide legal services to adults served by the board. Although R.C. 5126.31(C) authorizes a board of developmental disabilities to provide legal services to abused or neglected adults with developmental disabilities, there is no indication that the General Assembly intended to authorize a county board to offer the services of the county prosecutor—whether as part of providing protective services, during guardianship proceedings, or otherwise. We would expect to see an explicit reference to the county prosecutor in R.C. 5126.31(C) had that been the General Assembly’s intent. *Cf., e.g.,* R.C. 5126.032(B) (“[t]he prosecuting attorney, at the request of the board [of developmental disabilities], shall prepare a legal review of any direct services contract that has been recommended, or recommended with

⁵ Division (C)(2) of R.C. 5126.31 requires a board of developmental disabilities to “obtain the consent of the adult or the adult’s guardian to the provision of any of these [protective] services and obtain the signature of the adult or guardian on the individual service plan. An adult who has been found incompetent under Chapter 2111. of the Revised Code may consent to services. If the board is unable to obtain consent, it may seek, if the adult is incapacitated, a court order pursuant to section 5126.33 of the Revised Code authorizing the board to arrange these services.” *Cf. R.C. 5126.043* (“[w]hen an individual with mental retardation or other developmental disability is required within this chapter to consent, refuse to give consent, or withdraw consent for services and the individual has been adjudicated incompetent pursuant to Chapter 2111. of the Revised Code, the guardian for the individual appointed under that chapter and functioning in accordance with the appointment shall be responsible for giving, refusing to give, or withdrawing the consent for services”).

revisions, by the [ethics] council”). *See generally Gibbons v. Ogden*, 22 U.S. 1 (1824) (“men ... generally employ the words which most directly and aptly express the ideas they intend to convey”); *Lake Shore Electric Ry. Co. v. Public Utilities Commission*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (if the Legislature had intended a particular meaning, “it would not have been difficult to find language which would express that purpose”).

Indeed, the statutory schemes we are examining contemplate that an adult will have his own independent attorney. For example, in the hearing that a probate court is required to hold prior to the appointment of a guardian, the person for whom guardianship is sought has the “right to be represented by *independent counsel* of the alleged incompetent’s choice,” and if he is indigent, he has the right to have counsel appointed at court expense, including on appeal of the guardianship decision. (Emphasis added.) R.C. 2111.02(C)(7)(a) and (d). *See also* R.C. 2111.02(A) (the probate court shall, when necessary, appoint a guardian, “provided the person for whom the guardian is to be appointed ... has had the opportunity to have the assistance of counsel in the proceeding for the appointment of such guardian”). Or, if a county board of developmental disabilities determines that an adult with developmental disabilities has been neglected or abused and is in need of protective services, and the board is unable to secure the consent of the adult or his guardian to provide such services, *see* note 5, *supra*, it may file a complaint in probate court; a hearing must be held on the complaint in which the adult “shall be represented by counsel” and “[t]he board shall be represented by the county prosecutor or an attorney designated by the board” (emphasis added). R.C. 5126.33(C). *See* R.C. 305.14(C) and (D) (note 3, *supra*, and note 8, *infra*). *See also* R.C. 5126.33(B) (notice of the complaint and hearing must be given to the adult’s legal counsel and the Legal Rights Service).⁶

A county board works to provide services to people with developmental disabilities.⁷ Their respective positions, however, may not always be aligned, such as when an adult refuses to consent to the protective services proposed by the board or when an adult disagrees with the board and prospective guardian in a guardianship proceeding. *See, e.g., In re Guardianship of Allen*, 50 Ohio St. 3d 142, 552 N.E.2d 934 (1990) (ward retained own counsel to file an application to set aside her guardianship or appoint a new guardian). The prosecuting attorney is the *board’s* legal counsel, and adults served by the board are entitled to counsel who is

⁶ The Legal Rights Service has been created “to protect and advocate the rights of mentally ill persons, mentally retarded persons, [and] developmentally disabled persons.” R.C. 5123.60.

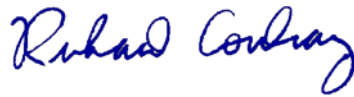
⁷ *See Estate of Ridley v. Hamilton County Bd. of Mental Retardation and Developmental Disabilities*, 150 Ohio App. 3d 383, 2002-Ohio-6344, 781 N.E.2d 1034 (Hamilton County), at ¶ 15, *aff’d*, 102 Ohio St. 3d 230, 2004-Ohio-2629, 809 N.E.2d 2 (“[a] county board of mental retardation and developmental disabilities exists to serve the needs of the mentally retarded and developmentally disabled residents of a given county”).

independent of the board and the prosecutor.⁸ Thus, a county board of developmental disabilities has the authority under R.C. 5126.31(C) to arrange for legal services to be provided to an adult needing protective services, but the attorney must be independent of all other interested persons, including the board and prosecuting attorney.

In conclusion, it is my opinion, and you are advised that:

1. A county prosecuting attorney has no authority to act as legal counsel for an organization or person seeking guardianship of an adult with developmental disabilities, and a county board of developmental disabilities has no authority under R.C. 5126.31(C) or elsewhere to request or require the county prosecuting attorney to do so.
2. A county prosecuting attorney has no authority to provide legal services to an adult served by the county board of developmental disabilities, and a county board of developmental disabilities has no authority under R.C. 5126.31(C) or elsewhere to request or require the county prosecuting attorney to do so.

Respectfully,



RICHARD CORDRAY
Ohio Attorney General

⁸ Because of an adult's need for independent counsel, a board of developmental disabilities may not make the services of the attorneys it hires under R.C. 305.14(C) and (D) available to the adults it serves, just as it may not make the services of the prosecuting attorney available to them. *See* note 3, *supra*.